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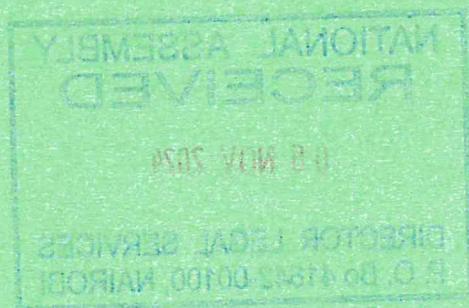
NATIONAL ASSEMBLY BILLS, 2024

NAIROBI, 1st November, 2024

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**THE PUBLIC PROCUREMENT AND ASSET
DISPOSAL (AMENDMENT) BILL, 2024**

Bill for

AN ACT of Parliament to amend the Public Procurement and Asset Disposal Act and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment) Act, 2024.

Short title.

2. The Public Procurement and Asset Disposal Act, in this Act referred to as the “principal Act”, is amended—

Amendment of section 2 of Cap. 412C.

(a) in the definition of “asset” by inserting the words “virtual asset” immediately after the words “proprietary rights”;

(b) by inserting the following new definitions in their proper alphabetical sequence—

“debarment” means the exclusion of a person or a firm from entering into a public procurement contract as a supplier, contractor or service provider;

“foreign firm” means a firm whose shareholding is more than thirty percent owned or is wholly owned by a non-Kenyan and duly incorporated in or outside Kenya;

“foreign funded procurement” means acquisition of goods, works and services by the government of Kenya which are wholly or partly funded by foreign loans or grants pursuant to a bilateral or multilateral treaty;

“investigative agency” includes the National Police Service, Ethics and Anti-Corruption Commission, Kenya Revenue Authority, Anti-Counterfeit Agency or any other government agency mandated with the role of investigation under any written law;

“joint venture procurement” means a procurement that is jointly undertaken by a grouping of two or more persons;

“local firm” means a company incorporated in Kenya firm under the Companies Act whose shareholding is wholly by Kenyan citizens; and

Cap. 486.

“minor deviation” means —

- (a) matter of form and not of substance; or
- (b) an immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other tenderers:

Provided that the defect or variation does not affect the price, quantity, quality or delivery or the defect or variation is negligible when contrasted with the total cost or scope of the supplies or services being acquired.

3. Section 4 of the principal Act is amended by inserting the following new subsection immediately after subsection (3)—

Amendment of section 4 of Cap. 412C.

“(4) For the avoidance of doubt, except under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency provides use of foreign or international financing procurement procedures and guidelines, this Act shall apply to foreign funded procurement for goods, works and services by Government of Kenya.”

4. Section 9 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (l)—

Amendment of section 9 of Cap. 412C.

“(la) monitor and evaluate the transfer of technology, knowledge and skill plans as provided for under this Act and provide annual public reports;”

5. Section 10 (1) of the principal Act is amended by deleting paragraph (b) and substituting therefor the following new paragraph—

Amendment of section 10 of Cap. 412C.

“(b) three members who shall be appointed by the Cabinet Secretary after nomination, through a fair process by—

- (i) the Institute of Certified Public Accountants of Kenya;
- (ii) the Kenya Institute of Supplies Management; and
- (iii) the Law Society of Kenya.”

6. Section 33 of the principal Act is amended in subsection (2) by inserting the following new paragraph immediately after paragraph (g)—

Amendment of section 33 of Cap. 412C.

“(ga) ensure that goods and services manufactured in the respective county are prioritized in the procurement process;”

7. The principal Act is amended in section 35 by inserting the following new subsection immediately after subsection 3—

Amendment of section 35 of Cap. 412C.

“(4) An act that constitutes an offence under this Act shall be referred to an investigative agency for its action by the Authority, a public institution, or any other person.”

40. 8. The principal Act is amended by deleting section

Amendment of section 40 of Cap. 412C.

9. The principal Act is amended in section 41—

Amendment of section. 41 of Cap. 412C.

(a) by deleting subsection (4) and substituting therefor the following new subsection —

“(4) A debarment under this section shall be for a specified period of time of not exceeding ten years.”

(b) by inserting the following new subsection immediately after subsection (4)—

“(5) A person or a firm debarred by an international agency recognized by Kenya shall be deemed to have been debarred in Kenya as if the debarment procedures and proceedings were conducted in Kenya.”

10. Section 44 of the principal Act is amended in subsection (2) by inserting the following new paragraphs immediately after paragraph (h)—

Amendment of
section 44 of Cap.
412C.

- “(ha) ensure that locally produced products or services are prioritized in the procurement and asset disposal process;
- (hb) ensure, where applicable, technology, knowledge and skills transfer plans from foreign firms are prioritized in the procurement and asset disposal process;”

11. Section 53 of the principal Act is amended—

Amendment of
section 53 of Cap.
412C.

- (a) by inserting the following new subsections immediately after subsection (6) —

“(6A) Any procurement of less than one billion shillings shall be awarded to a local firm.

(6B) A foreign firm shall be eligible for procurement of contracts of more than one billion shillings where the foreign firm has entered into joint venture procurement with a local firm for not less than thirty percent of the value of the procurement.”

- (b) by inserting the following new subsections immediately after subsection (13)—

“(14) A person who registers a company on behalf of a foreigner exhibiting unfair competition and seeks to benefit from the procurement under this section commits an offence and shall be liable, upon conviction, to a fine not exceeding five million shillings, or to a term of imprisonment not exceeding three years, or to both.

(15) A foreigner who registers a company by misrepresenting himself or herself as being Kenyan exhibiting unfair competition and seeks to benefit from procurement under this section commits an offence and shall be liable, upon conviction, to a fine not exceeding five million shillings, or to a term of imprisonment not exceeding five years, or to both.”

12. Section 70 of the principal Act is amended by inserting the following new subsection immediately after subsection (6)—

Amendment of section 70 of Cap. 412C.

“(6A) Where a procurement is of a value exceeding one billion shillings, in addition to the requirements set out in subsection (6), a procuring entity shall set out specific goods, works and services to be undertaken by a local firm under joint venture procurement.”

13. The principal Act is amended in section 81 by deleting subsection (2) and substituting therefor the following new subsection—

Amendment of section 81 of Cap. 412C.

“(2) A clarification shall not change the terms of the tender or add any new document or information.”

14. The principal Act is amended in section 83 by deleting subsection (2) and substituting therefore the following new subsection—

Amendment of section 83 of Cap. 412C.

“(2) The conduct of due diligence under subsection (1) includes but is not limited to obtaining confidential references from persons with whom the tenderer has had prior engagement, visiting contractor’s offices, inspecting of plant, equipment and completed works, in addition to confirming the validity of documents presented.”

15. Section 86 of the principal Act is amended by inserting the following new subsection immediately after subsection (2)—

Amendment of section 86 of Cap. 412C.

“(3) A successful tenderer who is a citizen contractor, shall not subcontract a foreign company unless the knowledge, skill, good or service is not available in the country.”

16. Section 89 of the principal Act is amended by—

Amendment of section 89 of Cap. 412C.

- (a) renumbering the existing provision as subsection (1);
- (b) inserting the following new subsection immediately after subsection (1)—

“(2) Where a foreign tenderer participates in the competition for procurement, the respective procuring entity shall obtain an advisory from the Attorney-General on the propriety of the funding of the foreign tenderer.”

17. Section 135 of the principal Act is amended in subsection (6) by inserting the following new paragraph immediately after paragraph (g)—

Amendment of
section 135 of
Cap. 412C.

“(ga) transfer of skills and technology plan, where applicable;”

18. The principal Act is amended in section 136 by inserting the following new subsections immediately after subsection (1)—

Amendment of
section 136 of
Cap. 412C.

“(1A) Upon completion of an evaluation and the successful tenderer is established, the Authority shall notify all the other tenderers of the award in accordance with section 87 of this Act.

(1B) Where a successful tenderer declines the contract, the accounting officer may—

- (a) issue the letter and notification of award to the next lowest evaluated tenderer; and
- (b) give a notice in writing to all other persons submitting tenders of the notification of the award.

(1C) A person aggrieved by the decision made by the accounting officer under subsection (1B) may seek administrative review of that decision by the Review Board within fourteen days of notification of award.”

19. Section 139 of the principal Act is amended in subsection (4) by—

Amendment of
section 139 of
Cap. 412C.

- (a) inserting the words “and works” immediately after the words “for goods” appearing in paragraph (d); and
- (b) deleting the word “professional” appearing in paragraph (e).

20. The principal Act is amended by inserting the following new section immediately after section 139—

Insertion of new
section 139A into
Cap. 412C.

Prompt payment.

139A. A procuring entity shall make prompt and timely payments to a contractor who satisfactorily performs the contractual obligations as stipulated in the procurement contract.

21. Section 149 of the principal Act is amended by inserting new subsections—

Amendment of
section 149 of
Cap. 412C.

“(3) The Authority shall ensure that priority is given to citizen contractors in sub-contracting of tenders that have been allocated to citizen contractors.

(4) Where it is deemed necessary to subcontract a tender to a foreign contractor—

(a) the accounting officer shall cause a report to be prepared detailing reasons for the need to subcontract to a foreign contractor; and

(b) the Authority shall ensure that a percentage of the margin preference is applied as shall be prescribed in the Regulations.”

22. Section 150 of the principal Act is amended by inserting the following new subsections immediately after subsection (3)—

Amendment of
section 150 of
Cap. 412C.

“(4) An accounting officer or his or her appointed representative who contravenes subsection (1), commits an offence.

(5) A head of the procurement function or his or her appointed representative who contravenes subsection (2), commits an offence.”

23. Section 155 of the principal Act is amended in subsection (3), by inserting the following new paragraph immediately after paragraph (a)—

Amendment of
section 155 of
Cap. 412C.

“(aa) locally available skilled and unskilled labour;”

24. Section 157 of the principal Act is amended –

Amendment of
section 157 of
Cap. 412C.

(a) in subsection (7)(a) by deleting subparagraph (iii) and substituting therefore the following new subparagraph—

“(iii) the prescribed threshold for exclusive preference shall be above one billion shillings;”

(b) by deleting subsection (9) and substituting therefor the following new subsection—

(9) For the purpose of ensuring sustainable promotion of local industries—

(a) a procuring entity shall have in its tender documents a mandatory requirement as a preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender;

(b) a procuring entity shall procure forty per cent of all its goods and services from a local manufacturer or local service provider;

(c) a procuring entity shall, on a quarterly basis, report to the Cabinet Secretary on its compliance with paragraph (b); and

(d) the Cabinet Secretary may publish in the *Gazette* a Preferential Procurement Master Roll specifying the locally manufactured goods that shall be procured locally by every procurement entity.

25. The principal Act is amended in section 175 —

Amendment of
section 175 of
Cap. 412C.

(a) by deleting subsection (3) and substituting therefore the following new subsection—

“(3) The High Court shall determine the judicial review application in accordance with the Civil Procedure Act.”

Cap. 21.

- (b) by deleting subsection (4) and substituting therefore the following new subsection—

“(4) Appeals from the decision of the High Court shall be made in accordance with the Court of Appeal (Organization and Administration) Act.”

Cap. 9A.

- (c) by deleting subsection (5).

26. Section 176 of the principal Act is amended—

Amendment of s.
176 of Cap. 412C.

- (a) in subsection (1)—

- (i) by inserting the following new paragraph immediately after paragraph (e)—

“(ea) submit substandard quality of works, goods or services contrary to the contract specifications, terms or conditions at the time of inspection”

- (ii) in paragraph (m) by inserting the words ‘Part VIII, Part IX’ immediately after the word ‘under’; and

- (b) by inserting the following new subsection immediately after subsection (2) —

“(2A) A person who certifies or delivers substandard goods or works that are incomplete, non-existent, or whose quality is below the specifications contained in the contract commits an offence.”

27. The principal Act is amended by repealing section 177 and replacing it with the following new section—

Repeal and
replacement of s.
177 of Cap. 412C.

General penalty and
sanctions.

177. (1) A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction to—

- (a) if the person is a natural person—

- (i) a fine not exceeding one million shillings, or to imprisonment for a term of not less than ten years, or to both; and

- (ii) an additional mandatory fine if, as a result of the conduct that

constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

- (b) if the person is a body corporate, to a fine not less than ten million shillings in addition to the mandatory fine provided for under subsection (1) (a) (ii).

(2) The mandatory fine referred to in subsection (1)(a) (ii) shall be determined as follows—

- (a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(a) (ii);
- (b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(a)(ii), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The principal object of the Bill is to amend the Public Procurement and Asset Disposal Act (Cap. 412C) to prescribe the threshold of procurements that shall be awarded to local firms in order to promote growth of local industries.

The Bill also prescribes a penalty for any person who registers a firm on behalf of a non-Kenyan for purposes of benefiting for a procurement that falls within a prescribed threshold. The Bill further seeks to ensure that procuring entities shall set out specific goods, works and services to be undertaken by a local firm in joint venture procurement.

Clause 1 of the Bill provides for the short title of the Bill.

Clause 2 of the Bill provides for new definitions including “debarment”, “foreign firm”, “foreign funded procurement”, “investigative agency”, “joint venture procurement”, “local firm”, and “minor deviation”.

Clause 3 of the Bill seeks to amend section 4 of the Act in order to ensure that foreign procurement contracts that have not been subjected to provisions international procurement guidelines or laws, adhere to the laws of procurement in Kenya.

Clause 4 of the Bill seeks to amend section 9 of the Act to ensure that the Authority monitors and evaluates technology, knowledge and skills transfer programmes.

Clause 5 of the Bill seeks to amend section 10 of the Act in order to include a representative from the Law Society of Kenya as a member of the Board.

Clause 6 of the Bill seeks to amend section 33 of the Act to ensure that the procurement function shall prioritize goods and services manufactured in that respective county.

Clause 7 of the Bill seeks to amend section 35 of the Act in order to allow the authority, a public institution or any other person to refer actions that constitute offences under the Act to investigative agencies such as the National Police. This will enable further investigations and subsequent prosecution of offences.

Clause 8 of the Bill seeks to repeal section 40 of the Act in order to enable investigations to proceed despite the fact that the issues under investigation are in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.

Clause 9 of the Bill seeks to amend section 41 of the Act in order to limit the period that a person can be debarred and approve any debarment done by an international agency recognized in Kenya.

Clause 10 of the Bill seeks to amend section 44 of the Act in order to task an accounting officer to ensure that locally produced products or services are prioritized and technology, knowledge and skills transfer plans from foreign firms are prioritized in the procurement and asset disposal process.

Clause 11 of the Bill seeks to amend section 53 of the Act to prescribe the threshold for procurement that shall awarded to a local firm and to prescribe a penalty for any person who registers a firm on behalf of a foreigner for purposes of benefiting for a procurement that falls within a prescribed threshold.

Clause 12 of the Bill seeks to amend section 70 of the Act to require procuring entities to set out specific goods, works and services to be undertaken by a local firm in joint venture procurement.

Clause 13 of the Bill seeks to amend section 81 of the Act in order to expound on what clarification of tenders should comprise.

Clause 14 of the Bill seeks to amend section 83 of the Act in order to expound the meaning of the conduct of due diligence.

Clause 15 of the Bill seeks to amend section 86 of the Act to prohibit citizen contractors who become successful tenderers to sub-contract to foreign companies unless the knowledge, skill, good or service is not available in the country.

Clause 16 of the Bill seeks to amend section 89 of the Act to task the procuring entity to seek the advice of the Attorney-General before accepting bids from a foreign company.

Clause 17 of the Bill seeks to amend section 135 of the Act in order to include as part of the tender documents the transfer of skills and technology plan.

Clause 18 of the Bill seeks to amend section 136 of the Act to provide the process for issuing a letter and notification of award to the next lowest evaluated tenderer where a successful tenderer fails to sign the contract.

Clause 19 of the Bill seeks to amend section 139 of the Act in order to correct inconsistencies in the section.

Clause 20 of the Bill seeks to insert a new clause 139A to provide for safeguards for contractors whose payments are overdue.

Clause 21 of the Bill seeks to amend section 149 of the Act to task the Authority to ensure that priority is given to citizen contractors in the sub-contracting of tenders.

Clause 22 of the Bill seeks to amend section 150 of the Act in order to provide for offences with regard to contract administration.

Clause 23 of the Bill seeks to amend section 155 of the Act in order to give preference to procurement of locally skilled and unskilled labour and where not available, the accounting officer should provide a report to prove unavailability of local skilled or unskilled labour.

Clause 24 of the Bill seeks to amend section 157 of the Act in order to increase the maximum amounts for citizen contractors, to prohibit subcontracting of local procurement contracts to foreign contractors and to prioritise contractors from respective counties where the project is fully funded by the county government unless such services are unavailable. It also provides for the mandatory procurement of forty percent of goods and services from local manufacturers or local service providers and grants the Cabinet Secretary the power to prescribe the Preferential Procurement Master Roll.

Clause 25 of the Bill seeks to amend section 175 of the Act in order to align the provisions of the Act to the Court of Appeal (Organization and Administration) Act and the Civil Procedure Act.

Clause 26 of the Bill seeks to amend section 176 of the Bill in order to provide for offences for where a contractor submits non-completed or substandard works.

Clause 27 of the Bill seeks to amend section 177 of the Act to provide mandatory fines and enhance the penalties.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedom

The Bill does not delegate any legislative powers, and it does not limit fundamental rights and freedoms.

Statement as to whether the Bill concerns county governments

The Bill seeks to amend the Public Procurement and Asset Disposal Act to prescribe the threshold of procurement to be awarded to a local firm in order to promote local industries. Procurement is undertaken by both the national government and the county governments.

In view of this, the Bill concerns county governments in terms of Article 110(1)(a) of the Constitution as it affects the functions and powers of county

governments recognized in the Fourth Schedule to the Constitution and is therefore a Bill concerning county governments.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill may occasion additional expenditure of public funds.

Dated the 1st November, 2024.

KURIA KIMANI,
*Chairperson, Departmental
Committee on Finance and National Planning.*

Section 2 of Cap. 412 which it is proposed to amend—

2. Interpretation

In this Act, unless the context otherwise requires—

"accounting officer" has the meaning assigned to it under section 2 of the Public Finance Management Act (Cap. 412A);

"appeal" means a request for administrative review or complaint filed with the Appeals Review Board pursuant to section 167 of this Act;

"assets" means movable and immovable property, tangible and intangible, including immovable property, stores, equipment, land, buildings, animals, inventory, stock, natural resources like wildlife, intellectual rights vested in the state or proprietary rights;

"Authority" means the Public Procurement Regulatory Authority established under section 8 of this Act;

"Board" means the Public Procurement Regulatory Board established under section 10 of this Act;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to finance;

"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;

"citizen contractor" means a person or a firm wholly owned and controlled by persons who are citizens of Kenya;

"common-user items" means goods, works or services that are usable by procuring entities across the board irrespective of type or category, and the items include office equipment, furniture, motor vehicles and stationery;

"complex and specialized contracts" means contracts that include procurement where the terms and conditions of an agreement are different from standard commercial terms and conditions, and includes contracts for infrastructural works performed under international agreements containing international terms and conditions;

"consultancy services" means services of predominantly an intellectual, technical or advisory nature, and includes services offered by all professionals;

"contract period" means the period between contract signing and the end of the defects liability period;

“contract administration” means management of terms of procurement or asset disposal contracts made with contractors or suppliers after tender award by a procuring entity, for the purpose of assuring compliance with obligations such as timely delivery, quality and quantity inspection, acceptance, payment, claims, dispute resolution and completion, among other terms;

“contractor” means a person who enters into a procurement contract with a procuring entity, and includes the main contractor;

“corruption” has the meaning assigned to it under section 2 of the Anti-Corruption and Economic Crimes Act (Cap. 65);

“design competition” means a procurement procedure for obtaining competitive tenders for services which are creative in nature and which require that part of the services be carried as part of the tender to facilitate evaluation of the tenders and such services may include architecture, landscaping, engineering, urban design projects, urban and regional planning, fine arts, interior design, marketing, advertising and graphic designs;

“Director-General” means the Director-General of the Authority provided for under section 15 of this Act;

“disadvantaged group” means persons denied by mainstream society access to resources and tools that are useful for their survival in a way that disadvantages them or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups or categories of persons without regard to their individual qualities, and includes enterprises in which a majority of the members or shareholders are youth, women, persons with disability or categories as shall be prescribed;

“disposal” means the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified;

“electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by tenderers, suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids;

“e-procurement” means the process of procurement using electronic medium such as the internet or other information and communication technologies;

“framework agreement” means a pact between a procuring entity and a selected supplier (or suppliers) or contractor (or contractors) identified for a definite term to supply goods works or service whose quantities and delivery schedules are not definable or determinable at the beginning;

“framework contract” means a pact between a procuring entity and a selected supplier (or suppliers) or contractor (or contractors) identified for a definite term to supply goods works or service whose quantities and deliveries are not definable or determinable at the beginning, with a commitment to order a minimum quantity of the required goods, works, or services;

“fraudulent practice” includes a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity or the tenderer or the contractor, and includes collusive practices amongst tenderers prior to or after tender submission designed to establish tender prices at artificial non-competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“financial year” has the meaning assigned to it under Article 260 of the Constitution;

“fiscal agency” means a person or an organization, or trust company, that acts on behalf of the Government of Kenya in performing various financial duties, including assistance in the arrangement for issuance of international sovereign bonds, redemption of bonds or coupons, handle tax issues, replace lost or damaged securities;

“goods” includes raw materials, products, equipment, commodities in solid, liquid or gaseous form, electricity and services that are incidental to the supply of the goods, works and services;

“loans” has the meaning assigned to it under Article 260 of the Constitution;

“local contractor” means a person or a firm registered in Kenya under the Companies Act (Cap. 486) of or any other written law and whose operation is based in Kenya;

“locally produced product or service” means goods and services that are manufactured in Kenya by firms that are registered and undertaking their business in Kenya;

“obstruction” means acts intended to materially impede access to required information in exercising a duty under this Act;

“person” has meaning assigned to it in Article 260 of the Constitution and includes sole proprietorship;

“person with disability” means a person with disability who has attained the age of eighteen years and includes a company, association or body of persons, corporate or unincorporated in which at least seventy percent of the shareholders, members or persons and a majority of the directors are persons with disability;

“public procurement” means procurement by procuring entities using public funds;

“prescribed” means prescribed by Regulations under this Act;

“preference” means the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another;

“pre-qualification” means the procedure to identify and shortlist tenderers that are qualified, prior to invitation for tenders;

“pre-qualification procedure” means a procedure by which candidates are invited to demonstrate their qualifications prior to, and as a condition for, being invited to tender or submit proposals;

“Principal Secretary” means the Principal Secretary for the time being responsible for matters relating to finance;

“procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system;

“procuring agent” means an organization which has been registered by the Authority, and competitively engaged by a procuring entity on its behalf, or an organization established under this Act, to carry out procurement or asset disposal activities;

“procurement contract” means an agreement concluded between the procuring entity and a contractor (or contractors) resulting from a tendering proceeding;

“procuring entity” means a public entity making a procurement or asset disposal to which this Act applies;

“procurement professional” means a person who has professional qualifications in procurement or supply chain management from a recognised institution and is a member of the Kenya Institute of Supplies Management or any other procurement or supply chain professional body recognised in Kenya;

“procurement function” means a division within a procuring entity staffed with procurement professionals who are officially concerned with managing the procurement and asset disposal process and reports directly to the head of procuring entity functionally and administratively;

“professional” means a person who has professional qualifications in a specialized field and who is engaged in the practice of a skill or trade, having undertaken the relevant formal academic and professional training including undertaking practical learning in the form of apprenticeship or tutelage under the guidance of a suitably qualified and experienced person in the field of training or tutelage;

“professional body” means a body representing members of a profession, which is regulated by statute, code of conduct or rules as may be amended from time to time;

“public entity” includes—

- (a) the national government or any organ or department of the national government;
- (b) a county government or any organ or department of a county government;
- (c) the Judiciary and the courts;
- (d) the Commissions established under the Constitution;
- (e) the Independent Offices established under the Constitution;
- (f) a state corporation within the meaning of the State Corporations Act (Cap. 446);
- (g) the Central Bank of Kenya established under the Constitution;
- (h) a public school within the meaning of the Basic Education Act (Cap. 211);
- (i) a public university within the meaning of the Universities Act (Cap. 210);
- (j) a city or urban area established under the Urban Areas and Cities Act (Cap. 275);
- (k) a company owned by a public entity;
- (l) a county service delivery coordination unit under the National Government Co-ordination Act (Cap. 127);
- (m) a constituency established under the Constitution;

- (n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;
- (o) a pension fund for a public entity;
- (p) a body that uses public assets in any form of contractual undertaking including public private partnership;
- (q) a body in which the national or county government has controlling interest;
- (r) a college or other educational institution maintained or assisted out of public funds;
- (s) an entity prescribed as a public entity for the purpose of this paragraph; or
- (t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the Public Finance Management Act (Cap. 412A);

“public money” includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid, grants and loans, put at the disposal of procuring entities by donors;

“public private partnership” has the meaning assigned to it under section 2 of the Public Private Partnerships Act (Cap. 430);

“publicise” has the meaning assigned to it under section 2 of the Public Finance Management Act (Cap. 412A);

“registration of suppliers” means the process of identifying and obtaining a list of prospective providers of a specified category of goods, works or services by a procuring entity for a specified period of time but not exceeding more than two years, and maintaining them for the purpose of inviting them on rotational basis for subsequent tendering proceedings such as request for quotations or restricted tendering, that may arise during the period of listing;

“regulations” means regulations made under this Act;

“Review Board” means the Public Procurement Administrative Review Board established under section 27 of this Act;

“reservations” means exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region;

“services” means any objects of procurement or disposal other than works and goods and includes professional, consultancy services, technical services, non-professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services;

“standard” means characteristics or set of characteristics for an item which for reasons of quality level or compatibility with other products is accepted by the manufacturers and users of that item as a required characteristic for all items of that type;

“supplier” means a person who enters into a procurement contract with a procuring entity to supply goods, works or services;

“supply chain management” means the design, planning, execution control and monitoring of supply chain activities which includes procurement, purchasing, logistics, transportation, warehousing, storage, stock control, contract management and distribution, with an objective of creating value to meet the objectives of the procuring entity;

“tender” means an offer in writing by a candidate to supply goods, services or works at a price; or to acquire or dispose stores, equipment or other assets at a price, pursuant to an invitation to tender, request for quotation or proposal by a procuring entity;

“tenderer” means a person who submitted a tender pursuant to an invitation by a public entity;

“tender box” means a lockable secure physical or virtual box where tenders are submitted including by electronic means so as to be opened only after the tender submission deadline;

“tender security” means a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfillment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed;

“urgent need” means the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable;

“user department” means the unit of a procuring entity that requisitions the goods, works or services being procured;

“works” means a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes—

- (a) the designing, building, installation, testing, commissioning and setting up of equipment and plant;
- (b) site preparation; and
- (c) other incidental services;

“woman” means a person of the female gender who has attained the age of eighteen years and includes a company, association or body of persons, corporate or unincorporated in which at least seventy percent of the shareholders, members or persons and a majority of its directors are of the female gender;

“writing” means printing, photography, facsimile, lithography, typewriting, electronic media and any other means of representing or reproducing words in a visible form; and

“youth” means a person who has attained the age of eighteen years and has not attained the age of thirty-five years and includes a company, association or body of persons, corporate or unincorporated in which at least seventy percent of shareholders are persons who have attained the age of eighteen years and have not attained the age of thirty-five years.

Section 4 of Cap. 412C which it is proposed to amend—

4. Application of the Act

(1) This Act applies to all State organs and public entities with respect to—

- (a) procurement planning;
- (b) procurement processing;
- (c) inventory and asset management;
- (d) disposal of assets; and
- (e) contract management.

(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

- (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he or she were an employee, but this shall not apply to persons who are under a contract of service;

- (b) the transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without financial consideration;
- (c) acquiring of services provided by government or government department;
- (d) acquisition and sale of shares or securities, fiscal agency by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;
- (e) procurement and disposal of assets under Public Private Partnerships Act (Cap. 430); and
- (f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

(3) For greater certainty, all public procurement are procurements with respect to the application of this Act.

Section 9 of Cap. 412C which it is proposed to amend—

9. Functions of Authority

- (1) The functions of the Authority shall be to—
 - (a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
 - (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
 - (c) enforce any standards developed under this Act;
 - (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
 - (e) monitor the implementation of the preference and reservation schemes by procuring entities;
 - (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;

- (g) provide advice and technical support upon request;
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
- (i) research on the public procurement and asset disposal system and any developments arising from the same;
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- (m) create a central repository or database that includes—
 - (i) complaints made on procuring entities;
 - (ii) a record of those prohibited from participating in tenders or those debarred;
 - (iii) market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that are non-compliant with procurement laws;
 - (vi) statistics related to public procurement and asset disposal;
 - (vii) price comparisons for goods, services and works; and
 - (viii) any information related to procurement that may be necessary for the public;
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;
- (o) generally report to Parliament and the relevant county assembly;

- (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
- (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
- (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
- (ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal;
- (s) perform such other functions and duties as are provided for under this Act and any other relevant law.

(2) If in the course of monitoring in accordance with section 9(1)(a), the Authority is of the opinion that civil or criminal proceedings ought to be preferred against a State Organ, public entity, state officer or public officer, the Authority shall refer the matter to the relevant authorities.

Section 10 of Cap. 412C which it is proposed to amend—

10. Public Procurement Regulatory Board

(1) The management of the Authority shall vest in a board to be known as the Public Procurement Regulatory Board which shall consist of—

- (a) a chairperson nominated by the Cabinet Secretary and appointed by the President;
 - (b) two members who shall be appointed by the Cabinet Secretary after nomination, through a fair process by—
 - (i) the Institute of Certified Public Accountants of Kenya, and
 - (ii) the Kenya Institute of Supplies Management;
 - (c) deleted by Act No. 15 of 2017, s. 55;
 - (d) the Cabinet Secretary or his or her representative;
 - (e) the Attorney-General or his or her representative; and
 - (f) four other persons appointed by the Cabinet Secretary.
- (2) In the appointment of the chairperson and members under this section, the appointing authority shall ensure regional and gender balance.

Section 33 of Cap. 412C which it is proposed to amend—

33. Roles and Responsibilities of the County Government

(1) A County Treasury shall be the organ responsible for the implementation of public procurement and asset disposal policy in the county.

(2) Without prejudice to the general provisions of sub-section (1), the County Treasury shall establish a procurement function which shall—

- (a) implement public procurement and asset disposal procedures;
- (b) coordinate administration of procurement and asset disposal contracts;
- (c) coordinate consultations with county stakeholders of the public procurement and asset disposal system in liaison with the National Treasury and the Authority;
- (d) advise the accounting officers of county government entities on public procurement and asset disposal matters;
- (e) co-ordinate county government monitoring and evaluation of the supply chain function of county government entities including ensuring compliance;
- (f) promote preference and reservations schemes for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with disabilities, minorities and marginalized groups in public procurement at the county;
- (g) promote preference and reservation schemes for residents of the county to ensure a minimum of twenty percent in public procurement at the county;
- (h) administer the scheme of service for county government procurement and supply chain management officers and capacity building.

(3) The County Treasury may prescribe an institutional framework to provide for the procurement, administration and management of common user items for the county government.

Section 35 of Cap. 412C which it is proposed to amend—

35. Investigations

(1) The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant relating to the procurement or disposal proceeding or contract with respect to a procurement or disposal with respect to a State organ or public entity for

the purpose of determining whether there has been a breach of this Act or the Regulations made thereunder.

(2) An investigation under sub-section (1) may be initiated by the Authority or on request in writing by a public institution or any other person.

(3) Investigation shall be conducted by an investigator appointed for the purpose by the Authority.

Section 40 of Cap. 412C which it is proposed to amend—

40. No investigation if issue before Review Board

(1) No investigation shall be commenced or continued under this Part, and no order shall be made under this Part, in relation to an issue that the Review Board is reviewing or has reviewed under the relevant provisions of this Act.

(2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Director-General that was not brought before the Review Board in the course of its review.

Section 41 of Cap. 412C which it is proposed to amend—

41. Debarment

(1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

- (a) has committed an offence under this Act;
- (b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;
- (c) has breached a contract for a procurement by a public entity including poor performance;
- (d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;
- (e) has refused to enter into a written contract as required under section 135 of this Act;
- (f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;
- (g) has defaulted on his or her tax obligations;
- (h) is guilty of corrupt or fraudulent practices;

- (i) is guilty of a serious violation of fair employment laws and practices; or
- (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.

(2) Without limiting the generality of subsection (1) the Board may debar a person from participating in any procurement process if that person—

- (a) has breached the requirements of the tender securing declaration form in the tender documents; or
- (b) has not performed according to professionally regulated procedures.

(3) The Authority, may also debar a person from participating in procurement or asset disposal proceedings—

- (a) on the recommendation of a law enforcement organ with an investigative mandate;
- (b) on grounds prescribed by the Authority in Regulations.

(4) A debarment under this section shall be for a specified period of time of not less than three years.

(5) The procedure for debarment shall be prescribed by Regulations.

Section 44 of Cap. 412C which it is proposed to amend—

44. Responsibilities of the accounting officer

(1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall—

- (a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity;
- (b) constitute all procurement and asset disposal committees within a procuring entity in accordance with the Act;
- (c) ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and, subject to subsection (3), submit them to the National Treasury;

- (d) ensure proper documentation of procurement proceedings and safe custody of all procurement records in accordance with the Act;
- (e) ensure compliance with sections 68, 147, 148 and 149 of the Public Finance Management Act (Cap. 412A);
- (f) approve and sign all contracts of the procuring entity;
- (g) ensure the procurement and asset disposal process of the public entity shall comply with this Act;
- (h) ensure that the procurement processes are handled by different professional offices in respect of procurements, initiation, processing and receipt of goods, works and services;
- (i) submit to the Authority the part in its procurement plan demonstrating application of preference and reservations schemes in relation to the procurement budget within sixty days after commencement of the financial year; and
- (j) ensure compliance with any other responsibilities assigned by this Act or any other Act of Parliament or as may be prescribed in Regulations.

(3) The procurement plans prepared by the national security organs shall be exempted from submission to the National Treasury.

(4) An accounting officer involved in a procurement transaction on exploitation of natural resources shall comply with provisions of Article 71 of the Constitution and any other written law.

(5) Where a public entity lacks capacity to comply with this Act, an accounting officer shall seek assistance from the National Treasury.

Section 53 of Cap. 412C which it is proposed to amend—

53. Procurement and asset disposal planning

(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.

(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act.

(4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.

(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).

(11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.

(12) 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 treat on its website.

(13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.

Section 70 of Cap. 412C which it is proposed to amend—

70. Standard tender documents

(1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.

(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings.

(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.

(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.

(5) A procuring entity may charge a fee for obtaining tender documents as prescribed by regulations and stated in the tender documents.

(6) The tender documents shall set out the following—

- (a) the specific requirements prepared under section 60 relating to the goods, works or services being procured and the time limit for delivery or completion;
- (b) if works are being procured, relevant drawings and bills of quantities shall be disclosed and the projects total estimated cost evaluated only on the basis of criteria disclosed, but a person shall not be disqualified on the basis that a bidder quoted above or below a certain percentage of engineer's estimates;
- (c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into;
- (d) the tender number assigned to the procurement proceedings by the procuring entity;
- (e) instructions for the preparation and submission of tenders including—
 - (i) the forms for tenders;
 - (ii) the number of copies to be submitted with the original tender;
 - (iii) any requirement that tender security be provided and the form and amount of any such security;
 - (iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;
 - (v) the procuring entity facilitation and the submission of tender documents by the tenderer through either soft or hard copy,

but it will be the onus of the tenderer to ensure the adequate submission of said documents;

- (vi) the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents;
- (f) an explanation of where and when tenders shall be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;
- (g) a statement that those submitting tenders or their representatives may attend the opening of tenders;
- (h) a statement of the period during which tenders must remain valid;
- (i) the procedures and criteria to be used to evaluate and compare the tenders;
- (j) a statement that the accounting officer of a procuring entity may, at any time terminate the procurement proceedings without entering into a contract in accordance with section 63 of the Act;
- (k) a provision for providing details of sub-contractors for the bidder, where applicable, and a declaration that the sub-contractors have complied with this Act; and
- (l) anything else required, under this Act or the regulations, to be set out in the tender documents.

Section 81 of Cap. 412C which it is proposed to amend—

81. Clarifications

(1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.

(2) A clarification shall not change the terms of the tender.

Section 83 of Cap. 412C which it is proposed to amend—

83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

- (a) initial each page of the report; and
- (b) append his or her signature as well as their full name and designation.

Section 86 of Cap. 412C which it is proposed to amend—

86. Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

- (a) the tender with the lowest evaluated price;
- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;
- (c) the tender with the lowest evaluated total cost of ownership; or
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges:

Provided that the provisions of this subsection shall not apply to section 141 of this Act.

(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

Section 89 of Cap. 412C which it is proposed to amend—

89. International tendering and competition

If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—

- (a) the invitation to tender and the tender documents shall be in English;

- (b) if the procuring entity is required to advertise the invitation to tender under sections 96(2) and 118(1), the procuring entity shall also advertise the invitation to tender in Kenya's dedicated tenders portal or one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;
- (c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders shall be not less than the minimum period of time prescribed for the purpose of this paragraph;
- (d) the technical requirements shall, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (e) a tenderer submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and
- (f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155.
- (g) any other conditions as may be prescribed.

Section 135 of Cap. 412C which it is proposed to amend—

135. Creation of procurement contracts

(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.

(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

- (a) Contract Agreement Form;
- (b) Tender Form;
- (c) price schedule or bills of quantities submitted by the tenderer;
- (d) Schedule of Requirements;
- (e) Technical Specifications;
- (f) General Conditions of Contract;
- (g) Special Conditions of Contract;
- (h) Notification of Award.

(7) A person who contravenes the provisions of this section commits an offence.

Section 136 of Cap. 412C which it is proposed to amend—

136. Refusal to sign contract

(1) If the person submitting the successful tender refuses to enter into a written contract in writing as required under section 135 and section 64 of this Act, he or she shall forfeit his or her tender security and the procurement process shall proceed with the next lowest evaluated tenderer.

(2) This section does not apply if the period during which tenders shall remain valid has already expired.

Section 139 of Cap. 412C which it is proposed to amend—

139. Amendments or variations to contracts

(1) An amendment or a variation to a contract resulting from a procurement proceeding is effective only if—

- (a) the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity; and
- (b) any contract variations or amendments for goods, works and services shall be as prescribed.

(2) An accounting officer of a procuring entity, on the recommendation of an evaluation committee or as prescribed in the signed Contract Agreement, may approve the request for—

- (a) use of prime costs;
- (b) use of contingencies;
- (c) reimbursable costs; and
- (d) use of provisional sums.

(2A) Despite subsection (2), an accounting officer of a procuring entity, on the recommendation of an evaluation committee or as prescribed in the signed contract agreement, may approve the request for the extension of the contract period, which request shall be accompanied by a letter from the tenderer making justifications for such extension.

(3) No contract price shall be varied upwards within twelve months from the date of the signing of the contract.

(4) For the purposes of this section, any variation of a contract shall only be considered if the following are satisfied—

- (a) the price variation from the original price is based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics;
- (b) the quantity variation for goods does not exceed fifteen per cent of the original contract quantity;
- (c) the price or quantity variation is to be executed within the period of the contract;
- (d) the cumulative value of all contract variations for goods do not result in an increment of the total contract price by more than twenty five per cent of the original contract price; and
- (e) the cumulative value of professional services does not result in an increment of the total contract price by more than twenty-five per cent of the original contract price.

(5) An accounting officer of a procuring entity shall submit a quarterly report of their varied or amended procurement contracts to the Authority.

(6) Where variations result in an increment of the contract price by more than twenty-five percent, such variations shall be tendered for separately.

(7) The method for computing price variation under this section shall be prescribed in regulations.

Section 149 of Cap. 412C which it is proposed to amend—

149. Sub-contracting

(1) If the tender documents do not prohibit subcontracting, the successful tenderer may subcontract part of the tender but only if the person to be subcontracted has not been debarred from procurement proceedings in accordance with this Act or has participated in the procurement of goods, works or services related to that contract.

(2) The successful tenderer shall be responsible towards the procuring entity for the obligations of the sub-contractor.

Section 150 of Cap. 412C which it is proposed to amend—

150. Contract administration

(1) An accounting officer or his or her appointed representative shall be responsible for ensuring that the goods, works and services are of the right quality and quantity.

(2) The head of the procurement function shall be responsible for assisting the accounting officer to confirm the right quality and quantity of goods, works and services have been delivered to the procuring entity and shall issue a certificate of acceptance to the accounting officer except where technical specifications are from another technical department or professionals engaged to work on behalf of the accounting officer.

(3) Where goods, works and services under sub-section (2), are of technical nature and the specifications were provided by a technical department or professionals engaged to work on behalf of the accounting officer, that technical department or professionals engaged to work on behalf of the accounting officer shall be responsible for confirming the right quality and quantity of goods, works or services have been delivered and issue a certificate to the recipient accounting officer.

Section 155 of Cap. 412C which it is proposed to amend—

155. Requirement for preferences and reservations

(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realisation of the applicable international or local standards, only such manufactured articles, materials

or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

- (a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or
- (b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

- (a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and
- (b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.

Section 157 of Cap. 412C which it is proposed to amend—

157. Participation of candidates in preference and reservations

(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.

(3) The preferences and reservations referred to in subsection (2) shall—

- (a) be non-discriminatory in respect of the targeted groups;
- (b) allow competition amongst the eligible persons; and
- (c) be monitored and evaluated by the Authority.

(4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—

- (a) candidates such as disadvantaged groups;
- (b) micro, small and medium enterprises;
- (c) works, services and goods, or any combination thereof;
- (d) identified regions; and
- (e) such other categories as may be prescribed.

(5) 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 thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

(7) The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

(8) In applying the preferences and reservations under this section—

(a) exclusive preferences shall be given to citizens of Kenya where—

- (i) the funding is 100% from the national government or county government or a Kenyan body; and
- (ii) the amounts are below the prescribed threshold;
- (iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;

(b) a prescribed margin of preference shall be given—

- (i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or
- (ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty per cent of their supplies from citizen contractors prior to submitting a tender.

(10) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty per cent of its procurement

value in every financial year is allocated to the youth, women and persons with disability.

(11) Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

(12) The procuring entities at the national and county level shall make a report after every six months to the Authority.

(13) A report under subsection (12) shall—

- (a) certify compliance with the provisions of this section; and
- (b) provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.

(14) 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.

(15) The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (10) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

(16) The preferences referred to in subsection (15) shall—

- (a) be prescribed within ninety days after commencement of this Act;
- (b) be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

(17) The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for—

- (a) registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;
- (b) training and capacity building of the above target groups;
- (c) providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and

- (d) monitoring and evaluating the implementation of the preferences and reservations under this Act.

(18) The National Treasury shall provide adequate staff and resources for the operations of the secretariat.

Section 175 of Cap. 412C which it is proposed to amend—

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty- five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

Section 177 of Cap. 412C which it is proposed to amend—

177. General penalty and sanctions

A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction—

- (a) if the person is a natural person, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both;
- (b) if the person is a body corporate, to a fine not exceeding ten million shillings.

