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NO. 3 OF 2005**PUBLIC PROCUREMENT AND DISPOSAL ACT**

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NO. 3 OF 2005**PUBLIC PROCUREMENT AND DISPOSAL ACT**

[*Date of assent: 26th October, 2005.*]

[*Date of commencement: 1st January, 2007.*]

An Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters

[Act No. 3 of 2005, L.N. 171/2006, Act No. 9 of 2007, Act No. 10 of 2010, Act No. 15 of 2013.]

PART I – PRELIMINARY**1. Short title**

This Act may be cited as the Public Procurement and Disposal Act.

2. Purpose of the Act

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives—

- (a) to maximise economy and efficiency;
- (b) to promote competition and ensure that competitors are treated fairly;
- (c) to promote the integrity and fairness of those procedures;
- (d) to increase transparency and accountability in those procedures;
- (e) to increase public confidence in those procedures; and
- (f) to facilitate the promotion of local industry and economic development.

3. Definitions

(1) In this Act, unless the context otherwise requires—

“accounting officer” means—

- (a) for a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity; or
- (b) for a local authority, the town or county clerk of the local authority;

“Advisory Board” means the Public Procurement Oversight Advisory Board established under section 21;

“Authority” means the Public Procurement Oversight Authority established under section 8;

“candidate” means a person who has submitted a tender to a procuring entity;

“citizen contractor” means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya;

“contractor” means a person who enters into a procurement contract with a procuring entity;

“corruption” has the meaning assigned to it in the Anti-corruption and Economic Crimes Act, 2003 (No. 3 of 2003) and includes the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process or in contract execution;

“Director-General” means the Director-General of the Authority provided for under section 10;

“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, other than those regulated by any other written law;

“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, and includes collusive practices amongst bidders prior to or after bid submission designed to establish bid prices at artificial non competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“goods” includes raw materials, things in liquid or gas form, electricity and services that are incidental to the supply of the goods;

“local contractor” means a contractor who is registered in Kenya under the Companies Act (Cap. 486) and whose operation is based in Kenya;

“Minister” means the Minister responsible for matters relating to finance;

“prescribed” means prescribed by regulation under this Act;

“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;

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

“public entity” means—

- (a) the Government or any department of the Government;
- (b) the courts;
- (c) the commissions established under the Constitution;
- (d) a local authority under the Local Government Act (Cap. 265);
- (e) a State corporation within the meaning of the State Corporations Act (Cap. 446);
- (f) the Central Bank of Kenya established under the Central Bank of Kenya Act (Cap. 491);
- (g) a co-operative society established under the Co-operative Societies Act (Cap. 490);

- (h) a public school within the meaning of the Education Act (Cap. 211);
- (i) a public university within the meaning of the Universities Act (Cap. 210B);
- (j) a college or other educational institution maintained or assisted out of public funds; or
- (k) an entity prescribed as a public entity for the purpose of this paragraph;

“public funds” has the meaning assigned to it in the Exchequer and Audit Act (Cap. 412) and includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra-budgetary funds, including aid grants and credits, put at the disposal of procuring entities by foreign donors, and revenues of procuring entities;

“Review Board” means the Public Procurement Administrative Review Board established under section 25;

“services” means any objects of procurement or disposal other than works and goods and includes professional, 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;

“the regulations” means regulations made under this Act;

“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;

“works” means the construction, repair, renovation or demolition of buildings, roads or other structures and includes—

- (a) the installation of equipment and materials;
- (b) site preparation; and
- (c) other incidental services.

(2) A regulation prescribing a public entity for the purpose of paragraph (k) of the definition of **“public entity”** in subsection (1) may prescribe a class of public entities or may specify particular public entities.

4. Application of Act

(1) This Act applies with respect to—

- (a) procurement by a public entity;
- (b) contract management;
- (c) supply chain management, including inventory and distribution; and
- (d) disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.

(2) For greater certainty, the following are not procurements 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 were an employee;

- (b) the acquiring of stores or equipment if the stores or equipment are being disposed of by a public entity in accordance with the procedure described in section 129(3)(a);
- (c) the acquiring of services provided by the Government or a department of the Government.

(3) For greater certainty, the following are procurements with respect to which this Act applies—

- (a) the renting of premises, except as described under subsection (2)(c);
- (b) the appointing, other than under the authority of an Act, of an individual to a committee, task force or other body if the individual will be paid an amount other than for expenses;
- (c) the acquiring of real property.

5. Conflicts with other Acts

(1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.

(2) For greater certainty, a provision of an Act that provides for a person or body to approve any work or expenditure shall not be construed as giving that person or body any power with respect to procurement proceedings.

6. Conflicts with international agreements

(1) Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

(2) Where a treaty or agreement referred to in subsection (1) contains provisions favourable to citizens and local contractors, full advantage shall be taken of these in the interest of promoting domestic capacity development.

(3) Where the Republic of Kenya is required under the terms of any treaty or agreement to which she is a party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part or wholly, jointly or separately, procurement through such contributions shall be—

- (a) in discrete activities where possible; and
- (b) subject to the applicable provisions of this Act.

(4) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) and (2) apply shall be subject to the provisions of this Act.

(5) Where a procurement to which subsection (1) applies favours an external beneficiary—

- (a) the procurement through contributions made by Kenya, shall be undertaken in Kenya through contractors registered in Kenya; and
- (b) all relevant insurances shall be placed with companies registered in Kenya and goods shall be transported in carriages registered in Kenya.

7. Conflict with conditions on donated funds

(1) If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.

(2) This section does not apply if the donor of funds is a public entity.

**PART II – BODIES INVOLVED IN THE
REGULATION OF PUBLIC PROCUREMENT**

A – Public Procurement Oversight Authority

8. Establishment of Authority

(1) The Public Procurement Oversight Authority is hereby established as a body corporate.

(2) The Authority shall have all the powers necessary or expedient for the performance of its functions.

(3) Without limiting the generality of subsection (2), the Authority shall have perpetual succession and a common seal and shall be capable of—

- (a) suing and being sued in its corporate name; and
- (b) holding and alienating moveable and immovable property.

9. Functions of Authority

The Authority shall have the following functions—

- (a) to ensure that the procurement procedures established under this Act are complied with;
- (b) to monitor the public procurement system and report on the overall functioning of it in accordance with section 20(3)(b) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable;
- (c) to assist in the implementation and operation of the public procurement system and in doing so—
 - (i) to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities;
 - (ii) to provide advice and assistance to procuring entities;
 - (iii) to develop, promote and support the training and professional development of persons involved in procurement; and
 - (iv) to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and
 - (v) to ensure that procuring entities engage procurement professionals in their procurement units;
- (d) to initiate public procurement policy and propose amendments to this Act or to the regulations; and

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- (e) to perform such other functions and duties as are provided for under this Act.

10. Director-General of the Authority

(1) The Authority shall have a Director-General who shall be the chief executive officer of the Authority and who shall be responsible for its direction and management.

(2) The Director-General shall be appointed by the Advisory Board with the approval of Parliament.

(3) To be appointed as the Director-General, a person must—

- (a) have a university degree in commerce, business administration, economics, engineering or a related field of study from a recognised university;
- (b) have a professional qualification in supply management from a reputable organisation;
- (c) have experience in management; and
- (d) be of outstanding honesty and integrity.

11. Term of office of Director-General

(1) The term of office of the Director-General shall be five years.

(2) A person who has held office as Director-General may be reappointed for one further term of five years.

12. Restrictions on activities of Director-General

During the period of his or her appointment, the Director-General shall not—

- (a) be employed in any other work or business; or
- (b) hold any other public office.

13. Terms and conditions of service of Director-General

The terms and conditions of service of the Director-General shall be determined by the Advisory Board in accordance with the State Corporations Act (Cap. 446).

14. Resignation of Director-General

(1) The Director-General may resign by a written resignation addressed to the Advisory Board.

(2) A resignation is effective upon being received by the Advisory Board.

15. Removal of Director-General

(1) The appointment of the Director-General may be terminated only in accordance with this section.

(2) The Advisory Board may terminate a person's appointment as the Director-General if the person—

- (a) is incompetent;

- (b) is unable to perform the functions of his office by reason of a mental or physical infirmity;
- (c) is convicted of an offence under the Penal Code (Cap. 63) or this Act or an offence involving dishonesty;
- (d) was involved in a corrupt transaction;
- (e) contravenes section 12; or
- (f) is adjudged bankrupt.

16. Staff

The Authority may, upon such terms and conditions of service as the Authority may determine, employ such staff or hire the services of such consultants, experts or independent investigators as may be necessary for the proper performance of its functions.

17. Acting Director-General

The Advisory Board may designate a member of the staff of the Authority to act as the Director-General during the illness or absence of the Director-General or during a vacancy in the office.

18. Financial arrangements

(1) The financial year of the Authority shall be the period of twelve months ending on 30th June in each year.

(2) At least three months before the commencement of each financial year, the Director-General shall cause estimates of the revenue and expenditures of the Authority for that year to be prepared and submitted to the Advisory Board for approval.

(3) The estimates shall make provision for all the estimated expenditures of the Authority for the financial year and, in particular, shall provide for expenditures for—

- (a) the payment of salaries, allowances and other charges in respect of the staff of the Authority;
- (b) the payment of pensions, gratuities and other charges in respect of former staff of the Authority;
- (c) the proper maintenance of buildings and grounds of the Authority;
- (d) the maintenance, repair and replacement of the equipment and other property of the Authority; and
- (e) the payment of allowances and expenses of the Advisory Board.

(4) The Authority shall make provision for the renewal of depreciating assets and the payment of pensions and other retirement benefits by the establishment of sinking funds and for contributions to such reserve and stabilisation funds as may be required.

(5) The funds of the Authority shall consist of—

- (a) money appropriated by Parliament for the purpose of running the Authority;
- (b) loans or grants received by the Authority for its activities;

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- (c) revenue or fees collected for services rendered by the Authority; and
 - (d) capacity building levy of such amount of the contract price as may be prescribed.

19. Audit

The Authority shall be audited in accordance with the Public Audit Act, 2003 (No. 12 of 2003).

20. Quarterly and annual reports

(1) For each financial year, the Director-General shall cause four quarterly reports and one annual report to be prepared.

(2) The Director-General shall submit each report to the Advisory Board and to the Minister—

- (a) in the case of a quarterly report, within one month after the end of the quarter to which the report relates; or
- (b) in the case of an annual report, within four months after the end of the year to which the report relates.

(3) Each report shall contain, in respect of the period to which it relates—

- (a) a description of the activities of the Authority;
- (b) a report on the overall functioning of the public procurement system;
- (c) a list of each procurement for which a procurement procedure was specially permitted under section 92;
- (d) a report on the extent of positive bias to local participation.

(4) In addition to what is required under subsection (3), each annual report shall include the financial statements of the Authority for the year to which the report relates.

(5) The Minister shall, within thirty days after receiving a report, transmit it to the National Assembly.

B – Public Procurement Oversight Advisory Board

21. Establishment of Advisory Board

The Public Procurement Oversight Advisory Board is hereby established as an unincorporated body.

22. Composition of Advisory Board

(1) The Public Procurement Oversight Advisory Board shall consist of—

- (a) nine members appointed by the Minister and approved by Parliament from persons nominated by the prescribed organisations; and
- (b) the Permanent Secretary to the Treasury, or his representative;
- (c) the Attorney-General or his representative;
- (d) the Director-General.

(2) The First Schedule shall apply in respect of the members of the Advisory Board.

[Act No. 9 of 2007, s. 77.]

23. Functions of Advisory Board

The functions of the Advisory Board are—

- (a) to advise the Authority generally on the exercise of its powers and the performance of its functions;
- (b) to approve the estimates of the revenue and expenditures of the Authority;
- (c) to recommend the appointment or termination of the Director-General in accordance with this Act;
- (d) to perform such other functions and duties as are provided for under this Act.

24. Procedures of Advisory Board

(1) The business and affairs of the Advisory Board shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Advisory Board may regulate its own procedure.

(3) Five nominated members of the Advisory Board shall constitute a quorum for the transaction of any business of the Board.

(4) The Advisory Board may invite any person to attend any of its meetings and to participate in its deliberations, but such an invitee shall not have a vote in any decision of the Board.

C – Public Procurement Administrative Review Board**25. Review Board**

(1) The Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, (L.N. 51/2001) is continued under this Act as the Public Procurement Administrative Review Board.

(2) The composition and membership of the Review Board shall be in accordance with the regulations.

(3) The Authority shall provide administrative services to the Review Board.

PART III – INTERNAL ORGANISATION OF PUBLIC ENTITIES RELATING TO PROCUREMENT**26. Threshold matrix and segregation of responsibilities**

(1) For the purpose of ensuring that its decisions are made in a systematic and structured way, a public entity shall establish procedures to provide for the making of decisions, on behalf of the public entity, relating to procurement.

(2) The procedures required under subsection (1) shall be consistent with this Act and the regulations.

(3) All procurement shall be—

- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;

- (b) undertaken by a procuring entity as per the threshold matrix as set out in the regulations;
- (c) handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services.

(4) A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations.

(5) A tender committee or body established under subsection (4) shall be established in accordance with the regulations and shall—

- (a) consist of not less than five members;
- (b) have as its secretary, the procurement professional in charge of the procurement unit.

(6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.

(7) A procurement unit established under subsection (4) shall be staffed with procurement professionals whose qualifications have been recognised by the Authority.

(8) For the purpose of this section, a “procurement professional” means a person who—

- (a) has professional qualifications in procurement and supply management from a recognised institution;
- (b) is engaged in a calling or occupation in which recourse to procurement is directly or indirectly involved and has experience in the practise of procurement; and
- (c) is a member of a recognised institute of purchasing and supply.

(9) The level of qualification and experience required of procurement professionals under subsection (8) shall be as prescribed.

(10) The Authority shall facilitate the establishment of an examination body for procurement professionals and shall ensure support for their professional association.

27. Responsibility for complying with Act, etc.

(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).

(3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.

(4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.

(5) The accounting officer may use the procurement unit and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.

(6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed.

28. Procuring agents

(1) A procuring entity may appoint a procurement agent, on competitive basis, to carry out such procurement proceedings on its behalf as may be prescribed.

(2) The Authority shall pre-qualify procuring agents to be engaged by a procuring entity pursuant to subsection (1).

(3) A procuring agent shall be registered with the Authority and where the procuring agent is undertaking procurement on behalf of a procurement entity, the procuring agent shall comply with the provisions of this Act and the regulations.

PART IV – GENERAL PROCUREMENT RULES

29. Choice of procurement procedure

(1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.

(2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.

(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—

- (a) obtains the written approval of its tender committee; and
- (b) records in writing the reasons for using the alternative procurement procedure.

(4) A procuring entity shall use such standard tender documents as may be prescribed.

30. Procurement not to be split or inflated

(1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence.

(3) Standard goods, services and works with known market prices shall be procured at the prevailing real market price.

(4) Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations, be required to pay the procuring entity for the loss resulting from their actions.

31. Qualifications to be awarded contract

(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria—

- (a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;
- (b) the person has the legal capacity to enter into a contract for the procurement;
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) the procuring entity is not precluded from entering into the contract with the person under section 33;
- (e) the person is not debarred from participating in procurement proceedings under Part IX.

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3).

(5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications.

(6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section and under section 39.

(7) Procuring entities shall use creative approaches, such as design and build in order to enhance efficiency of the procurement process and project implementation.

32. Pre-qualification procedures

To identify qualified persons a procuring entity may use a pre-qualification procedure or may use the results of a pre-qualification procedure used by another public entity.

33. Limitation on contracts with employees, etc.

(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with—

- (a) an employee of the procuring entity or a member of a board or committee of the procuring entity;

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- (b) a Minister, public servant or a member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a Minister; or
 - (c) a person, including a corporation, who is related to a person described in paragraph (a) or (b).
- (2) Whether a person is related to another person for the purpose of subsection (1)(c) shall be determined in accordance with the regulations.

34. Specific requirements

(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate—

- (a) relate to performance rather than to design or descriptive characteristics; and
- (b) be based on national or international standards.

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—

- (a) there is no other sufficiently precise or intelligible way of describing the requirements; and
- (b) the requirements allow equivalents to what is referred to.

35. Verification that not debarred

A tender, proposal or quotation submitted by a person shall include a statement verifying that the person is not debarred from participating in procurement proceedings under Part IX and a declaration that the person will not engage in any corrupt practice.

36. Termination of procurement proceedings

(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

37. Form of communications

(1) If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.

(2) If the procurement procedure used is direct procurement or a request for quotations, communications between the procuring entity and a person seeking a contract for the procurement shall either be—

- (a) in writing; or
- (b) referred to and confirmed in writing.

(3) To the extent allowed under written directions of the Authority, electronic communications may be used instead of written communications.

38. Inappropriate influence on evaluations, etc.

(1) After the deadline for the submission of tenders, proposals or quotations—

- (a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and
- (b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction—

- (a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both; or
- (b) if the person is a corporation, to a fine not exceeding ten million shillings.

39. Participation in procurement

(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 Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and 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;
- (c) be monitored and evaluated by the Authority.

(4) The preferences and reservations shall apply to—

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

(5) A procuring entity shall, when processing procurement, 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.

(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 preference shall be given to citizens of Kenya where—
 - (i) the funding is 100% from the Government of Kenya or a Kenyan body; and
 - (ii) the amounts are below the prescribed threshold;
- (b) a prescribed margin of preference shall be given—
 - (i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or
 - (ii) works, goods and services where a preference shall be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

[Act No. 10 of 2010, s. 80.]

40. Corrupt practice

(1) No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding.

(2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply—

- (a) the person shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offence.

41. Fraudulent practice

(1) No person shall be involved in a fraudulent practice in any procurement proceeding.

(2) If a person contravenes subsection (1) the following shall apply—

- (a) the person shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

42. Collusion

(1) No person shall collude or attempt to collude with any other person—

- (a) to make any proposed price higher than would otherwise have been the case;
- (b) to have that other person refrain from submitting a tender, proposal or quotation or withdraw or change a tender, proposal or quotation; or
- (c) to submit a tender, proposal or quotation with a specified price or with any specified inclusions or exclusions.

(2) If a person contravenes subsection (1) the following shall apply—

- (a) both persons referred to in subsection (1) shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with either person referred to in subsection (1), the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

43. Conflicts of interest

(1) An employee or agent of the procuring entity or a member of a board or committee of the procuring entity who has a conflict of interest with respect to a procurement—

- (a) shall not take part in the procurement proceedings; and
- (b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.

(2) An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection that, but for that subsection, would have been within his duties shall disclose the conflict of interest to the procuring entity.

(3) If a person contravenes subsection (1) with respect to a conflict of interest described in subsection (5)(a) and the contract is awarded to the person or his relative or to another person in whom one of them had a direct or indirect pecuniary interest, the contract shall be voidable at the option of the procuring entity.

(4) The voiding of a contract by the procuring entity under subsection (3) does not limit any other legal remedy the procuring entity may have.

(5) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person—

- (a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or
- (b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.

(6) In this section, “**relative**” means—

- (a) a spouse, child, parent, brother or sister;
- (b) a child, parent, brother or sister of a spouse; or
- (c) any other prescribed relative.

(7) For the purpose of subsection (5), the following are persons seeking a contract for a procurement—

- (a) a person submitting a tender, proposal or quotation; or
- (b) if direct procurement is being used, a person with whom the procuring entity is negotiating.

(8) Any person who contravenes the provisions of this section shall be guilty of an offence.

44. Confidentiality

(1) During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following—

- (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition;
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or
- (d) the contents of tenders, proposals or quotations.

(2) This section does not prevent the disclosure of information if any of the following apply—

- (a) the disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
- (b) the disclosure is for the purpose of law enforcement;
- (c) the disclosure is for the purpose of a review under Part VII or an investigation under Part VIII or as required under section 105;
- (d) the disclosure is pursuant to a court order; or
- (e) the disclosure is allowed under the regulations.

(3) Notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2)(e).

(4) Any person who contravenes the provisions of this section shall be guilty of an offence.

45. Procurement records

(1) A procuring entity shall keep records for each procurement for at least six years after the resulting contract was entered into or, if no contract resulted, after the procurement proceedings were terminated.

(2) The records for a procurement must include—

- (a) a brief description of the goods, works or services being procured;
- (b) if a procedure other than open tendering was used, the reasons for doing so;
- (c) if, as part of the procurement procedure, anything was advertised in a newspaper or other publication, a copy of that advertisement as it appeared in that newspaper or publication;
- (d) for each tender, proposal or quotation that was submitted—
 - (i) the name and address of the person making the submission; and
 - (ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation;
- (e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used;
- (f) if the procurement proceedings were terminated without resulting in a contract, an explanation of why they were terminated;
- (g) a copy of every document that this Act requires the procuring entity to prepare; and
- (h) such other information or documents as are prescribed.

(3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the

procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.

(4) The procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 44(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 44(1).

(6) A procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files.

46. Publication of procurement contracts

(1) The Authority shall publish notices of the contracts awarded by procuring entities together with such other information as may be prescribed.

(2) The Authority shall issue directions governing the publication of notices under this section, including directions specifying what must be included in a notice and how it must be published.

47. Amendments to contracts

An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if—

- (a) the amendment has been approved in writing by the tender committee of the procuring entity; and
- (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services.

48. Interest on overdue amounts

The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement—

- (a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and
- (b) the interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.

49. Inspections and audits relating to contracts

(1) The following shall apply in relation to a contract for a procurement—

- (a) the Director-General, or anyone authorised by the Director-General, may inspect, at any reasonable time, the records and accounts of the procuring entity and contractor relating to the contract and the procuring entity and contractor shall co-operate with and assist whoever does such an inspection; and
- (b) the Controller and Auditor-General, or an auditor authorised by the Controller and Auditor-General, may audit the accounts of the

(2) The costs of an audit under subsection (1)(b) shall be borne by the Authority if the audit was conducted at the request of the Director-General.

PART V – OPEN TENDERING

50. Part sets out requirements

This Part sets out the requirements for open tendering.

51. Invitation to tender

The procuring entity shall prepare an invitation to tender that sets out the following—

- (a) the name and address of the procuring entity;
- (b) the tender number assigned to the procurement proceedings by the procuring entity;
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;
- (d) an explanation of how to obtain the tender documents, including the amount of any fee;
- (e) an explanation of where and when tenders must be submitted and where and when the tenders will be opened; and
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders.

52. Tender documents

(1) The procuring entity shall prepare tender documents in accordance with this section and the regulations.

(2) The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders.

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

- (a) the specific requirements prepared under section 34 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;
- (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;

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- (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; and
 - (iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;
 - (f) an explanation of where and when tenders must 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 procuring entity may, at any time, terminate the procurement proceedings without entering into a contract; and
 - (k) anything else required, under this Act or the regulations, to be set out in the tender documents.

53. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry.

(3) The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

54. Advertisement, etc.

(1) The procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.

(2) If the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for national advertising, the procuring entity shall advertise, at least twice in a newspaper of general nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement, and on its website in instances where the procuring entity has a website, and the advertisement shall also be posted at any conspicuous place reserved for this purpose in the premises of the procuring entity as certified by the head of the procurement unit.

55. Time for preparing tenders

(1) The time allowed for the preparation of tenders must not be less than the minimum period of time prescribed for the purpose of this subsection.

(2) For the purpose of this section, the time allowed for the preparation of tenders is the period of time between whatever steps the procuring entity takes to bring the invitation to tender to the attention of those who may wish to submit tenders and the deadline for submitting tenders.

(3) If the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one-third of the time allowed for the preparation of tenders, the procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

56. Provision of tender documents

(1) The procuring entity shall provide copies of the tender documents expeditiously and in accordance with the invitation to tender.

(2) The procuring entity may charge such fees as may be prescribed for copies of the tender documents.

57. Tender security

(1) A procuring entity may require that tender security be provided with tenders.

(2) The procuring entity may determine the form and amount of the tender security, subject to such requirements or limits as may be prescribed.

(3) Tender security shall be forfeited if the person submitting the tender—

- (a) withdraws the tender after the deadline for submitting tenders but before the expiry of the period during which tenders must remain valid;
- (b) rejects a correction of an arithmetic error under section 63; or
- (c) refuses to enter into a written contract as required under section 68 or fails to furnish any required performance security.

(4) The procuring entity shall immediately release any tender security if—

- (a) the procurement proceedings are terminated;
- (b) the procuring entity determines that none of the submitted tenders is responsive; or
- (c) a contract for the procurement is entered into.

58. Submission and receipt of tenders

(1) A tender must be in writing, it must be signed and it must be sealed in an envelope.

(2) A tender and the envelope it is sealed in must bear the tender number assigned to the procurement proceedings by the procuring entity.

(3) A tender must be submitted before the deadline for submitting tenders and any tender received after that deadline shall be returned unopened.

(4) The procuring entity shall ensure that the place where tenders must be submitted is open and accessible and shall provide, in that place, a tender box that complies with the prescribed requirements.

- (5) Each tender that is delivered shall be placed unopened in the tender box—
(a) if the tender is delivered by post, by the staff of the procuring entity immediately upon receipt; or
(b) if the tender is delivered otherwise than by post, by the person delivering the tender.

(6) If a tender that is delivered by post is inadvertently opened, the fact of that opening shall be recorded on the envelope by the person who opened the tender and then the tender shall be placed in the tender box.

(7) If a tender or part of a tender is too large to be placed in the tender box it shall be received in the manner set out in the tender documents or the invitation to tender or, if no such manner is set out, in the manner determined by the procuring entity.

59. Changes to tenders

(1) Before the deadline for submitting tenders, a person who submitted a tender may change or withdraw it in accordance with the following—

- (a) the change or withdrawal must be in writing; and
(b) the change or withdrawal must be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change, the substance of the tender.

(3) The procuring entity shall not attempt to have the substance of a tender changed.

60. Opening of tenders

(1) The accounting officer shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

- (a) the committee shall have at least three members; and
(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(3) Those submitting tenders or their representatives may attend the opening of tenders.

(4) The tender opening committee shall assign an identification number to each tender.

(5) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

- (a) the name of the person submitting the tender;

- (b) the total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and
- (c) if applicable, what has been given as tender security.

(6) The procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(7) Each member of the tender opening committee shall—

- (a) sign each tender on one or more pages as determined by the tender opening committee; and
- (b) initial, in each tender, against the quotation of the price and any modifications or discounts.

(8) The tender opening committee shall prepare tender opening minutes which shall set out—

- (a) a record of the procedure followed in opening the tenders; and
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(9) Each member of the tender opening committee shall sign the tender opening minutes.

61. Extension of tender validity period

(1) Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period.

(2) The procuring entity shall give notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) is subject to such restrictions and requirements as may be prescribed.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn during an extension under subsection (1).

62. Clarifications

(1) The procuring entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.

(2) A clarification may not change the substance of the tender.

63. Corrections of arithmetic errors

(1) The procuring entity may correct an arithmetic error in a tender.

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited.

64. Responsiveness of tenders

- (1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.
- (2) The following do not affect whether a tender is responsive—
- (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or
 - (b) errors or oversights that can be corrected without affecting the substance of the tender.
- (3) A deviation described in subsection (2)(a) shall—
- (a) be quantified to the extent possible; and
 - (b) be taken into account in the evaluation and comparison of tenders.

65. Notification if no responsive tenders

If the procuring entity determines that none of the submitted tenders are responsive, the procuring entity shall notify each person who submitted a tender.

66. Evaluation of tenders

- (1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—
- (a) the criteria must, to the extent possible, be objective and quantifiable; and
 - (b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.
- (4) The successful tender shall be the tender with the lowest evaluated price.
- (5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.
- (6) The evaluation shall be carried out within such period as may be prescribed.

67. Notification of award of contract

- (1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.
- (2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.
- (3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.

68. Creation of contract

(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

69. Refusal to sign contract

(1) If the person submitting the successful tender refuses to enter into a written contract as required under section 68, the procuring entity shall notify, under section 67(1), the person who submitted the tender that, according to the evaluation under section 66, would have been successful had the successful tender not been submitted.

(2) Section 67(2), section 68 and this section apply, with necessary modifications, with respect to the tender of the person notified under subsection (1).

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

70. Changes to contract responsibilities

The procuring entity shall not request or require, as a condition of awarding a contract that a person who submitted a tender undertake responsibilities not set out in the tender documents.

71. International tendering

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

- (a) the invitation to tender and the tender documents must be in English;
- (b) if the procuring entity is required to advertise the invitation to tender under section 54(2), the procuring entity shall also advertise the invitation to tender in 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 must be not less than the minimum period of time prescribed for the purpose of this paragraph;
- (d) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;

- (e) a person 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) any general and specific conditions to which the contract will be subject must be of a kind generally used in international tendering.

PART VI – ALTERNATIVE PROCUREMENT PROCEDURES

72. Part sets out requirements

This Part sets out the requirements for the procurement procedures that are alternatives to open tendering.

A – Restricted Tendering

73. When restricted tendering may be used

(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

(2) A procuring entity may use restricted tendering if the following conditions are satisfied—

- (a) competition for contract, because of the complex or specialised nature of the goods, works or services is limited to prequalified contractors;
- (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and
- (c) there are only a few known suppliers of the goods, works or services as may be prescribed in the regulations.

B – Direct Procurement

74. When direct procurement may be used

(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied—

- (a) there is only one person who can supply the goods, works or services being procured; and
- (b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied—

- (a) there is an urgent need for the goods, works or services being procured;
- (b) because of the urgency the other available methods of procurement are impractical; and

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- (c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

75. Procedure

The following shall apply with respect to direct procurement—

- (a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;
- (b) the procuring entity shall not use direct procurement in a discriminatory manner; and
- (c) the resulting contract must be in writing and signed by both parties.

*C – Request for Proposals***76. When request for proposals may be used**

- (1) A procuring entity may use a request for proposals for a procurement if—
 - (a) the procurement is of services or a combination of goods and services; and
 - (b) the services to be procured are advisory or otherwise of a predominately intellectual nature.
- (2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals for a procurement if the procuring entity would be allowed to use another alternative procurement procedure for that procurement under section 73, 74, 88 or 90.

77. Procedure

Sections 78 to 86 set out the procedure for a procurement using a request for proposals.

78. Notice inviting expressions of interest

- (1) The procuring entity shall prepare a notice inviting interested persons to submit expressions of interest.
- (2) The notice inviting expressions of interest shall set out the following—
 - (a) the name and address of the procuring entity;
 - (b) a brief description of the services being procured and, if applicable, the goods being procured;
 - (c) the qualifications necessary to be invited to submit a proposal; and
 - (d) an explanation of where and when expressions of interest must be submitted.
- (3) The procuring entity shall advertise the notice inviting expressions of interest in at least two daily newspapers of nationwide circulation.

79. Terms of reference

The procuring entity shall prepare terms of reference that set out the following—

- (a) the specific requirements prepared under section 34 relating to the services and, if applicable, the goods being procured and the time limit for delivery or completion; and
- (b) anything else required under the regulations to be set out in the terms of reference.

80. Determination of qualified persons

After the deadline for submitting expressions of interest the procuring entity shall examine each expression of interest to determine if the person submitting it is qualified to be invited to submit a proposal in accordance with the notice inviting expressions of interest.

81. Request for proposals to qualified persons

(1) The procuring entity shall give each person who it determines is qualified to be invited to submit a proposal a request for proposals and a copy of the terms of reference.

(2) The request for proposals shall set out the following—

- (a) the name and address of the procuring entity;
- (b) the general and specific conditions to which the contract will be subject;
- (c) instructions for the preparation and submission of proposals which shall require that a proposal include a technical proposal and a financial proposal;
- (d) an explanation of where and when proposals must be submitted;
- (e) the procedures and criteria to be used to evaluate and compare the proposals including—
 - (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
 - (ii) the procedures and criteria for evaluating the financial proposals; and
 - (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method;
- (f) a statement giving notice of the restriction, in section 87, on entering into other contracts; and
- (g) anything else required, under this Act or the regulations to be set out in the request for proposals.

82. Evaluation of proposals

(1) The procuring entity shall examine the proposals received in accordance with the request for proposals.

(2) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.

(3) For each proposal that is determined, under subsection (2), to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.

(4) If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals.

(5) The successful proposal shall be 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 under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).

83. Notification of successful proposal

(1) The procuring entity shall notify the person who submitted the successful proposal that his proposal was successful.

(2) At the same time as the person who submitted the successful proposal is notified, the procuring entity shall notify all other persons who submitted proposals that their proposals were not successful.

84. Negotiations with submitter of successful proposal

(1) The procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 85(2).

(2) If the negotiations with the person who submitted the successful proposal do not result in a contract the procuring entity may negotiate with the person who submitted the proposal that would have been successful had the successful proposal not been submitted and subsection (1) and this subsection apply, with necessary modifications, with respect to those negotiations.

85. Contract requirements

(1) This section shall apply with respect to the contract resulting from a procurement by a request for proposals.

(2) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following—

- (a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and
- (b) the variations must be such that if the proposal, with those variations, was evaluated again under section 83, the proposal would still be the successful proposal.

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- (3) The contract must be in writing.
 - (4) The contract must set out either—
 - (a) the maximum amount of money that can be paid under the contract; or
 - (b) the maximum amount of time that can be paid for under the contract.

86. International competition

If there will not be effective competition unless foreign persons participate, the following shall apply—

- (a) the notice inviting expressions of interest and the request for proposals must be in English;
- (b) in addition to the advertisement required under section 54(2), the procuring entity shall also advertise the notice inviting expressions of interest in 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 technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (d) a person submitting a proposal may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for proposals specifically allows to be used; and
- (e) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

87. Restriction on entering into certain related contracts

A person who enters into a contract resulting from a procurement by a request for proposals shall not enter into any other contract for the procurement of goods or works that follows from or is related to that original contract.

*D – Request for Quotations***88. When may be used**

A procuring entity may use a request for quotations for a procurement if—

- (a) the procurement is for goods that are readily available and for which there is an established market; and
- (b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

89. Procedure

- (1) This section sets out the procedure for a procurement using a request for quotations.

(2) The procuring entity shall prepare a request for quotations that sets out the following—

- (a) the name and address of the procuring entity;
- (b) the specific requirements prepared under section 34 relating to the goods being procured;
- (c) an explanation of where and when quotations must be submitted; and
- (d) anything else required under this Act or the regulations to be set out in the request for quotations.

(3) The procuring entity shall deal with the request for quotations in accordance with the following—

- (a) the procuring entity shall give the request to such persons as the procuring entity determines;
- (b) the request must be given to as many persons as necessary to ensure effective competition and must be given to at least three persons, unless that is not possible; and
- (c) the procuring entity shall give the request to each person early enough so that the person has adequate time to prepare a quotation.

(4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

(5) The following shall apply with respect to the contract resulting from a procurement by a request for quotations—

- (a) the procuring entity shall place a purchase order with the person submitting the successful quotation; and
- (b) the person submitting the successful quotation shall confirm the purchase order in writing.

(6) If there will not be effective competition unless foreign persons participate, the following shall apply—

- (a) the request for quotations must be in English;
- (b) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (c) a person submitting a quotation may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for quotations specifically allows to be used; and
- (d) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

E – Procedure for Low-value Procurements

90. When may be used

(1) A procuring entity may use a low-value procurement procedure if—

- (a) the estimated value of the goods, works or services being procured are less than or equal to the prescribed maximum value for that low-value procurement procedure; and

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- (b) any other prescribed conditions for the use of the low-value procurement procedure are satisfied.

(2) A regulation prescribing a maximum value for a low-value procurement procedure or prescribing conditions for the use of such a procedure may prescribe different values or conditions for different classes of public entities or different classes of goods, works or services being procured.

91. Procedure

- (1) The procedure for a low-value procurement shall be as prescribed.
- (2) A regulation prescribing a low-value procurement procedure may—
 - (a) prescribe different procedures for different classes of public entities or different classes of goods, works or services being procured; or
 - (b) exempt the procedure from the application of a provision of Part IV or vary the application of such a provision to the procedure.

F – Specially Permitted Procurement Procedure

92. Authority may permit

(1) A procuring entity may use a procurement procedure specially permitted by the Authority which may include design competition.

- (2) For the purpose of this section—
 - (a) *Deleted by Act No. 15 of 2013, s. 78;*
 - (b) “**design competition**” means a procurement procedure for obtaining competitive bids for services which are creative in nature and which require that part of the services be carried as part of the bid to facilitate evaluation of the bids and such services include architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts.
- (3) The procedure for specially permitted procurement shall be as prescribed.

(4) In specially permitting a procedure under subsection (1), the Authority may exempt the procedure from the application of a provision of Part IV or vary the application of such a provision.

[Act No. 15 of 2013, s. 78.]

PART VII – ADMINISTRATIVE REVIEW OF PROCUREMENT PROCEEDINGS

93. Request for a review

(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

(2) The following matters shall not be subject to the review under subsection (1)—

- (a) the choice of a procurement procedure pursuant to Part IV;
- (b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;
- (c) where a contract is signed in accordance to section 68; and
- (d) where an appeal is frivolous.

94. Suspension of proceedings, etc.

Upon receiving a request for a review under section 93, the secretary to the Review Board shall notify the procuring entity of the pending review and the suspension of the procurement proceedings in such manner as may be prescribed.

95. Dismissal of frivolous requests, etc.

The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.

96. Parties to review

The parties to a review shall be—

- (a) the person who requested the review;
- (b) the procuring entity;
- (c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and
- (d) such other persons as the Review Board may determine.

97. Completion of review

(1) The Review Board shall complete its review within thirty days after receiving the request for the review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in the Act or the regulations.

98. Powers of Review Board

Upon completing a review the Review Board may do any one or more of the following—

- (a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;
- (b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;
- (c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and
- (d) order the payment of costs as between parties to the review.

99. Right to review is additional right

The right to request a review under this Part is in addition to any other legal remedy a person may have.

100. Right to judicial review to procurement

(1) A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.

(2) Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court, and the decision of the High Court shall be final.

(3) A party to the review which disobeys the decision of the Review Board or the High Court 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 shall be null and void.

(4) If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.

PART VIII – AUTHORITY POWERS TO ENSURE COMPLIANCE**101. Information to Authority**

A public entity shall provide the Authority with such information relating to procurement as the Director-General may require in writing.

102. Investigations

(1) The Director-General may order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of this Act, the regulations or any directions of the Authority.

(2) An investigation shall be conducted by an investigator appointed for the purpose by the Director-General.

103. Powers of investigators

(1) For the purpose of carrying out an investigation of procurement proceedings an investigator has the following powers—

- (a) the investigator shall have access to all books, records, returns, reports and other documents of the procuring entity or a person who participated in the procurement proceedings, including electronic documents;
- (b) the investigator may remove or make copies of any documents the investigator has access to under paragraph (a); and
- (c) the investigator may require any of the following to provide explanations, information and assistance—
 - (i) an employee or official of the procuring entity; or
 - (ii) an employee or official of a person who participated in the procurement proceedings.

(2) In addition to the powers under subsection (1), an investigator shall have such powers as are prescribed.

(3) The powers of an investigator are subject to such conditions and limitations as are prescribed.

104. Report of investigation

After completing his investigation, an investigator shall prepare and submit a report thereon to the Director-General.

105. Order by Director-General

(1) If, after considering the report of an investigator, the Director-General is satisfied that there has been a breach of this Act, the regulations or any directions of the Authority, the Director-General may, by order, do any one or more of the following—

- (a) direct the procuring entity to take such actions as are necessary to rectify the contravention;
- (b) cancel the procurement contract, if any;
- (c) terminate the procurement proceedings; or
- (d) prepare and submit a summary of the investigator's findings and recommendations to the procuring entity and to the Kenya Anti-Corruption Commission established under the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003).

(2) Before making an order under subsection (1), the Director-General shall give the following persons an opportunity to make representations—

- (a) the procuring entity; and
- (b) any other person whose legal rights the Director-General believes may be adversely affected by the order.

106. Request for a review

(1) The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 105(2) may request the Review Board to review the order of the Director-General under section 109.

(2) A request for a review may only be made within twenty-one days after the order was made.

(3) A request for a review shall be accompanied by the prescribed fee.

107. Dismissal of frivolous requests, etc.

The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious.

108. Convening of review

The Review Board shall meet to conduct a review within twenty-one days after receiving the request for the review.

109. Parties to review

The parties to a review are—

- (a) the person who requested the review;

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- (b) the procuring entity; and
 - (c) such other persons as the Review Board may determine.

110. Completion of review

The Review Board shall complete its review within thirty days after receiving the request for the review.

111. Powers of Review Board

Upon completing a review the Review Board may do any or both of the following

- (a) confirm, vary or overturn the Director-General's order; and
- (b) order the payment of costs as between parties to the review.

112. Appeals

A party to the review may appeal against the decision of the Review Board to the High Court within fourteen days after the decision is made.

113. Right to review is additional right

The right to request a review under section 106 is in addition to any other legal remedy a person may have.

114. 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 Part VII.

(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.

PART IX – DEBARMENT FROM PARTICIPATING IN PROCUREMENT PROCEEDINGS

115. Debarment

(1) The Director-General, with the approval of the Advisory Board, may debar a person from participating in procurement 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 Act;
- (c) has breached a contract for a procurement by a public entity;
- (d) has, in procurement proceedings, given false information about his qualifications; or
- (e) has refused to enter into a written contract as required under section 68.

(2) The Director-General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on a prescribed ground.

(2A) Debarment under this section may be imposed by the Director-General on the recommendation of a law-enforcement agency with an investigative mandate.

(3) A debarment under this section shall be for a period of time of not less than five years, as may be specified by the Director-General.

[Act No. 10 of 2010, s. 81]

116. Opportunity to make representations

Before debarring a person under section 115, the Director-General shall give that person an opportunity to make representations to the Director-General.

117. Request for a review

(1) A person who is debarred under section 115 may request the Review Board to review the debarment.

(2) A request for a review may only be made within twenty-one days after the person was debarred.

(3) A request for a review shall be accompanied by the prescribed fee.

118. Dismissal of frivolous requests, etc.

The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious.

119. Convening of review

The Review Board shall meet to conduct a review within twenty-one days after receiving the request for the review.

120. Parties to review

The parties to a review are—

- (a) the person who was debarred; and
- (b) the Director-General.

121. Completion of review

The Review Board shall complete its review within thirty days after receiving the request for the review.

122. Powers of Review Board

Upon completing a review the Review Board may do any or both of the following

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- (a) confirm, vary or overturn the Director-General's debarment of the person; and
 - (b) order the payment of costs as between parties to the review.

123. Appeals

A party to the review may appeal from the decision of the Review Board to the High Court within fourteen days after the decision is made.

124. Right to review is additional right

The right to request a review under section 117 is in addition to any other legal remedy a person may have.

125. List of debarred persons

The Authority shall maintain and make available to public entities a list of persons debarred from participating in procurement proceedings under this Part.

PART X – DISPOSAL OF STORES AND EQUIPMENT**126. Application of Part**

This Part applies with respect to the disposal of stores and equipment of a public entity that are unserviceable, obsolete or surplus.

127. Responsibility for complying with Act, etc.

(1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with in respect of each of its disposals to which this Part applies.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).

(3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.

128. Disposal committee

(1) A public entity shall establish a disposal committee in accordance with the regulations for the purpose of recommending the best method of disposing of unserviceable, obsolete or surplus stores or equipment.

(2) The disposal committee shall meet within the prescribed period to report on the items and subject to a technical report, recommend the best method of disposal.

129. Disposal procedure

(1) The employee in charge of unserviceable, obsolete or surplus stores or equipment shall bring the matter to the attention of the disposal committee.

(2) An employee shall comply with subsection (1) within a reasonable time after the stores or equipment become unserviceable, obsolete or surplus.

(3) The disposal committee shall recommend to the accounting officer a method of disposing of the stores and equipment which may include any of the following—

- (a) transfer to another public entity or part of a public entity, with or without financial adjustment;
- (b) sale by public tender;
- (c) sale by public auction;
- (d) destruction, dumping or burying; or
- (e) trade-in.

(4) Within the prescribed time period after receiving the recommendations of the disposal committee the accounting officer shall give the committee a written notice as to whether the accounting officer accepts or rejects the recommendations of the committee.

(5) If the accounting officer accepts the recommendations of the disposal committee, the stores and equipment shall be disposed of in accordance with those recommendations.

(6) If the accounting officer rejects the recommendations of the disposal committee he shall, within the time period referred to in subsection (4)—

- (a) include, with the notice given to the committee under subsection (4), written reasons for rejecting the recommendations of the committee;
- (b) give the Authority a copy of the notice under subsection (4) and the written reasons under paragraph (a); and
- (c) refer the matter back to the committee for further consideration.

130. Directions

The Authority may issue written directions to public entities with respect to the disposal of unserviceable, obsolete or surplus stores and equipment.

131. Restriction on disposal to employees, etc.

A public entity shall not dispose of unserviceable, obsolete or surplus stores and equipment to an employee of the public entity or a member of a board or committee of the public entity except as expressly allowed under the regulations.

132. Application of Part VIII to disposals

Part VIII applies, with necessary modifications, with respect to disposals of unserviceable, obsolete or surplus stores and equipment in the same manner as that Part applies with respect to procurements.

PART XI – MISCELLANEOUS

133. Certain procurements and disposals by armed forces, police, etc.

(1) For the avoidance of doubt, defence and national security organs shall comply with this Act subject to subsection (2) and (3).

(2) The defence and national security organs shall manage their procurement and disposal on the basis of a dual list, covering items subject to open and restricted procurement and disposal methods respectively.

(3) The defence and national security organs shall agree annually with the Authority on the category of restricted items to be included in the restricted list and on restricted procurement or disposal methods to be applied to each category of items on the restricted list.

(4) The restricted list of items shall be subjected to classified audit by the Controller and Auditor-General or his appointee.

(5) The defence and national security organs to which this section applies are the following—

- (a) the Armed Forces;

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- (b) the Kenya Police Force;
 - (c) the National Security Intelligence Service;
 - (d) the Kenya Prisons Service;
 - (e) the Administration Police;
 - (f) the Kenya Wildlife Service; and
 - (g) such other institution as may be prescribed.

134. Consultation meetings

(1) The Director-General shall convene meetings at least annually for the purpose of consulting with persons in the public and private sectors who have an interest in the proper functioning of the public procurement system.

(2) The Permanent Secretary of the Ministry responsible for finance, or a member of the staff of the Ministry selected by the Permanent Secretary, shall chair each meeting convened under this section.

(3) The Director-General, or a member of the staff of the Authority selected by the Director-General, shall act as the secretary to each meeting convened under this section.

(4) The procedure for conducting a consultative meeting referred to in subsection (1) shall be as prescribed.

135. Offence – obstruction, etc.

(1) No person shall—

- (a) obstruct or hinder a person carrying out a duty or function under this Act or exercising a power under this Act;
- (b) knowingly lie to or mislead a person carrying out a duty or function under this Act or exercising a power under this Act;
- (c) delay without justifiable cause the opening or evaluation of bids or the awarding of contract beyond the prescribed period;
- (d) unduly influence or exert pressure on any member of a tender committee or on any employee or agent of a procuring entity to take a particular action which favours or tends to favour a particular bidder; or
- (e) open any sealed bid, including such bid as may be submitted through the electronic system and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the bid or documents.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

136. Offence – contravention of orders

A person who contravenes an order of the Review Board under Part VII or an order of the Director-General or the Review Board under Part VIII is guilty of an offence.

137. General penalty

(1) A person convicted of a offence under this Act for which no penalty is provided shall be liable—

- (a) if the person is an individual, 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.

(2) In addition to the penalty under subsection (1), the public officer involved shall suffer disqualification from public office while the private individual shall be debarred.

138. Protection from personal liability

No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act.

139. Ethics applicable

All procurement and disposal shall be carried out in accordance with the codes of ethics that may from time to time be specified by the Authority.

140. Regulations

The Minister shall make regulations generally for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make regulations—

- (a) governing how decisions relating to procurement are to be made on behalf of public entities, including requiring the creation of specified committees and the assignment of responsibilities and functions within a public entity;
- (b) governing pre-qualification procedures;
- (c) providing for and governing the use of electronic communications and documents in relation to procurement;
- (d) governing the procedures to be followed in reviews by the Review Board, including the panels of the Review Board to conduct reviews;
- (e) governing how decisions relating to disposals of stores and equipment that are unserviceable, obsolete or surplus are to be made on behalf of public entities, including requiring the creation of specified committees and the assignment of responsibilities and functions within a public entity;
- (f) prescribing anything that this Act requires or allows to be prescribed.

141. Availability of Act, etc.

The Authority shall ensure that this Act, the regulations and any directions issued under this Act are accessible to the public.

142. Transitional provisions

The provisions of the Third Schedule shall apply.

143. Amendment of Cap. 412

The Exchequer and Audit Act is amended by deleting section 5A.

144. Other consequential amendments

The Acts identified in the Fourth Schedule are amended in the manner set out in that Schedule.

FIRST SCHEDULE

[Section 22.]

PROVISIONS RELATING TO MEMBERS OF THE ADVISORY BOARD**1. Appointment of nominated members**

The nomination and appointment of the members of the Advisory Board under section 22(1)(a) shall be in accordance with the prescribed procedures and requirements.

2. Term of members

(1) The term of office of each nominated member of the Advisory Board shall be three years.

(2) A person may not serve more than two terms as a nominated member of the Advisory Board.

3. Resignation

(1) A nominated member of the Advisory Board may resign by a written resignation addressed to the Minister.

(2) A resignation is effective upon being received by the Minister or by a person authorised by the Minister to receive it.

4. Termination of appointment

The Minister, on the recommendation of the Advisory Board, may terminate a person's appointment as a member of the Advisory Board only if the person—

- (a) is unable to perform the functions of his office by reason of a mental or physical infirmity;
- (b) is adjudged bankrupt;
- (c) is convicted of an offence under the Penal Code (Cap. 63) or this Act or an offence involving dishonesty; or
- (d) is absent from three consecutive meetings of the Advisory Board without reasonable excuse.

5. Disclosure of personal interest

(1) A member of the Advisory Board who has a direct or indirect personal interest in a matter being considered or to be considered by the Advisory Board shall, as soon as reasonably practicable after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Advisory Board.

(2) A disclosure of interest in a matter shall be recorded in the minutes of the meeting of the Advisory Board and the member shall not be present while that matter is being dealt with by the Advisory Board and shall not take part in any deliberations or vote relating to the matter.

6. Allowances

The Authority shall pay the members of the Advisory Board such allowances and expenses as are determined by the Minister for Finance.

SECOND SCHEDULE

[Section 24.]

**PROVISIONS RELATING TO THE CONDUCT OF
BUSINESS AND AFFAIRS OF THE ADVISORY BOARD****1. Meetings**

(1) The Advisory Board shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(2) Meetings shall be convened by the Chairman, or in his absence by the Vice-Chairman.

(3) Unless three-quarters of the members otherwise agree, at least fourteen days' notice of a meeting shall be given to every member.

(4) A meeting shall be presided over by the Chairman, or in his absence by the Vice-Chairman or in both their absences, by a person elected by the Advisory Board at the meeting for that purpose.

2. Voting

A decision of the Advisory Board shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a second or casting vote.

3. Chairman and Vice-Chairman

(1) The Advisory Board shall elect one of its nominated members to be the Chairman of the Advisory Board and another of its nominated members to be its Vice-Chairman.

(2) Subject to an earlier resignation or termination, the Chairman and Vice-Chairman shall each hold office until his current term as a member of the Advisory Board expires.

4. Secretary

The Director-General shall be the secretary of the Advisory Board.

5. Minutes

Minutes of all meetings shall be kept and entered in books kept for that purpose.

THIRD SCHEDULE

[Section 142.]

TRANSITIONAL PROVISIONS**1. Interim Director-General**

(1) The person who, immediately before this Act comes into operation, was the Director of the Public Procurement Directorate shall become the interim Director-General of the Authority upon the establishment of the Authority.

(2) The interim Director-General shall cease to be the interim Director-General upon the appointment of a Director-General under section 10.

(3) For greater certainty, the interim Director-General shall have and may exercise and perform all the powers and functions of the Director-General until the Director-General is appointed, including being a member of the Advisory Board.

(4) For greater certainty, service as the interim Director-General shall not constitute service for a term for the purpose of section 11(2).

2. Interim members of Advisory Board

(1) Before members of the Advisory Board are nominated and appointed under section 22(1)(a), the Minister shall appoint nine interim members.

(2) The Minister shall designate one of the interim members as the Chairman.

(3) The interim members shall cease to hold office upon sufficient members of the Advisory Board being appointed, under section 22(1)(a), to constitute a quorum.

(4) While the interim members hold office the Advisory Board shall not recommend the appointment of the Director-General under section 23(c).

(5) For greater certainty, service as an interim member shall not constitute service for a term for the purpose of paragraph 2(2) of the First Schedule.

3. Existing procurement proceedings continued under old law

(1) Procurement proceedings commenced before this Act comes into operation shall be continued in accordance with the law applicable before this Act comes into operation.

(2) A procurement proceeding commences for the purpose of subparagraph (1) when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.

4. Existing exemptions continued

If, before this Act comes into operation, the Minister made a decision under Regulation 3(2) of the Exchequer and Audit (Public Procurement) Regulations, 2001 with respect to the use of a different procedure for a procurement, that procurement shall be exempt from this Act.

5. Confidentiality in relation to past proceedings

Section 44 shall apply with respect to procurement proceedings completed before this Act comes into operation.

6. Records of past procurements

(1) Section 45 shall apply with respect to—

- (a) a procurement that took place before this Act comes into operation; or
- (b) a procurement, the procurement proceeding for which was terminated before this Act comes into operation.

(2) Section 45(2), as it applies under subparagraph (1), does not require the record of a procurement to include anything that was not required before this Act comes into operation.

7. Publication of existing contracts

Section 46 shall not apply with respect to a contract formed before this Act comes into operation.

8. Amendments to existing contracts

Section 47 shall apply with respect to a contract formed before this Act comes into operation but not to an amendment to such a contract made before this Act comes into operation.

9. Interest on overdue amounts under existing contracts

Section 48 shall apply to contracts formed before this Act comes into operation and to amounts under such contracts that became overdue before this Act comes into operation.

10. Inspections and audits relating to prior contracts

Section 49 shall apply to contracts formed before this Act comes into operation including contracts that are no longer in force when this Act comes into operation.

11. Administrative review, etc. for existing proceedings

Parts VII and VIII apply, with necessary modifications, with respect to procurement proceedings commenced before this Act comes into operation.

12. Continuation of existing administrative review proceedings

Proceedings before the Public Procurement Review, Complaints and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 (L.N. 51/2001)) shall be continued before the Review Board under Part VII and the provisions of that Part shall apply, with necessary modifications.

13. Continuation of existing investigations

An investigation of procurement proceedings by the Public Procurement Directorate shall be continued under Part VIII and the provisions of that Part shall apply, with necessary modifications.

14. Grounds for debarment include previous actions

The grounds for debarring a person from participating in procurement proceedings under section 115 extend to anything done before this Act comes into operation that would constitute a ground under that section.

15. Transfer of staff

(1) Upon the establishment of the Authority each member of the staff of the Public Procurement Directorate, including the Director, shall remain a member of the public service but shall be seconded to the Authority for a one year period.

(2) If, within the first year after the Authority is established, a person seconded to the Authority under subparagraph (1) enters into a written contract of service with the Authority the person shall cease to be a member of the public service without right to severance pay but without prejudice to any right to other remuneration or benefits payable on termination or in respect of their public service.

(3) A person seconded to the Authority under subparagraph (1) shall cease to be so seconded and shall be re-deployed as a member of the public service if—

- (a) the one year period of secondment under subparagraph (1) expires without the person having entered into a written contract under subparagraph (2); or
- (b) the person opts, within the one year period of secondment under subparagraph (1), to end his secondment.

(4) This paragraph does not apply with respect to staff whose duties are, in the opinion of the Director of the Public Procurement Directorate, primarily concerned with procurement operations rather than with the oversight of public procurement.

16. Transfer of authorized expenditures for 2005/2006

Expenditures that were authorized for the 2005/2006 financial year to be used in relation to the Public Procurement Directorate and that, upon the commencement of this Act, have not been expended, shall be deemed to be authorized for that financial year to be used in relation to the Authority.

17. Financing of Authority

The Minister shall facilitate an adequate budget for the Authority upon the commencement of this Act.

18. Transfer of assets

The assets of the Directorate of Public Procurement existing before the commencement of this Act shall be transferred to the Authority upon commencement of this Act.

FOURTH SCHEDULE

[Section 145.]

CONSEQUENTIAL AMENDMENTS**KENYA ROADS BOARD ACT, 1999**

- (1) This paragraph amends the Kenya Roads Board Act, 1999 (No. 7 of 1999).
- (2) Section 6(2)(f) of the Act is deleted.
- (3) Section 37(b) of the Act is deleted.

LOCAL GOVERNMENT ACT

2. Subsections (4), (5), (6) and (7) of section 143 of the Local Government Act (Cap. 265) are deleted.

PARLIAMENTARY SERVICE ACT, 2000

3. Section 22 of the Parliamentary Service Act, 2000 (No. 10 of 2000) is deleted.

STATE CORPORATIONS ACT

4. Section 13 of the State Corporations Act, (Cap. 446) is amended by adding the following new subsection at the end—

(4) This section does not apply with respect to procurements or disposals to which the Public Procurement and Disposal Act applies.

GOVERNMENT CONTRACT ACT

5. Section 8 of the Government Contract Act (Cap. 25) is deleted.

NO. 3 OF 2005

PUBLIC PROCUREMENT AND DISPOSAL ACT

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PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006

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[Subsidiary]**PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS, 2006**

[Section 140, L.N. 174/2006, L.N. 129/2009, L.N. 141/2009, L.N. 106/2013, L.N. 109/2013, L.N. 121/2013, L.N. 15/2014, L.N. 22/2014.]

PART I – PRELIMINARY**1. Citation and commencement**

These Regulations may be cited as the Public Procurement and Disposal Regulations, 2006 and shall come into operation on the 1st January, 2007.

2. Interpretation

In these Regulations, unless the context otherwise requires—

“asset” means movable and immovable property, tangible and intangible, including immovable property stores, equipment, shares, intellectual rights vested in the state or proprietary rights;

“procurement cycle” means the cycle that starts with the initiation of the process of an individual procurement requirement and when the goods, works, services have been delivered and accepted;

“procurement plan” means the document prepared annually by each procuring entity, to plan all procurement requirements necessary to perform the activity plan of the procuring entity;

“public-private partnership” means an agreement between a procuring entity and a private party under which—

- (a) the private party undertakes to perform a public function or provide a service on behalf of the procuring entity;
- (b) the private party receives a benefit for performing the function, either by way of—
 - (i) compensation from a public fund;
 - (ii) charges or fees collected by the private party from the users of a service provided to them; or
 - (iii) a combination of such compensation and such charges or fees;
- (c) the private party is generally liable for the risks arising from the performance of the function depending on the terms of the agreement;

“pre-qualification procedure” means the pre-qualification procedure set out in these Regulations;

“request for review” means a request for administrative review filed with the Review Board under section 93, 106 or 117 of the Act;

“tenderer” means a person submitting a tender;

“user department” means the department in a procuring entity which initiates procurement proceedings.

3. Public entity

For the purposes of section 3 of the Act, public entity shall include—

- (a) any body that uses public assets in any form of contractual undertaking including public private partnerships;

- (b) a company owned by a public entity to carry out functions that would have otherwise been performed by the public entity; and
- (c) any body in which the Government has a controlling interest.

4. Capacity building levy

(1) The capacity building levy payable under section 18(5)(d) of the Act shall be one and a half percent of the contract price.

(2) The capacity building levy referred to in paragraph (1) shall not apply where the contract is one hundred percent fully funded by a donor.

(3) Where the contract is partly funded by a donor, the capacity building levy shall be payable in respect of the portion funded by the Government.

5. Membership of the Advisory Board

(1) For the purposes of section 22(1)(a) of the Act, the Minister shall appoint nine members of the Public Procurement Oversight Advisory Board from persons nominated by

- (a) the Institute of Certified Public Accountants of Kenya;
- (b) the Institution of Engineers of Kenya;
- (c) the Kenya National Chamber of Commerce and Industry;
- (d) the Kenya Federation of Master Builders;
- (e) the Kenya Institute of Management;
- (f) the Kenya Association of Manufacturers;
- (g) the Law Society of Kenya;
- (h) the Institute of Certified Public Secretaries of Kenya;
- (i) the Marketing Society of Kenya;
- (j) the Architectural Association of Kenya;
- (k) the Computer Society of Kenya;
- (l) the Institute of Surveyors of Kenya;
- (m) the Federation of Kenya Employers; and
- (n) the Central Organization of Trade Unions.

(2) Each organization referred to in subregulation (1) shall submit to the Minister the curriculum vitae of two members being nominated of whom one shall be a woman.

6. Threshold matrix

(1) A procuring entity shall, pursuant to section 26(3)(b) of the Act, undertake procurement in accordance with the threshold matrix set out in the First Schedule to these Regulations.

(2) The approval authorities for all procurement methods shall, for the purposes of section 26(3)(c) of the Act, be as set out in the First Schedule.

(3) The Authority shall, by notice in the *Gazette*, classify procuring entities either as class A, class B or class C for the purposes of the First Schedule.

PART II – INTERNAL ORGANIZATION OF PROCURING ENTITIES**7. Roles of accounting officer**

In addition to the responsibilities stipulated under section 27(2) of the Act, the accounting officer shall be responsible for—

- (a) ensuring that the procuring entity establishes a tender committee and a procurement committee in accordance with the Act and these Regulations;
- (b) ensuring that the procuring entity establishes a procurement unit;
- (c) signing contracts for the procurement and disposal activities on behalf of the procuring entity for contracts entered into in accordance with the Act and these Regulations;
- (d) ensuring that the procurement plans are prepared; and
- (e) ensuring that the procuring entity properly documents procurement proceedings and manages records in accordance with these Regulations.

8. Procurement unit

(1) A procuring entity shall establish a procurement unit in accordance with this Regulation.

(2) The level of qualification and experience required of procurement professionals under section 26(9) of the Act shall be stipulated by the Authority.

(3) The functions of the procurement unit shall be to—

- (a) maintain and update bi-annually standing lists of registered tenderers required by the procuring entity through a pre-qualification process and submit the results to the Authority for consolidation within fourteen days from date of notification;
- (b) prepare, publish and distribute procurement and disposal opportunities including invitations to tender, pre-qualification documents and invitations for expressions of interest;
- (c) co-ordinate the receiving and opening of tender documents;
- (d) maintain and safeguard procurement and disposal documents and records in accordance with these Regulations;
- (e) submit shortlists and lists of pre-qualified tenderers to the tender committee or procurement committee for approval;
- (f) issue procurement and disposal documents to candidates in accordance with the Act and these Regulations;
- (g) propose the membership of evaluation committee to the accounting officer for approval;
- (h) co-ordinate the evaluation of tenders, quotations and proposals;
- (i) recommend a negotiating team for appointment by the accounting officer where negotiations are allowed by the Act and these Regulations and participate in such negotiations;
- (j) prepare and publish notices of award and notices of tender acceptance;
- (k) prepare contract documents, in line with the award decision;
- (l) prepare and issue rejection and debriefing letters;
- (m) prepare contract variations and modifications to documents;
- (n) maintain and archive documents and records of the procurement and disposal activities for the required period;

- (o) provide information, as required, for any petition or investigation to debar a tenderer or contractor or any investigation under review procedures;
- (p) implement the decisions of the procurement, tender and disposal committees, including co-ordinating all activities of these committees;
- (q) act as a secretariat to the tender, procurement and disposal committees;
- (r) liaise with the Authority and other bodies on matters relating to procurement and disposal;
- (s) prepare and submit to the Authority reports required under the Act, these Regulations and guidelines of the Authority;
- (t) monitor contract management by user departments to ensure implementation of contracts in accordance with the terms and conditions of the contracts;
- (u) report any significant departures from the terms and conditions of the contract to the head of the procuring entity;
- (v) recommend the delegation of a procurement or disposal function to another procuring entity by the head of the procuring entity whenever a need arises;
- (w) prepare consolidated procurement and disposal plans;
- (x) advise the procuring entity on aggregation of procurement to promote economies of scale;
- (y) co-ordinate internal monitoring and evaluation of the supply chain function;
- (z) carry out periodic market surveys to inform the placing of orders or adjudication by the relevant award committee;
- (aa) conduct periodic and annual stock taking;
- (bb) certify the invoices and payment vouchers to suppliers;
- (cc) approve extension of the tender validity period;
- (dd) verify that the available stock levels warrant initiating a procurement process;
- (ee) carry out any other functions or duties as may be provided under the Act or these Regulations and any other functions that might be stipulated by the Authority.

[L.N. 106/2013, r. 2, L.N. 121/2013.]

9. Responsibilities of user departments

A user department shall be responsible for—

- (a) initiating procurement and disposal requirements and forwarding them to the procurement unit;
- (b) participating in the evaluation of tenders, proposals and quotations;
- (c) reporting any departure from the terms and conditions of the contract to the procurement unit;
- (d) forwarding details of any required variations to contracts to the procurement unit for consideration and action;
- (e) maintaining and archiving records of contract management;
- (f) preparing any reports required for submission to the procurement unit, the procurement committee, the tender committee, head of procuring entity or the accounting officer;
- (g) undertaking conformity assessments of supplied goods, works and services with the specifications of the contract documents;
- (h) endorsing the issuance of goods, works and services received notes;

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- (i) preparing technical specifications and submitting the same to the procurement unit;
- (j) assisting in the preparation of procurement and disposal plans;
- (k) making clarifications on tenders, requests for quotations and any other matter as may be required; and
- (l) carrying out any other functions and duties as may be provided under the Act or these Regulations, or as may be stipulated by the Authority.

10. Tender committee

(1) A procuring entity shall establish a tender committee in the manner set out in the Second Schedule.

(2) The functions of the tender committee shall be to—

- (a) review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents;
- (b) approve the selection of the successful tender or proposal;
- (c) award procurement contracts in accordance with thresholds prescribed in First Schedule;
- (d) approve the commencement of the procurement process upon the approval of the annual procurement plan by the accounting officer and where applicable by the board of directors or a similar body and upon satisfaction that sufficient funds are available to meet the obligations of the entity arising from any contract as set out in the budgetary estimates or such documentation evidencing the availability of the funds, before making an award is provided;
- (e) ensure that the procuring entity does not pay in excess of prevailing market prices;
- (f) review and approve aggregation of procurements where proposed;
- (g) review and approve the use of lots where packaging into lots has been proposed;
- (h) review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority;
- (i) approve the list of tenderers in cases of restricted tendering pursuant to regulation 54(3);
- (j) approve the list of persons qualified to submit proposals pursuant to section 80 of the Act;
- (k) approve the list of persons to be given requests for quotations pursuant to regulation 59(2);
- (l) approve negotiations under the Act, these Regulations and as may be stipulated by the Authority;
- (m) approve the amendment of contracts previously awarded by the tender committee, in accordance with the Act and these Regulations;
- (n) review the quarterly reports on quotations that have been awarded by the procurement committee;

- (o) undertake any other functions and duties as are provided under the Act, these Regulations or as may be stipulated by the Authority.

[L.N. 106/2013, r. 3, L.N. 121/2013.]

11. Approvals by tender committees

(1) In considering submissions made by the procurement unit or evaluation committees, the tender committee may—

- (a) approve a submission; or
- (b) reject a submission with reasons; or
- (c) approve a submission, subject to minor clarifications by the procurement unit or evaluation committee.

(2) The tender committee shall not—

- (a) modify any submission with respect to the recommendations for a contract award or in any other respect;
- (b) reject any submission without justifiable and objective reasons.

(3) Where the tender committee rejects the recommendation of the evaluation committee, the decision shall be reported to the head of the procuring entity or to the accounting officer.

(4) Any submission rejected by the tender committee may be resubmitted and the tender committee shall provide an explanation and a justification for its decision thereof.

12. Procedure for tender committee meetings

(1) The accounting officer or the head of the procuring entity shall appoint an alternate member for each member of the tender committee and only the alternate shall attend any meeting of the tender committee whenever the member is unable to attend.

(2) The quorum of the tender committee shall be five members including the chairman.

(3) Decisions of the tender committee shall be by consensus and where there is no consensus, the decision shall be through voting by simple majority and where there is a tie, the chairman shall have a second or casting vote.

(4) Where any member of the tender committee has a direct or indirect interest in any matter, he or she shall declare his or her interest in the matter and shall not participate in the deliberations or decision-making process of the committee in relation to that particular matter.

(5) Members of the tender committee may be paid such honoraria as the procuring entity may determine.

(6) The tender committee shall cause to be prepared minutes of all its meetings and such records shall include—

- (a) a register of attendance;
- (b) date of the meeting;
- (c) list of all matters considered;
- (d) the decision made for each matter, including any major issues discussed, the reasons for any rejections and any clarifications or minor amendments to which the approval is subject;
- (e) a note on the basis of any evaluation made;
- (f) any conflicts of interest declared by members;

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- (g) any dissenting opinions among tender committee members; and
- (h) such other records as may be necessary.

(7) The tender committee may invite independent advisers or members of the procurement unit to explain submissions or provide technical advice, where required.

(8) To enhance transparency of the procurement process the procuring entity shall invite in addition to the representative of various departments, at least two observers to attend its meetings in cases where the value of the contract is estimated to be above one hundred million shillings.

(9) At least one of the observers invited under paragraph (8) shall come from a duly recognized private sector organization or discipline relevant to the procurement under consideration.

(10) The failure of an invited observer to attend a meeting shall not nullify the procurement proceedings.

(11) The role of the observers shall be to—

- (a) monitor the procurement process and prepare a report on whether the process has been carried out in accordance with section 2 of the Act; and
- (b) submit to the accounting officer and the Authority, within fourteen days from date of notification of the award, the report prepared under subparagraph (a)..

[L.N. 106/2013, L.N. 121/2013, L.N. 22/2014, r. 3.]

13. Procurement committee

(1) A procuring entity shall establish a procurement committee.

(2) The procurement committee shall be responsible for procurement below the threshold of the tender committee set out in the First Schedule.

(3) The procurement committee shall be composed of—

- (a) an official delegated by the head of the procuring entity or the accounting officer, who shall serve as the chairman of the committee;
- (b) the finance officer or an officer carrying out related functions;
- (c) three other members appointed by the head of the procuring entity or the accounting officer.

(4) The head of the procurement unit shall appoint an officer to serve as secretary to the procurement committee.

14. Approvals by procurement committee

(1) In considering submissions made by the procurement unit, the procurement committee may—

- (a) approve a submission; or
- (b) reject a submission with reasons; or
- (c) approve a submission, subject to minor clarifications by the procurement unit.

(2) The procurement committee shall not—

- (a) modify any submission with respect to the recommendations for contract award or in any other respect;
- (b) reject any submission without justifiable and objective reasons.

(3) Any submission rejected by the procurement committee may be resubmitted and the procurement committee shall provide explanation and justification of its decision thereof.

15. Procedure for procurement committee meetings

(1) The quorum for a meeting of the procurement committee shall be the chairman and at least two other members.

(2) Where any member is unable to attend a meeting of the procurement committee, that member shall delegate authority to an appropriate official, who shall attend the meeting in his or her place.

(3) Members of the procurement committee shall ensure that their authority is only delegated to officials with appropriate skills and experience to represent them at a meeting of the procurement committee.

(4) Decisions of the procurement committee shall be by consensus and where there is no consensus, the decision shall be through voting by simple majority and where there is a tie, the chairman shall have a second or casting vote.

(5) Where any member of the procurement committee has a direct or indirect interest in any matter, he or she shall declare his or her interest in the matter and shall not participate in the deliberations or decision-making process of the committee in relation to that particular matter.

(6) The procurement committee may invite independent advisers or members of the procurement unit to explain submissions or provide technical advice, where required.

(7) The procurement committee shall cause to be prepared minutes of all its meetings and such records shall include—

- (a) a register of attendance;
- (b) date of the meeting;
- (c) list of all matters considered;
- (d) the decision made for each matter, including any major issues discussed, the reasons for any rejections and any clarifications or minor amendments to which the approval is subject;
- (e) a note on the basis of any evaluation made;
- (f) any conflicts of interest declared by members;
- (g) any dissenting opinions among procurement committee members; and
- (h) such other records as may be necessary.

16. Evaluation Negotiations, Inspection and Acceptance Committee

(1) A procuring entity shall establish a tender processing in relation to each procurement process for the purposes of carrying out the evaluation of the tenders or proposals, negotiations or inspection and acceptance of goods, works or services.

(2) A committee established under paragraph (1) shall consist of a chairman and at least three other members all appointed by the accounting officer or the head of the procuring entity upon recommendation by the procurement unit.

(3) A person shall not be appointed as a member of the committee under paragraph (2) if he or she is a member of the tender committee of the procuring entity.

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(4) The committee shall—

- (a) adhere to the compliance and evaluation criteria set out in the tender documents in undertaking to carry out the technical and financial evaluation of the tenders or proposals received by the procuring entity;
- (b) evaluate the tenders within a period of fifteen days after the opening of the tenders; and
- (c) carry out the tender evaluation with all due diligence.

(5) Each member of the committee shall evaluate the tenders or proposals received by the procuring entity independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the committee.

(6) A member of the committee shall not communicate with a tenderer who has submitted a tender or proposal that is under the consideration of the evaluation.

(7) A tender processing committee shall prepare an evaluation report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee.

(8) The report prepared under paragraph (7) shall include—

- (a) the results of the preliminary evaluation, with reasons why any tender or proposal was rejected;
- (b) the scores awarded by each evaluator for each tender or proposal;
- (c) a summary of the relative strengths and weaknesses of each tender or proposal;
- (d) the total score for each tender or proposal; and
- (e) a recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

[L.N. 106/2013, r. 5, L.N. 121/2013, L.N. 22/2014, r. 2.]

17. Inspection and acceptance

The committee established under regulation 16 shall immediately after the delivery of the goods, works or services—

- (a) inspect and where necessary, test the goods received;
- (b) inspect and review the goods, works or services in order to ensure compliance with the terms and specifications of the contract;
- (c) accept or reject, on behalf of the procuring entity, the delivered goods, works or services;
- (d) ensure that the correct quantity of has been received;
- (e) ensure that the goods, works or services meet the technical standards specified in the contract;
- (f) ensure that the goods, works or services have been delivered or completed on time, or that any delay has been noted;
- (g) ensure that all required manuals or documentation in relation to the goods, works or services have been received; and
- (h) ensure the issuance of interim or completion certificates or goods received notes, as appropriate and in accordance with the contract.

[L.N. 106/2013, s. 6, L.N. 121/2013.]

18. Transfer of procurement authority

(1) Pursuant to the provisions of section 27(6) of the Act, the Authority may transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent—

- (a) where the Authority is of the view that the procuring entity lacks the capacity to comply with the Act, these Regulations or the directions issued by the Authority, due to its size or capacity;
- (b) where the accounting officer or the head of the procuring entity decides that it would be more economical or efficient to transfer the function and requests the Authority to do so.

(2) The accounting officer or the head of the procuring entity who requests the Authority to transfer its function shall remain accountable for all decisions taken by the procuring entity to which the function is transferred.

(3) Where the procurement and disposal function is transferred to another procuring entity under paragraph (1)(b), the accounting officers or the heads of the two procuring entities shall agree on—

- (a) any function that may be excluded from the transfer arrangement;
- (b) the mechanism for implementation of the procurement and disposal requirement;
- (c) reporting and monitoring procedures and responsibilities;
- (d) any limitations or exceptions to the transfer; and
- (e) any costs to be paid.

(4) The agreement for transferring the procuring responsibility under paragraph (3) shall be in writing and signed by the accounting officers or the heads of the two procuring entities.

19. Procuring agents

(1) A procuring agent shall pay a registration fee of twenty thousand shillings to the Authority.

(2) The fee under paragraph (1) shall be payable only once at the time of the initial registration.

(3) The procuring entity shall—

- (a) meet the cost of the services offered by the procuring agent;
- (b) prepare the terms of reference for the procuring agent assignment in accordance with the provisions of the Act and these Regulations;
- (c) be responsible for the actions and performance of the procuring agent.

(4) Where the procuring agent is engaged, a procurement committee or a tender committee shall adjudicate the contract award.

(5) A procuring entity shall not contract out both the procurement functions and the contract management functions to the same procuring agent.

(6) None of the functions of the accounting officer, procurement committee or the tender committee shall be contracted out to a procuring agent.

20. Procurement planning

(1) A procuring entity shall prepare a procurement plan under section 26(3)(a) of the Act for each financial year as part of the annual budget paragraph process.

[Subsidiary]

(2) Annual procurement planning shall be integrated with applicable budget processes and based on indicative or approved budgets, as appropriate.

(3) Where appropriate, multi-year procurement plans may be prepared and shall be integrated into the medium term budgetary expenditure framework.

(4) A head of department shall submit an annual procurement plan to the accounting officer at least thirty days before the close of each financial year.

(5) The consolidated annual procurement plan shall be prepared by the procurement unit and approved by the tender committee, head of the procuring entity and where applicable by the board of directors or a similar body.

(6) The approval of a plan under paragraph (5) by the tender committee shall be deemed to include the approval of all alternative procurement procedures under section 29(3) of the Act.

[L.N. 106/2013, r. 7, L.N. 121/2013.]

21. Contents of procurement plan

- (1) The annual procurement plan for each procuring entity shall include—
- (a) a detailed breakdown of the goods, works, or services required;
 - (b) a schedule of the planned delivery, implementation or completion dates for all goods, works, or services required;
 - (c) an indication and justification for whether it shall be procured within a single-year period or under a multi-year arrangement;
 - (d) an indication of which items can be aggregated for procurement as a single package or for procurement through any applicable arrangements for common-user items;
 - (e) an indication of which items shall be packaged into lots;
 - (f) an estimate of the value of each package of goods, works or services required and an indication of the budget available and sources of funding;
 - (g) an indication of the appropriate procurement method for each procurement requirement.

(2) Where transfer of responsibilities is justified, the optimal period of such transfer shall be established by taking into account seasonal price variations, warehousing and distribution capacity and product shelf life.

(3) The Authority shall issue instructions to the procuring entities on the format for preparing procurement plans.

22. Purchase requisition and authorization

(1) Every procurement requirement shall be initiated using a purchase requisition which shall include all necessary information pertaining to the procurement.

(2) When estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions.

(3) The purchase requisition shall be approved by the person specified in the First Schedule, prior to the initiation of procurement proceedings.

(4) Approved procurement requisitions shall be submitted to the procurement unit of the procuring entity to initiate procurement proceedings.

(5) Upon receipt of the approved purchase requisition, the procurement unit shall prepare a procurement plan for each individual procurement requirement, which shall include an estimate of the time required for each stage in the procurement cycle.

PART III – GENERAL PROCUREMENT RULES

23. Pre-qualification procedures

(1) Where the procuring entity conducts a pre-qualification procedure pursuant to the Act, it shall publish an invitation to candidates to submit applications to be pre-qualified.

(2) The invitation referred to in paragraph (1) shall include—

- (a) the name, address and contact details of the procuring entity;
- (b) an outline of the procurement requirement, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
- (c) statement of the key requirements and criteria to pre-qualify;
- (d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and
- (e) instructions on the location and deadline for submission of applications to pre-qualify.

24. Pre-qualification documents

(1) A procuring entity shall promptly issue pre-qualification documents to all candidates who request them and shall maintain a record of all candidates to whom documents are issued.

(2) The pre-qualification document shall contain all the information necessary for the potential candidates to prepare and submit applications to be pre-qualified.

(3) Without prejudice to the generality of paragraph (2) such information shall include—

- (a) the name, address and contact details of the procuring entity;
- (b) details of the procurement requirements, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
- (c) instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates;
- (d) instructions on the sealing, labelling and submission of applications to pre-qualify, including the location and deadline for submission; and
- (e) information on how applications will be evaluated.

(4) The procuring entity shall allow the candidates at least seven days to prepare and submit their applications to be pre-qualified.

(5) The procuring entity shall promptly respond to all requests for any clarification relating to the pre-qualification document where such requests are received before the deadline for submission.

[L.N. 106/2013, r. 8, L.N. 121/2013.]

[Subsidiary]**25. Approval of pre-qualified candidates**

(1) The procuring entity shall, in writing, record the results of its evaluation of applications for pre-qualification using the evaluation criteria in the pre-qualification documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The record of results prepared under paragraph (1) shall be submitted to the tender committee for approval.

(3) The procuring entity shall invite tenders from only the persons who have been pre-qualified under this regulation.

26. Limitations of contracts with employees

For the purposes of section 33(2) of the Act, a relative is limited to a spouse or 2 children.

27. Procurement approvals

(1) Subject to the Act, all approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed.

(2) No procurement approval shall be made to operate retrospectively to any date earlier than the date on which it is made.

(3) No procurement approval shall be made by a person exercising delegated authority unless such delegation has been approved by the accounting officer.

(4) A procuring entity shall maintain specimen signatures of all persons authorised to make approvals within the procurement process.

(5) Responsibility for each approval made in the procurement procedure shall rest with both the person who delegates the authority and the person to whom the approval authority is delegated.

28. Preferences and reservations

(1) For the purposes of section 39(8) of the Act, the threshold below which exclusive preference shall be given to citizens of Kenya, shall be the sum of—

- (a) fifty million shillings for procurements in respect of goods or services;
- (b) two hundred million shillings for procurements in respect of works.

(2) The margin of preference—

- (a) for the purposes of section 39(8)(b)(i) of the Act, shall be fifteen per cent of the evaluated price of the tender;
- (b) for the purposes of section 39(8)(b)(ii) of the Act, shall be—
 - (i) six percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than twenty per cent; and
 - (ii) eight per cent of the evaluated price of the tender where the percentage of shareholding of the locals is less than fifty one per cent but above twenty per cent.

29. Tender documents

(1) The standard tender documents for purposes of section 29(4) of the Act shall be as set out in the Third Schedule to these Regulations.

(2) Pursuant to section 9(c)(i) of the Act, the Authority shall avail the standard tender documents to procuring entities.

30. Manuals by the Authority

Pursuant to section 9(c)(i) of the Act, the Authority may, in consultation with specific procuring entities, develop internal procurement manuals, administrative guidelines and best practices manuals specific to such entities consistent with the Act and these Regulations.

31. Variations to contracts

For the purposes of section 47(b) of the Act, any variation of a contract shall be effective only if—

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

[L.N. 106/2013, r. 9, L.N. 121/2013.]

32. Contract termination

(1) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable to termination.

(2) The procurement unit shall obtain the approval of the tender committee which authorised the original contract, prior to terminating the contract and the request for approval shall clearly state—

- (a) the reasons for termination;
- (b) the contractual grounds for termination; and
- (c) the cost of terminating the contract.

33. Format of procurement documents

(1) The Authority shall issue guidelines on the format of procurement documents to be adopted for approvals and the documentation of the procurement procedure.

(2) The Authority may issue standard forms by which a procuring entity shall carry out specific procurement procedures.

(3) The documents shall be clear and bear references to the procurement requirement, dates and signatures of authorizing officers.

(4) The Authority may, from time to time, issue circulars and guidelines on the content of procurement documentation.

[Subsidiary]**34. Additional procurement records**

(1) For the purposes of section 45(2)(h) of the Act, the following documents shall be treated as part of the procurement records—

- (a) where the procurement or the disposal requirement involves feasibility studies and surveys directly carried out or accepted by the procuring entity in order to prepare the tender documents, the reports and other documents resulting from these studies and surveys;
- (b) all receipts for the sale of tender documents, request for clarifications and clarifications issued by the procuring entity;
- (c) records of any negotiations;
- (d) end of activity report as may be stipulated by the Authority.

(2) The Authority may issue guidelines relating to the use, record management, filing and storage of procurement documentation.

(3) A procuring entity shall maintain an individual file for each procurement requirement containing all information documents and communications relating to that procurement proceeding and such file shall be marked with the relevant procurement reference number.

PART IV – OPEN TENDERING**35. Open tendering**

A procuring entity that conducts procurement using the open tender method shall be subject to the procurement thresholds set out in the First Schedule.

36. Time for international tendering

For the purposes of section 71(c) of the Act, the minimum period of time between advertisement and deadline for submission of international tenders shall be twenty-one days.

[L.N. 106/2013, r. 10, L.N. 121/2013.]

37. Threshold for national advertising

For the purposes of section 54(2) of the Act, the threshold for national advertising shall be as set out in the First Schedule.

38. Additional information to be contained in tender documents

For the purposes of section 52(3)(k) of the Act, the tender documents shall contain—

- (a) a statement whether tenders which do not conform precisely to the description of requirements, but which meet the objectives of the procurement in an alternative manner, may be permitted and the manner in which such tenders shall be evaluated;
- (b) instructions on the sealing, labeling and submission of tenders, including the location and deadline for submission of tenders and procedures for the withdrawal, modification or replacement of tenders;
- (c) any applicable preference programs and the margin of preference and the manner in which such preference will be applied in the evaluation;
- (d) the procedures and criteria to be used in cases where a procuring entity decides to invite tenders in two separate phases for the purposes of carrying out the respective technical and financial evaluation of the same tender;

- (e) the procedure and criteria to be used to evaluate and compare the tenders as set out in regulations 46 to 52.

39. Fee for tender documents

(1) A procuring entity may, pursuant to section 56(2) of the Act, charge a fee not exceeding one thousand shillings for hard copies of tender documents.

(2) In determining the fee payable under paragraph (1), a procuring entity shall only have regard to the costs related to printing, copying, and distributing or of converting the documents into electronic form.

(3) A procuring entity shall not charge a fee under paragraph (1) where the tender documents are—

- (a) obtained electronically;
- (b) invitations for expression of interest; or
- (c) invitations for pre-qualification.

(4) Where a procuring entity charges a fee for the delivery of tender documents, the procuring entity shall permit potential tenderers to inspect the documents, prior to paying the fee for the document.

[L.N. 106/2013, r. 11, L.N. 121/2013.]

40. Time for preparing tenders

The minimum period for the preparation of national open tenders for the purposes of section 55(1) of the Act shall be fourteen days.

[L.N. 106/2013, r. 12, L.N. 121/2013.]

41. Tender security

(1) The amount of any tender security under section 57(2) of the Act shall be expressed either as a fixed amount or as a percentage of the estimated value of the contract and shall not in either case exceed two per cent of the estimated value of the contract.

(2) In determining the amount of tender security under paragraph (1), a procuring entity shall take into account—

- (a) the cost to tenderers of obtaining a tender security;
- (b) the estimated value of the contract; and
- (c) the risk of tenderers failing to fulfill the conditions of their tenders.

(3) The tender security under section 57 of the Act shall be provided in the following form—

- (a) cash;
- (b) a bank guarantee;
- (c) such insurance company guarantee as may be approved by the Authority;
- (d) a letter of credit; or
- (e) guarantee by a deposit taking microfinance institution, Sacco society, the Youth Enterprise Development Fund or the Women Enterprise Fund.

(4) No tender security shall be accepted under the Act unless such security is valid for a period of at least thirty days after the expiry of the tender validity period.

(5) The procuring entity shall, where it extends the tender validity period, request the tenderers' to extend the period of validity of their tender securities.

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(6) A procuring entity may, where it deems necessary, verify the authenticity of any tender security.

[L.N. 106/2013, r. 13, L.N. 121/2013.]

42. Period of validity of tenders

(1) The period of validity of a tender shall be stated in calendar days from the date of opening of the tender.

(2) For purposes of this regulation, a calendar day includes any day of the week including Saturday, Sunday and a public holiday.

43. Inquiries relating to tender documents

(1) Where a tenderer makes an inquiry relating to the tender documents under section 53(2) of the Act, the procuring entity shall promptly reply in writing.

(2) The reply under paragraph (1) shall be copied to all tenderers and shall include a description of the inquiry but without identifying the source.

(3) The procuring entity shall not be bound to reply to inquiries received after the deadline for submitting inquiries stipulated in the tender documents.

44. Form of tender box

A procuring entity shall, for purposes of section 58(4) of the Act, ensure that—

- (a) a tender box has two locks;
- (b) the keys for each lock are kept by a different officer; and
- (c) the tender box remains locked until the time for tender opening.

45. Opening of tenders

(1) Pursuant to section 60(5)(b) of the Act, the total price of the tender—

- (a) may not be read out where a tender consists of numerous items that are quoted for separately;
- (b) shall not be read out where a tender is preceded by a technical evaluation and such tender has not met the technical evaluation criteria.

(2) Where a tenderer fails a technical evaluation under paragraph (1)(b) a procuring entity shall return the financial proposal unopened.

(3) A tender opening committee shall, where applicable, record in the tender opening minutes whether any sample has been submitted in respect of any tender.

46. Period for evaluation of tenders

(1) A procuring entity shall, for purposes of section 66(6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender.

(2) Where a tender is complex or has attracted a high number of tenderers, the accounting officer or head of the procuring entity may extend the period for tender evaluation under paragraph (1) for a further period within the tender validity period but not exceeding thirty more days from date of expiry of initial period.

[L.N. 106/2013, s. 14, L.N. 121/2013.]

47. Preliminary evaluation of open tenders

(1) Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether—

- (a) the tender has been submitted in the required format;

- (b) any tender security submitted is in the required form, amount and validity period;
- (c) the tender has been signed by the person lawfully authorised to do so;
- (d) the required number of copies of the tender have been submitted;
- (e) the tender is valid for the period required;
- (f) all required documents and information have been submitted; and
- (g) any required samples have been submitted.

(2) The evaluation committee shall reject tenders, which do not satisfy the requirements set out in paragraph (1).

48. Non-responsive tenders to be rejected

(1) A procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act.

(2) The classification of a deviation from the requirements as minor under section 64(2)(a) of the Act shall be applied uniformly and consistently to all the tenders received by the procuring entity.

49. Technical evaluation

(1) Upon completion of the preliminary evaluation under regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.

(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).

50. Financial valuation

(1) Upon completion of the technical evaluation under regulation 49, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

- (a) taking the bid price, as read out at the bid opening;
- (b) taking into account any corrections made by a procuring entity relating to arithmetic errors in a tender;
- (c) taking into account any minor deviation from the requirements accepted by a procuring entity under section 64(2)(a) of the Act;
- (d) where applicable, converting all tenders to the same currency, using a uniform exchange rate prevailing at the date indicated in the tender documents;
- (e) applying any discounts offered in the tender;
- (f) applying any margin of preference indicated in the tender documents.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act.

51. Evaluation report

(1) An evaluation report prepared under section 66(5) of the Act shall include—

- (a) a summary of all the tenders received and opened;
- (b) the results of the preliminary evaluation under regulation 47;

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- (c) the results of the technical evaluation under regulation 49;
- (d) reasons why any tenders were rejected;
- (e) details of any minor deviations accepted under section 64 of the Act and the way in which such deviations were quantified and taken into account in the evaluation and comparison of the tenders;
- (f) the evaluated price of each tender, showing any discounts, corrections or adjustments to the tender price and any conversion to a common currency;
- (g) the ranking of the tenders each according to its total evaluated price;
- (h) the results of any confirmation of qualification conducted under regulation 52; and
- (i) a recommendation to award the contract to the lowest evaluated tender;
- (j) such other recommendation as may be necessary.

(2) The evaluation report prepared under paragraph (1) shall be considered by the tender committee, prior to awarding the contract or taking any other action in relation to the procurement as may be necessary.

52. Confirmation of qualifications

(1) Where so indicated in the tender documents, a procuring entity may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with section 31(1) of the Act.

(2) Where so indicated in the tender documents, if the lowest evaluated tenderer is determined under paragraph (1) not to be qualified in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer who submitted the next lowest evaluated responsive bid.

PART V – ALTERNATIVE PROCUREMENT PROCEDURES

53. Use of restricted tendering

(1) A procuring entity may use restricted tendering only if the conditions provided in sections 29(3) and 73(2) of the Act are satisfied.

(2) A procuring entity that conducts procurement using the restricted tendering method shall be subject to the procurement thresholds set out in the First Schedule.

54. Procedure for restricted tendering

(1) Save as is otherwise provided in this Regulation, the procedure for open tendering set out in the Act and these Regulations shall, for the purposes of section 73(1) of the Act, apply *mutatis mutandis* to restricted tendering.

(2) A procuring entity shall, for the purpose of identifying pre-qualified contractors pursuant to section 73(2)(a) of the Act, use the pre-qualification procedures set out in regulations 23, 24 and 25 or otherwise as permitted under section 32 of the Act.

(3) Where restricted tendering is used pursuant to section 73(2)(b) of the Act, the procuring entity shall invite tenders from at least ten persons selected from the list maintained under regulation 8(3)(a).

(4) Where restricted tendering is used pursuant to section 73(2)(c) of the Act, the procuring entity shall invite tenders from all the known suppliers of the goods, works or services.

(5) The minimum time for the preparation of tenders for the purposes of section 73 of the Act shall be a period of seven days.

[L.N. 106/2013, s. 15, L.N. 121/2013.]

55. Request for proposals

(1) A procuring entity that conducts procurement using the request for proposals method pursuant to section 76 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) The notice inviting expressions of interest prepared by the procuring entity pursuant to section 78 of the Act shall give a minimum period of seven days for tenderers to submit their expressions of interest.

(3) A procuring entity that carries out a procurement process through a request for proposal method pursuant to section 76 shall be subject to the procurement thresholds set out in the First Schedule.

(4) The notice inviting an expression of interest prepared by the procuring entity under section 78 shall specify a minimum period of seven days for the submission by tenderers of their expressions of interest.

(5) The requirement for the invitation of expression of interest shall not apply where the tender committee of a procuring entity has approved, in writing—

- (a) a direct request for proposals;
- (b) a direct procurement or single source selection;
- (c) restricted tendering; or
- (d) a request for quotations.

[L.N. 106/2013, r. 16, L.N. 121/2013, L.N. 22/2014, r. 4.]

56. Terms of reference

For the purposes of section 79(b) of the Act, the terms of reference prepared by a procuring entity shall set out—

- (a) the background including the reasons necessitating the procurement;
- (b) the objects to be achieved by the procurement;
- (c) the output expected from the person awarded the tender;
- (d) the qualifications necessary for a person to be awarded the tender.

57. Preliminary evaluation of proposals

The procedure for preliminary evaluation of open tenders set out in regulation 47 shall apply to evaluation of proposals under section 82 of the Act.

58. Procedure for negotiation

(1) A procuring entity shall not enter into any negotiations pursuant to section 84 of the Act until the tender committee has approved the successful proposal.

(2) The negotiations shall be conducted by at least two members of staff of the procuring entity appointed by the accounting officer or the head of the procuring entity on the recommendation of the procurement unit.

(3) The members of staff conducting the negotiations under paragraph (2) shall prepare a report of the negotiations and submit it to the tender committee for decision making.

(4) The report prepared under paragraph (3) shall form part of the records of the procurement.

59. Request for quotations

(1) A procuring entity that conducts procurement using the request for quotations method pursuant to section 88 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

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(2) For the purpose of determining the persons to be given a request for quotations under section 89 of the Act, a procuring entity shall—

- (a) prepare a list of qualified persons—
 - (i) selected from the list maintained under regulation 8(3)(a);
 - (ii) from its own knowledge of the market;
- (b) submit the list prepared under paragraph (a) to the tender committee for approval; and

- (c) ensure a fair and equal rotation amongst the persons on the list kept under paragraph (a) in respect to giving the requests for quotations.

60. Submission of quotations

A request for quotations prepared by a procuring entity under section 89(2)(d) of the Act shall set out—

- (a) a requirement that quotations be submitted in sealed envelopes; and
- (b) the mode of delivery of the sealed envelopes to the procuring entity.

61. Opening and evaluation of quotations

(1) The opening, evaluation and comparison of quotations shall be carried out jointly by the procurement unit and the user department of the procuring entity.

(2) Where the procurement unit is of the view that the successful quotation is higher than the prevailing market price, the procurement unit shall reject the quotations and repeat the process by giving a fresh request for quotations to a set of new persons in the list approved by the tender committee under regulation 59(2)(b).

(3) Pursuant to section 30(3) of the Act the procurement unit shall not accept a quotation under section 89(4) of the Act if the quotation is above the prevailing real market price.

62. Direct procurement

(1) A procuring entity that conducts procurement using the direct procurement method pursuant to section 74 of the Act shall be subject to the procurement thresholds set out in the First Schedule.

(2) Where a procuring entity uses direct procurement, the procuring entity shall record the reasons upon which it makes a determination that the relevant condition set out in section 74 of the Act has been satisfied.

(3) A procuring entity shall, within fourteen days after the notification of the award of the contract, report any direct procurement of a value exceeding five hundred thousand shillings to the Authority.

(4) The procedure for negotiations for proposals set out in regulation 58 shall apply *mutatis mutandis* to negotiations relating to direct procurement pursuant to section 75(a) of the Act.

(5) A procuring entity shall not enter into a contract under section 75(c) of the Act unless it is satisfied that the offer—

- (a) meets the requirements of the procuring entity as specified under paragraph (2); and
- (b) is at the prevailing real market price.

63. Low value procurement

(1) For the purposes of section 90(2) of the Act, a procuring entity may use a low value procurement procedure only if—

- (a) the estimated cost of the goods, works or services being procured per item is less than or equal to the prescribed maximum value as set out in the First Schedule;
- (b) no benefit would accrue to the procuring entity in terms of time or cost implications if the procuring entity uses requests for quotations or any other procurement method;
- (c) the procedure is not being used for the purpose of avoiding competition;

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- (d) the use of the procedure has been recommended by the procurement committee after a market survey.
- (2) The following procedure shall apply in respect to low value procurement—
 - (a) the procurement unit shall procure the goods, works or services from a reputable outlet or provider through direct shopping;
 - (b) an original invoice or receipt for the low value procurement of goods, works or services and the price paid shall be obtained and signed by the person undertaking the procurement.

64. Use of specially permitted procedures

(1) For purposes of section 92 of the Act, the Authority may allow the use of specially permitted procedure—

- (a) where exceptional requirements make it impossible, impracticable or uneconomical to comply with the Act and these Regulations; or
 - (b) where the market conditions or behaviour do not allow effective application of the Act and these Regulations; or
 - (c) for specialized or particular requirements that are regulated or governed by harmonized international standards or practices; or
 - (d) where competitive negotiations are critical for achieving value for money in the procurement of specialized goods, works or services.
- (2) A procuring entity shall—
- (a) first obtain the approval of its tender committee; and
 - (b) submit the proposal and all the tender documents to the Authority for approval before proceeding with the procedure.
- (3) The Authority shall maintain a register of all specially permitted procedures allowed.
- (4) The Authority shall issue detailed guidelines for concessioning or public private partnership.

[L.N. 106/2013, r. 17, L.N. 121/2013.]

65. Award of contract

(1) All contract award decisions shall be taken by the appropriate award authority, in accordance with the levels of Authority specified in the First Schedule.

(2) The period of tender award shall not exceed thirty days from the date of tender opening..

[L.N. 106/2013, r. 18.]

66. Notification of the award

(1) A procuring entity shall, upon rejecting unsuccessful tenders return any tender securities and any unopened financial proposals.

(2) A procuring entity shall immediately after tender award notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful.

(3) The reasons given under paragraph (2) shall not contain any information on any other tender other than information that is publicly available from tender openings or published notices.

[L.N. 106/2013, r. 19, L.N. 121/2013.]

PART VI – ADMINISTRATIVE REVIEW OF PROCUREMENT PROCEEDINGS*A – Composition and Membership of the Review Board***67. Appointment and tenure of members**

(1) The members of the Review Board shall be appointed for a term of three years and shall be eligible for reappointment for one further term of three years.

(2) Subject to paragraph (1), a member shall hold and vacate office in accordance with the member's terms of appointment.

68. Composition and membership

(1) Pursuant to section 25 of the Act, the Review Board shall comprise of—

- (a) six members appointed by the Minister from among persons nominated by—
 - (i) a Kenya Association of Manufacturers;
 - (ii) a Law Society of Kenya;
 - (iii) the Architectural Association of Kenya;
 - (iv) the Institution of Engineers of Kenya;
 - (v) the Institute of Certified Public Accountants of Kenya;
 - (vi) the Kenya Institute of Supplies Management;
 - (vii) the Institute of Certified Public Secretaries of Kenya;
 - (viii) the Chartered Institute of Arbitrators;
 - (ix) the Kenya National Chamber of Commerce and Industry;
 - (x) the Kenya Institute of Management;
 - (xi) the Computer Society of Kenya;
 - (xii) the Pharmaceutical Society of Kenya;
 - (xiii) the Federation of Kenya Employers;
 - (xiv) the Central Organization of Trade Unions;
- (b) three other members appointed by the Minister;
- (c) a chairman appointed by the Minister from among the persons appointed under paragraph (a) or (b).

(2) Each Organization referred to in subregulation (1)(a) shall submit to the Minister the curriculum vitae of two members being nominated of whom one shall be a woman.

(3) The Director General shall appoint a Secretary to the Review Board from amongst the staff of the Authority.

[L.N. 15/2014, r. 2.]

69. Quorum, panels and proceedings

(1) The quorum of the Review Board shall be three members including the Chairman.

(2) The Secretary may in consultation with the Chairman and the Review Board constitute a panel of three members to hear and determine a request for review and each panel shall elect its own chairman.

(3) In the absence of the Chairman, the Review Board may designate one member to act as Chairman for the purpose of that meeting.

(4) Decisions of the Review Board shall be taken by simple majority but in the case of a tie the proposal supported by the Chairman shall prevail.

[Subsidiary]**70. Resignation from Office**

The Chairman or any other member of the Review Board may at any time, by notice to the Minister, resign from his office.

71. Termination of appointment

The Minister may terminate a person's appointment as a member of the Review Board only if the person—

- (a) is unable to perform the functions of his Office by reason of mental or physical infirmity;
- (b) is adjudged bankrupt;
- (c) is convicted of an offence under the Penal Code, the Anti-corruption and Economic Crimes Act, 2003, or the Act or these Regulations or an offence involving dishonesty; or
- (d) is absent from three consecutive meetings of the Review Board to which the member has been invited without reasonable excuse.

72. Allowances

The Authority shall pay the members of the Review Board such allowances as may be determined by the Advisory Board.

*B – Procedures in Reviews***73. Mode of filing requests**

(1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.

(2) The request referred to in paragraph (1) shall—

- (a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;
- (b) be accompanied by such statements as the applicant considers necessary in support of its request;
- (c) be made within seven days of—
 - (i) the occurrence of the breach complained of where the request is made before the making of an award; or
 - (ii) the notification under section 67 or 83 of Act;
- (d) be submitted in fifteen bound copies and a soft copy, pages of which shall be consecutively numbered;
- (e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable.

(3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees.

(4) The Secretary shall acknowledge filing of the request for review.

[L.N. 106/2013, r. 20, L.N. 121/2013.]

74. Notification of filing of request

(1) The Secretary shall immediately after the filing of the request under regulation 73, serve a copy thereof, on the procuring entity or Director General as the case may be.

(2) The copy to the procuring entity under paragraph (1) shall also contain a notification of the pending review and the suspension of the procurement proceedings of such procuring entity.

(3) Upon being served with a notification of a request, the procuring entity shall—

- (a) notify the Secretary of the names and contact details of all parties to the review; and
- (b) within five days or such lesser period as may be specified by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.

(4) The Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review.

[L.N. 106/2013, r. 21, L.N. 121/2013.]

75. Notice of hearing

(1) The Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.

(2) The notice referred to in paragraph (1) shall be in the format shown in Form RB 2 set out in the Fourth Schedule.

76. Representation by person of own choice

Any party to a request filed under regulation 73 shall, at the hearing thereof, be entitled to be represented by an advocate or any other person of his own choice.

77. Preliminary objection

(1) A party notified under regulation 74 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within five days from the date of notification.

(2) The preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served on the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board shall hear the preliminary objection and make a determination whether to uphold or dismiss the same and shall record the reasons for the determination.

(5) If the Review Board dismisses the preliminary objection, it shall soon thereafter proceed to hear the request for review as scheduled.

(6) The fees chargeable for filing a preliminary objection shall be as set out in the Part II of the Fourth Schedule.

78. Invitation to the hearing

(1) The Secretary shall, at least three days before the date set for the hearing, invite the members of the Review Board to attend the hearing.

(2) The invitation under paragraph (1) shall set out the time, date, and place where the hearing shall take place.

(3) The business of the Review Board shall be transacted between 8.00 a.m. and 5.00 p.m. on normal working days unless otherwise agreed to by the Secretary.

79. Disclosure of interest

Where any member of the Review Board has a direct or indirect interest in any matter before the Review Board, he or she shall declare his or her interest in the matter and shall not participate in the hearing or decision-making process of the Review Board in relation to that particular matter.

80. Attendance at the hearing

If on the day set for the hearing of a review for which due notification has been given—

- (a) the applicant appears and the procuring entity fails to appear, the hearing of the request for review shall proceed in the absence of the procuring entity unless the Review Board deems it fit to adjourn the hearing;
- (b) the procuring entity appears and the applicant does not appear, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing;
- (c) if both parties fail to appear, the request for review shall be dismissed unless the Board deems it fit to adjourn the hearing.

81. Procedure at hearing

At the hearing of the request for review, unless decided otherwise by the Review Board, the applicant shall be given the first opportunity to present the case in support of the request and the procuring entity shall be given an opportunity to reply thereto.

82. Consolidation of requests

Where two or more requests for review are instituted arising from the same tender or procurement procedure the Review Board may consolidate the requests and hear them as if they were one request for review.

83. Withdrawal of requests for review

(1) A request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the applicant and upon such notice being received the request for review shall be deemed to have been withdrawn.

(2) When a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.

84. Hearing of request

(1) Hearing of review proceedings shall be open to all parties to the review.

(2) The Review Board may, at the hearing of the request exclude any person from the hearing whom it deems is unruly, interruptive or otherwise conducts himself in an unreasonable manner.

85. Experts

The Review Board may engage an expert to assist it in proceedings in which it feels it lacks the necessary expertise but the opinion of the expert shall not be binding on the Review Board.

86. Rules of evidence

The Review Board shall not be bound to observe the rules of evidence in the hearing of a request under these Regulations.

87. Proof of documents

An order of the Review Board certified by both the Chairman and the Secretary to be a true copy thereof shall in any legal proceedings be *prima facie* evidence of the issuance of that order.

88. Communication to the Review Board

All communications to the Review Board relating to matters pending before the Review Board shall be through the Secretary.

PART VII – INVESTIGATION, DEBARMENT AND DISPOSAL**89. Limitation of investigator's powers**

An investigator appointed pursuant to section 102 of the Act shall not, in the course of investigation, advise a procuring entity on any matter relating to a procurement proceeding.

90. Other grounds for debarment

For the purposes of section 115(2) of the Act, the Director-General, with the approval of the Advisory Board, may debar a person from participating in procurement proceedings on the ground that, that person has breached a code of ethics issued by the Authority pursuant to section 139 of the Act.

91. Debarment

Where a person is debarred from participating in procurement proceedings under section 115 of the Act, the debarment extends to any firm in which the debarred person has a controlling interest.

92. Disposal committee

(1) A procuring entity shall, for the purposes of section 128 of the Act, establish a disposal committee comprising of at least five members as follows—

- (a) the officer in charge of finance;
- (b) the head of the procurement unit who shall be the Secretary;
- (c) the head of the accounting department; and
- (d) two heads of end-user departments, of whom one shall be the head of the end-user department disposing of the stores or equipment.

(2) The disposal committee shall select a chairperson from amongst its members.

(3) The disposal committee shall pursuant to section 128(2) of the Act, first meet within fourteen days of its appointment and subsequently at least once in every quarter.

(4) The accounting officer shall, pursuant to section 129(4) of the Act, give the disposal committee a written notice as to whether he accepts or rejects the recommendations of the disposal committee within fourteen days of receipt of the recommendations.

93. Disposal to employees

(1) A procuring entity may, pursuant to section 131 of the Act, dispose its unserviceable, obsolete or surplus stores and equipment to an employee of the public entity or a member of a board or committee of the public entity where—

- (a) the time and cost required to dispose to any other person would be disproportionate to the value of the unserviceable, obsolete or surplus stores and equipment to be disposed;

[Subsidiary]

- (b) the employee is in possession of the stores or equipment to be disposed and may be given the first priority to purchase the same.

(2) Every disposal made by a procuring entity under paragraph (1) shall be reported by the accounting officer or head of the procuring entity to the Authority within fourteen days of the disposal

94. Reservations

For the Purposes of section 39 (4) (c) of the Act, constituencies and local authorities shall be regions where citizen contractors who are located and operate in those regions shall be given exclusive preference when participating in procurements using Constituency Development Funds and Local Authority Transfer Funds, except where it is established that local capacity is not available.

[L.N. 129/2009, L.N. 141/2009.]

95. Reporting on public contract awards

For purposes of section 46(1), each procuring entity shall submit to the Authority, on a quarterly basis, information of all public contract awards as directed by the Authority.

[L.N. 106/2013, r. 22, L.N. 121/2013.]

FIRST SCHEDULE

[L.N. 106/2013, r. 23.]

THRESHOLD MATRIX

FIRST SCHEDULE
[L.N. 106/2013, s. 23.]

THRESHOLD MATRIX

THRESHOLDS MATRIX FOR CLASS A PROCURING ENTITIES

Procurement method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
International Open tender (s. 71 of the Act)	There is no maximum or minimum level of expenditure under this method	There is no maximum or minimum level of expenditure under this method	There is no maximum or minimum level of expenditure under this method	The Accounting Officer	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
National Open tender (s. 54(2) of the Act)	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

Public Procurement and Disposal

[Subsidiary]

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS A PROCURING ENTITIES

Procurement method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
	When using this method the minimum expenditure that requires advertising is KES. 6,000,000/- below which may use alternative methods	When using this method the minimum expenditure that requires advertising is KES. 6,000,000 below which may use alternative methods	When using this method the minimum expenditure that requires advertising is KES. 3,000,000 below which may use alternative methods	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
Restricted tender under s. 73(2) of the Act	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
	The minimum level of expenditure is KES. 2,000,000 below this threshold use request for quotations	The minimum level of expenditure is KES. 4,000,000 below this threshold use request for quotations	The minimum level of expenditure is KES. 2,000,000 below this threshold use request for quotations	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS A PROCURING ENTITIES

Procurement method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
Request for proposals (s. 76(1) of the Act)	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
Direct procurement under s. 74(2) and (3) of the Act	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the user department	Tender committee or Procurement committee where expenditure is below KES. 500,000	The Accounting Officer or Head of the User Department where expenditure is below KES. 500,000	Evaluation, negotiations, inspection and acceptance committee
Request for quotation (s. 88 of the Act)	Maximum level of expenditure under this method is KES. 2,000,000	Maximum level of expenditure under this method is KES. 4,000,000	Maximum level of expenditure under this method is KES. 2,000,000	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS A PROCURING ENTITIES

Procurement method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
	Minimum level of expenditure under this method is KES. 30,000 per procurement per item	Minimum level of expenditure under this method is KES. 50,000 per procurement per item	Maximum level of expenditure under this method is KES. 30,000 per procurement per item	Head of the user department	Procurement committee where expenditure is below KES. 500,000	Head of the user department where expenditure is below KES. 500,000	Evaluation, negotiations, inspection and acceptance committee
Low value procurement (s. 90 of the Act)	Maximum level of expenditure under this method is KES. 30,000 per procurement per item	Maximum level of expenditure under this method is KES. 50,000 per procurement per item	Maximum level of expenditure under this method is KES. 30,000 per procurement per item	Head of the user department	User department	The Head of the procurement unit	Stores officer
	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	Head of the user department	User department	The Head of the procurement unit	Stores officer

Public Procurement and Disposal

[Subsidiary]

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS B PROCURING ENTITIES

<i>Procurement method</i>	<i>Goods</i>	<i>Works</i>	<i>Services</i>	<i>Person responsible for procurement initiation</i>	<i>Body responsible for awarding the contract</i>	<i>Person responsible for signing the Contract</i>	<i>Verification of receipt of goods, services or works</i>
International open tender (s. 71 of the Act)	There is no maximum or minimum level of expenditure under this method	There is no maximum or minimum level of expenditure under this method	There is no maximum or minimum level of expenditure under this method	The Accounting Officer	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
National open tender (s. 54(2) of the Act)	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
	When using this method the minimum expenditure that requires advertising is KES. 5,000,000/- below which may use alternative advertising methods	When using this method the minimum expenditure that requires advertising is KES. 5,000,000/- below which may use alternative advertising method	When using this method the minimum expenditure that requires advertising is KES. 3,000,000/- below which may use alternative advertising method	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS B PROCURING ENTITIES

<i>Procurement method</i>	<i>Goods</i>	<i>Works</i>	<i>Services</i>	<i>Person responsible for procurement initiation</i>	<i>Body responsible for awarding the contract</i>	<i>Person responsible for signing the Contract</i>	<i>Verification of receipt of goods, services or works</i>
Restricted tender under s. 73(2) the Act	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
	The minimum level of expenditure is KES. 1,500,000 below this threshold use request for quotations	The minimum level of expenditure is KES. 3,000,000 below this threshold use request for quotations	The minimum level of expenditure is KES. 1,500,000 below this threshold use request for quotations	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
Request for proposals (s. 76(1) of the Act)	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS B PROCURING ENTITIES

<i>Procurement method</i>	<i>Goods</i>	<i>Works</i>	<i>Services</i>	<i>Person responsible for procurement initiation</i>	<i>Body responsible for awarding the contract</i>	<i>Person responsible for signing the contract</i>	<i>Verification of receipt of goods, services or works</i>
Request for quotations (s. 88 of the Act)	Maximum level of expenditure under this method is KES. 1,500,000. There is no minimum expenditure for the use of this method	Maximum level of expenditure under this method is KES. 3,000,000. There is no minimum expenditure for the use of this method	Maximum level of expenditure under this method is KES. 1,500,000. There is no minimum expenditure for the use of this method	Head of the user department	Tender committee or procurement committee where expenditure is below KES. 500,000	The Accounting Officer or Head of user Department where expenditure is below KES. 500,000	Evaluation, negotiations, inspection and acceptance committee
Direct procurement under s. 74(2) and (3) of the Act.	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the user department	Tender committee or procurement committee where expenditure is below KES. 500,000	The Accounting Officer or Head of user Department where expenditure is below KES. 500,000	Evaluation, negotiations, inspection and acceptance committee

Public Procurement and Disposal

[Subsidiary]

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS B PROCURING ENTITIES

Procurement method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
Low value procurement (s. 90 of the Act)	Maximum level of expenditure under this method is KES. 10,000/- per procurement per item	Maximum level of expenditure under this method is KES. 10,000 per procurement per item	Maximum level of expenditure under this method is KES. 10,000 per procurement per item	Head of the user department	User department	The Head of the procurement unit	Stores Officer
	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	Head of the user department	User department	The Head of the procurement unit	Stores Officer

THRESHOLDS MATRIX FOR CLASS C PROCURING ENTITIES

International open tender (s. 71 of the Act)	There is no maximum or minimum level of expenditure under this method	There is no maximum level of expenditure under this method	There is no maximum or minimum level of expenditure under this method	The Accounting Officer	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
National open tender (s. 54(2) of the Act)	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Maximum level of expenditure shall be determined by the funds allocated in the budget for the particular procurement	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS C PROCURING ENTITIES

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
When using this method the minimum expenditure that requires advertising is KES. 4,000,000/- below which may use alternative advertising methods	When using this method the minimum expenditure that requires advertising is KES. 4,000,000/- below which may use alternative advertising methods	When using this method the minimum expenditure that requires advertising is KES. 2,000,000/- below which may use alternative advertising methods	Head of the user department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee	
Restricted tender under (s. 73(2) of the Act)	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
	The minimum level of expenditure is KES 500,000. Below this threshold request for quotations	The minimum level of expenditure is KES 500,000. Below this threshold request for quotations	The minimum level of expenditure is KES 500,000. Below this threshold request for quotations	Head of the User Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS C PROCURING ENTITIES

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
Request for proposals (s. 76(1) of the Act)	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	Head of the user Department	Tender committee	The Accounting Officer	Evaluation, negotiations, inspection and acceptance committee
Request for quotations (s. 88 of the Act)	Maximum level of expenditure under this method is KES. 500,000	Maximum level of expenditure under this method is KES. 500,000	Maximum level of expenditure under this method is KES 500,000	Head of the user department	Tender committee or Procurement committee where expenditure is below KES. 100,000	The Accounting Officer or Head of the user Department where expenditure is below KES. 100,000	Evaluation, negotiations, inspection and acceptance committee

[Subsidiary]

FIRST SCHEDULE—continued

THRESHOLDS MATRIX FOR CLASS C PROCURING ENTITIES

Procurement Method	Maximum or minimum level of expenditure allowed for the use of a particular procurement method			Segregation of duties for different officers and committees in the procurement cycle under section 26(3)(c) of the Act			
	Goods	Works	Services	Person responsible for procurement initiation	Body responsible for awarding the contract	Person responsible for signing the Contract	Verification of receipt of goods, services or works
Direct procurement under (s. 74(2) and (3) of the Act.)	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	No minimum or maximum expenditure under this method provided the conditions under this section are met	The Accounting Officer Head of the user department initiates procurement whose expenditure is below KES. 200,000	Tender committee Procurement Committee awards for procurement whose expenditure is below KES. 200,000	The Accounting Officer or Head of the user department where expenditure is below KES. 200,000	Evaluation, negotiations, inspection and acceptance committee
Low value procurement (s. 90 of the Act)	Maximum level of expenditure under this method is KES. 5,000 per procurement per item	Maximum level of expenditure under this method is KES. 5,000 per procurement per item	Maximum level of expenditure under this method is KES. 5,000 per procurement per item	Head of the user department	User department	The Head of the procurement unit	Stores officer
	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	There is no minimum expenditure for the use of this method	Head of the user department	User department	The Head of the procurement unit	Stores officer

SECOND SCHEDULE

[Section 26(4), L.N. 129/2009, L.N. 141/2009.]

COMPOSITION OF TENDER COMMITTEES

1. Ministerial Tender Committee or Self Accounting Unit Tender Committee*Membership Structure:*

- Chairman An officer appointed in writing by the accounting officer.
- Deputy Chairman Chief Finance Officer or, if there is no such officer, the Head of the Finance Unit appointed in writing by the accounting officer.
- Other members Five heads of departments appointed in writing by the accounting officer.
- Secretary The officer heading the Procurement Unit of the Ministry or the Self Accounting Unit.

2. District Tender Committee*Membership Structure:*

- Chairman A head of department appointed in writing by the District Commissioner.
- Deputy Chairman District Development Officer appointed in writing by the District Commissioner.
- Other members At least five heads of departments appointed in writing by the District Commissioner from among the following Ministries—
- (a) Agriculture;
 - (b) Health;
 - (c) Environment and Natural Resources;
 - (d) Roads and Public Works;
 - (e) Education;
 - (f) Water and Irrigation; and
 - (g) Livestock and Fisheries Department and;
 - (h) The District Accountant.
- Secretary The District Procurement Officer.

3. State Corporations Tender Committee

Membership Structure:

Chairman	A head of department appointed in writing by the Chief Executive Officer.
Deputy Chairman	The Head of Finance Department appointed in writing by Chief Executive Officer.
Other members	At least five departmental heads including the Company Secretary or officers in equivalent positions appointed in writing by the Chief Executive Officer.
Secretary	The officer heading the procurement unit of the corporation.

[Subsidiary]

4. Public Universities Tender Committee

Membership Structure:

Chairman	A head of department appointed in writing by the Vice-Chancellor.
Deputy Chairman	The Head of Finance Department appointed in writing by the Vice Chancellor.
Other members	The Head of Administration. The Head of Academic Affairs. A Principal of a College appointed by the Vice Chancellor. Three Heads of a Faculty or School appointed in writing by the Vice-Chancellor.
Secretary	The officer heading the procurement unit of the University.

5. Local Authorities Tender Committee

Membership Structure:

Chairman	For City Councils (Nairobi, Mombasa, Kisumu) - A head of department appointed in writing by the Clerk to the council. For Urban, County and Town Councils – the Clerk.
Deputy Chairman	A head of department appointed in writing by the Clerk.
Members	The Finance officer/Treasurer. Seven heads of departments, appointed by the Clerk of the local authority.
Secretary	The officer heading the procurement unit of the local authority.

6. Colleges Tender Committee

Membership Structure:

Chairman	Appointed in writing by the principal.
Deputy Chairman	The officer in charge of finance appointed in writing by the Principal.
Other members	At least six heads of departments. Matron/Officer in charge of boarding facilities appointed in writing by the Principal.
Secretary	The officer heading the procurement unit of the college.

7. Schools Tender Committee

Membership Structure:

Chairman	The Deputy Principal or Deputy Headmaster appointed in writing by the Principal/Headmaster.
Deputy Chairman	The officer in charge of finance or equivalent appointed by the Principal/Headmaster.
Other members	At least six heads of departments or members of the teaching staff including the Matron or officer-in-charge of the boarding facilities where applicable appointed by the Principal or Headmaster.
Secretary	The officer heading the procurement unit.

8. Co-operative Societies Tender Committee

Membership Structure:

Chairman	The Deputy Chief Executive Officer appointed in writing by the Chief Executive Officer.
Deputy Chairman	The person in charge of finance appointed in writing by the Chief Executive Officer.
Other members	At least six heads of departments appointed by the Chief Executive Officer.
Secretary	The officer heading the procurement unit of the co-operative society.

9. Voluntary Organizations/Institutions Tender Committee

Membership Structure:

Chairman	The Deputy Chief Executive appointed in writing by the Chief Executive Officer.
Deputy Chairman	The person in charge of finance appointed in writing by the Chief Executive Officer.
Other members	At least five members of the governing body or committee of the Institution appointed by the Chief Executive Officer.
Secretary	The officer heading the procurement unit of the Organization.

10. Central Bank of Kenya Tender Committee

Membership Structure:

Chairman	The Deputy Governor appointed in writing by the Governor.
Deputy Chairman	The person in charge of finance appointed in writing by the Governor.
Other members	At least six heads of departments appointed in writing by the Governor.
Secretary	The officer heading the procurement unit.

11. Commissions (Permanent) Tender Committees

Membership Structure:

Chairman	A person appointed in writing by the accounting officer.
Deputy Chairman	The person in charge of finance appointed in writing by the accounting officer.
Other members	At least six heads of departments or equivalent positions appointed in writing by the accounting officer.
Secretary	The officer heading the procurement unit.

12. Semi Autonomous Government Agencies

Membership Structure:

Chairman	A person appointed in writing by the accounting officer.
Deputy Chairman	The person in charge of finance appointed in writing by the accounting officer.
Other members	At least six heads of departments or equivalent positions appointed in writing by the accounting officer.
Secretary	The officer heading the procurement unit.

[Subsidiary]

13. Hospital Tender Committee

Membership Structure:

Chairman	The officer appointed in writing by the Medical Superintendent.
Deputy Chairman	The Nursing Officer in charge.
Other members	Hospital Administrator. Public Health Officer. Accountant in charge. Catering Officer in charge. Maintenance Officer in charge. Pharmacist in charge. Medical Clinician.
Secretary	The officer heading the procurement unit of the hospital.

14. Health Facility Tender Committee

Membership Structure:

Chairman	The officer in charge of the health centre/dispensary.
Deputy Chairman	The Nursing Officer/Clinical Officer in charge as appropriate.
Other members	Public Health Technician. Laboratory Technician.
	Two members of the facility management committee (other than the chairman) appointed in writing by the officer in charge of the facility.
Secretary	The officer heading the procurement unit.

15. Special Security Tender Committee

Membership Structure:

Membership	The membership of each special security tender committee may be determined by the Director General in consultation with the respective security organ.
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16. Tender committee for the Constituency Development Fund

(a) Constituency Projects Tender Committee—

MEMBERSHIP STRUCTURE:

Chairman	Member of the Constituency Development Fund Committee appointed in writing by the Constituency Development Fund Account Manager.
Deputy Chairperson	A person in charge of finance appointed in writing by the Constituency Development Committee Account Manager.
Member	Three members of the Constituency Development Fund Committee elected by the Constituency Development Fund Committee. District Accountant of the District or Accountant appointed in writing by the District Accountant of the District.

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SECOND SCHEDULE—*continued*

	District Development Officer of the District or Development Officer appointed by the District Development Officer of the District.
	District Works Officer of the District or Works Officer appointed in writing by the District Works Officer of the District.
	Respective Departmental Representative of the District for the subject procurement.
Secretary	District Procurement Officer of the District or Procurement Officer appointed in writing by the District Procurement Officer of the District.

(b) Constituency Development Fund Tender Committee—

MEMBERSHIP STRUCTURE:

Chairman	Elected from among members of the Constituency Development Fund Tender Committee.
Deputy Chairman	Treasurer of the Constituency Development Fund Committee.
Members	Secretary to the Constituency Development Fund Committee.
	Four members elected from the Constituency Development Fund Committee.

Secretary Procurement Officer appointed in writing by District Procurement Officer of the District.

[L.N. 141/2009, s. 3.]

THIRD SCHEDULE

STANDARD TENDER DOCUMENTS

The standard tender documents include the following—

1. Standard tender document for procurement of works (buildings and associated civil engineering works).
2. Standard tender document for procurement of works (roads, water bridges, etc.).
3. Standard tender document for procurement of works (electrical and mechanical).
4. Standard tender document for procurement of small works.
5. Standard tender document for procurement of goods.
6. Standard tender document request for proposals (selection of consultants).
7. Standard tender document for procurement of general services.
8. Request for quotation form.
9. Procurement requisition form.
10. Local procurement order.
11. Local service order.
12. Order amendment form.

[Subsidiary]THIRD SCHEDULE—*continued*

13. Tender register.
 14. Register of samples.
 15. Confidential business questionnaire.
 16. Application for adjudication of tenders/quotation.
 17. Board of survey form.
 18. Disposal certificate.
 19. Destruction certificate.
 20. Contract agreement for goods.
 21. Counter requisition and issue voucher.
 22. Counter receipt voucher.
 23. Bin Card, stock verification, issue/receipt.
 24. Contract agreement for goods (term contracts).
 25. Contract agreement for consultancy services.
 26. Contract agreement for consultancy services (time based).
 27. Contract agreement for general services.
 28. Contract agreement for insurance services.
 29. Standard tender document for disposal.
 30. Standard tender document for concessioning.
 31. Standard tender document for insurance services.
 32. Standard tender document for information technology.
 33. Standard tender document for maintenance services.
 34. Standard tender document for design and build (turnkey).
 35. Standard tender document for supply and installation.
 36. Standard tender document for specialized goods and services.
 37. Standard tender documents for pre-qualification.
 38. Standard tender documents for preference and reservations.
 39. Standard tender documents for management contracts.
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FOURTH SCHEDULE

[Regulation 73(1), L.N. 106/2013, r. 24.]

PART I – FORMS FOR REVIEWS

FORM RB1**REPUBLIC OF KENYA****PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

APPLICATION NO. OF 20.....
BETWEEN
..... **APPLICANT**
AND **.....**

FOURTH SCHEDULE, FORM RB1—*continued*RESPONDENT (*Procuring Entity or Director General*)

request for review of the decision of the (*Name of the Procuring Entity or Director General*) of dated the day of, 20
the matter of Tender No. of, 20

REQUEST FOR REVIEW

We the above named Applicant(s), of address (Physical Address) Fax No. Tel. No. Email
reby request the Public Procurement Administrative Review Board to review the whole/part of the
above mentioned decision on the following ground's, namely—

In this memorandum, the Applicant requests the Board for an order/orders that—

GNED (Applicant)

dated on day of , 20

FOR OFFICIAL USE ONLY

lodged with the Secretary Public Procurement Administrative Review Board on
day of , 20

Signed
Board Secretary

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REQUEST NO. OF , 20.....

BETWEEN

APPLICANT

AND

RESPONDENT (*Procuring Entity or Director General*)

D:

1) (*Procuring Entity or Director General*)2) (*Applicant*)**HEARING NOTICE**

Whereas the Applicant herein has instituted a complaint against
(*Procuring Entity or Director General*) on (Date) particulars of which were set out in a
Request For Review served upon you on
You are hereby required to appear on the day of , 20..... at a.m./
p.m. when the complaint against you will be heard by this Board sitting at

FOURTH SCHEDULE, FORM RB2—continued

If you fail to appear, the Applicant may proceed with the complaint and determination by order of the Board may be made in your absence.

Dated on day of 20

.....
Board Secretary

PART II – FEES FOR REVIEWS

Administrative fee KES. 5,000

Upon filing a request for review, the fees payable shall be as follows—

<i>Amount of Tender</i>	<i>Fees</i>
Tenders of Ascertainable Value	
a) Does not exceed KES. 2,000,000	1% subject to a minimum of KES. 20,000/-
b) Exceeds KES. 2,000,000/- but not over KES. 50,000,000/-	The fees for KES. 2,000,000 plus an additional fee of 0.25% on the amount above KES. 2,000,000
c) Exceeds KES. 50,000,000/-	The fees for tender sum of KES. 50,000,000 plus an additional fee of 0.025% on the amount above KES. 50,000,000/- subject to a maximum fee of KES. 200,000/-
Pre-qualification and other “Unquantified Tenders”	KES. 40,000/-
f) Any other Tenders	Subject to a minimum of KES. 20,000/- and a maximum of KES. 40,000
Upon request of an adjournment to a party by the Board	KES. 10,000/-
Filing preliminary objection	KES. 5,000/-
Fee to accompany the review of Director-General's order (s. 106(3))	KES. 40,000/-
Filing fees on each request for a review on debarment order (s. 117(3))	KES. 40,000/-
The Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable	

[Subsidiary]

PUBLIC PROCUREMENT AND DISPOSAL (PUBLIC PRIVATE PARTNERSHIPS) REGULATIONS, 2009**ARRANGEMENT OF REGULATIONS***Regulation*

1. Citation.
2. Interpretation.
3. Entering into public private partnership.
4. Public Private Partnership Steering Committee.
5. Functions of Steering Committee.
6. Meetings.
- 6A. Steering Committee remuneration.
7. Public Private Partnership Secretariat.
8. Functions of Secretariat.
9. Personnel of the Public Private Partnership Secretariat.
10. Price of service or goods.
11. Government investment protection.
12. Duration of the public private partnership.
13. Conceptualization, identification and prioritization of Public Private Partnership's.
14. Performance indicators.
15. Procuring entity not to restrict innovation.
16. Invitation for bids.
17. Qualification criteria.
18. Disqualification of a bidder.
19. Procurement procedure.
20. Evaluation of bid proposals.
21. Minimum contractual obligations.
22. Contracting public private partnership agreements.
23. Management of Public Private Partnership agreements
24. Publishing of information after conclusion of Public Private Partnership agreement.
25. Amendment and variation of public private partnership agreements.
26. Financial reporting.
27. Auditing.
28. Inspection of public private partnership premises etc.
29. Contract standardization.
30. Unsolicited bids.

SCHEDULES

FIRST SCHEDULE —

PUBLIC PRIVATE PARTNERSHIP
PREPARATION AND APPROVAL STEPS

SECOND SCHEDULE —

MAJOR PUBLIC PRIVATE PARTNERSHIP
RISKS

PUBLIC PROCUREMENT AND DISPOSAL (PUBLIC PRIVATE PARTNERSHIPS) REGULATIONS, 2009

[L.N. 38/2009, L.N. 173/2011.]

1. Citation

These Regulations may be cited as the Public Procurement and Disposal (Public Private Partnerships), Regulations 2009.

2. Interpretation

In these Regulations, unless the context otherwise requires—

“Act” means the Public Procurement and Disposal Act (Cap. 412A);

“affordability” means that the financial commitments to be incurred by a procuring entity in terms of public private partnership agreement can be met by funds—

- (a) designated within the procurement entity's existing budget for its function for which the agreement relates; and
- (b) destined for the procurement entity in accordance with its relevant future budgetary allocation.

“private party” means a party to a public private partnership agreement, other than

- (a) a procuring entity to which the Act applies;
- (b) an enterprise or other entity controlled by one or more municipalities; or
- (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality, enterprise or entity referred to in paragraph (a) or (b).

“public private partnership” means an agreement between a procuring entity and a private party under which—

- (a) the private party undertakes to perform a public function or provide a service on behalf of the procuring entity;
- (b) the private party receives a benefit for performing the function, either by way of—
 - (i) compensation from a public fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided to them; or
 - (iii) combination of such compensation and such charges or fees.
- (c) the private party is generally liable for risks arising from the performance depending on the terms of the agreement.

“public private partnership agreement” means a written contract recording the terms of a public private partnership concluded between a procuring entity and a private party;

“procuring entity’s property” includes all movable and immovable property belonging to the procuring entity as well as intellectual property rights vested in the procuring entity;

[Subsidiary]

"transaction advisor" means a person or persons appointed in writing by the procurement entity who has the appropriate skills and experience to assist and advise the procuring entity in connection with public private partnership, including the preparation and conclusion of a public private partnership agreement;

"value for money" means that the provision of the procuring entity function by a private party in terms of the public-private partnership agreement results in a net benefit to the procuring entity, defined in terms of cost, price, quality, quantity, timeliness, or risk transfer, or a combination thereof;

"public private partnership nodes" means units established by procuring entity under regulation 23(1); and

"Steering Committee" means Public Private Partnership Steering Committee established under regulation 4.

3. Entering into public private partnership

(1) Subject to provisions of these Regulations and the Act, a procuring entity may enter into any of the following public private partnership arrangements—

- (a) management contract whereby a procuring entity awards a private party the responsibility to manage and perform a specific service, within well-defined specifications for a specified period of time not to exceed five years and the procuring entity retains ownership and control of all facilities and capital assets and properties;
- (b) a lease whereby the private party pays the procurement entity rent and manages, operates and maintains the facility and receives fees or charges from consumers for the provision of the service for specified time not exceeding fifteen years;
- (c) a concession for a period not exceeding thirty years whereby the private party maintains, rehabilitates, upgrades and enhances the facility in question;
- (d) a Build-Own Operate-Transfer scheme whereby a private party designs, constructs, finances, owns, operates and maintains the given infrastructure facility for a specified time period not exceeding thirty years, or such longer period as may be agreed, after which the facility is transferred to the procuring entity;
- (e) a Build-Own Operate scheme whereby a private party designs, finances, constructs, owns, operates and maintains the infrastructure facility and provides services for an agreed time period; or
- (f) any other scheme as may be prescribed by the Public Private Partnership Steering Committee and approved by the Cabinet.

(2) Except as provided for under these Regulations all public private partnership projects shall be procured through a competitive bidding process as provided for under these Regulations or any other written relevant law.

(3) The preparation and approval process of all public private partnership agreements shall be as set out in the First Schedule.

(4) Where the procuring entity is not the Government, only the accounting officer or the accounting authority of such procuring entity may enter into a public private partnership agreement under paragraph (1) on behalf of that procuring entity.

(5) The procurement entity may where necessary consult the Minister with regard to the accounting for Public Private Partnership activities and taxation aspects relevant to the project prior to issue of the invitation for bids.

4. Public Private Partnership Steering Committee

(1) There is established Public Private Partnership Steering Committee which shall consist of—

- (a) the Permanent Secretary to the Treasury-Chairman;
- (b) the Attorney-General or his representative;
- (c) the Permanent Secretary, Office of the Prime Minister;
- (d) Permanent Secretary for the Ministry responsible for Planning, National Development and Vision 2030;
- (e) other three members not being public servants appointed by the Minister from a list of nominees from private sector bodies.

(2) The Director, Public Private Partnership shall be the secretary to the Steering Committee.

(3) The Steering Committee shall have power to co-opt a maximum of two members from sector specific organizations.

(4) A member of the Steering Committee, except the *ex-officio* members, shall hold office for a term of three years and shall be eligible for re-appointment for one further term of three years.

(5) The appointment of the Steering Committee members under sub-paragraph (e) shall by name and notice in the *Gazette*.

[L.N. 173/2011.]

5. Functions of Steering Committee

The Steering Committee shall—

- (a) spearhead the public private partnership process and promote understanding and awareness of Public Private Partnership among key stakeholder groups;
- (b) review challenges constraining participation or realization of full benefits expected from Public Private Partnership and formulate time bound solutions to address the challenges and to create an enabling environment;
- (c) establish public private partnership standards, guidelines and procedures including development of standard procedures for conceptualization, identification, prioritization, development, assessment of Public Private Partnership projects and development of standardized bid documents;
- (d) review direct and indirect liabilities and assess contingent liability risk exposure of the Government and advise on the acceptable levels of direct and indirect liabilities;
- (e) ensure that all proposed public private partnership projects are consistent with the country's national priorities outlined in various policy documents;
- (f) coordinate with the Public Procurement Oversight Authority established under the Act to ensure that all tender phase activities of Public Private Partnership projects conform to procurement best practices;
- (g) approve public private partnership projects submitted to the Committee in accordance with the provisions of these Regulations.

6. Meetings

(1) The Steering Committee shall regulate its meetings and its own procedures and may co-opt members as it shall deem appropriate.

[Subsidiary]

(2) The quorum of the Steering Committee meeting shall be two thirds of the members including the Chairman.

(3) The Steering Committee shall invite accounting officers responsible for the project under discussions to attend its meetings.

(4) The Steering Committee shall meet once every month or at such regular intervals as it may deem necessary.

6A Steering Committee remuneration

The member of the Steering Committee shall be paid such remuneration, fees, allowances and disbursements for expenses as may be approved by the Minister

[L.N. 173/2011.]

7. Public Private Partnership Secretariat

There is established a Public Private Partnership Secretariat to be within the Ministry of Finance and headed by the Director, Public Private Partnership which shall support and act as Secretariat to the Steering Committee.

[L.N. 173/2011.]

8. Functions of Secretariat

The Public Private Partnership Secretariat shall—

- (a) serve as a resource centre for best public private partnership practice in Kenya including supporting capacity building in public partnership projects' planning, co-ordination and contract monitoring and working as the focal reference point for public private partnership advice;
- (b) carry out any other functions as the Steering Committee may determine.

9. Personnel of the Public Private Partnership Secretariat

The Steering Committee shall determine the personnel of the Public Private Partnership Secretariat in consultation with the Ministry of State for Public Affairs.

10. Price of service or goods

(1) The price setting for public private partnership projects shall, to the degree possible, be based upon competition but where effective competition is not possible, prices shall be based upon fully allocated cost of service or goods determined in accordance with international best practice.

(2) Notwithstanding the provision of paragraph (1), the price for the public private partnership projects shall be affordable, and provide value for money for the procuring entities while allowing the private party to maintain its financial integrity, attract capital, operate efficiently and compensate investors for risks assumed.

11. Government investment protection

(1) Where it is necessary to support private sector investments and reduce premiums factored for political risks, the Government where it is not a signatory to the agreement, may issue binding letters of comfort to private sector investors and their lenders to acknowledge the investment by the private sector, assure investors that they will be provided with reasonable assistance with acquiring authorizations and guarantee against risks arising from Government actions or omissions.

(2) The Steering Committee may recommend to the Minister the principles, procedures and standards for making decisions on investment protection and letters of comfort on public private partnership projects based on Cost Benefit Analysis, national priorities and available Government resources.

12. Duration of the public private partnership

(1) In determining the duration of the public private partnership the procuring entity shall take into account the provisions of any relevant law, reasonable period required to recoup the investment, and flexibility that may be required to adapt to changes and new technologies.

(2) The duration shall ensure that the investment is economically and financially viable for the public private partnership, and the private party to meet service delivery standards and investment levels that require to be met and maintained throughout the duration of the partnership, while at the same time, being affordable and providing value for money to be procuring entity.

13. Conceptualization, identification and prioritization of Public Private Partnership's

(1) When conceptualizing, identifying and prioritizing potential Public Private Partnership projects, procuring entities shall consider the strategic and operational benefits of a public private partnership, compared to the continuing performance of the function by the procuring entity.

(2) Planning for public private partnership's shall form an integral part of the national development planning whose requirements shall be presented by the Steering Committee.

14. Performance indicators

A procuring entity pursuing public private partnership projects shall ensure—

- (a) that they identify quantifiable measurable outputs that serve as the basis for projects monitoring and evaluation and serve as the basis for remunerating the private party;
- (b) that contract management focuses upon monitoring the delivery and quality of service or goods rather than managing the execution of works or the delivery of goods.
- (c) that specific levels of maintenance and quality of service or goods is specified for the life of the Public Private Partnership project and agreed with the private party; and
- (d) that payments are linked to specific indicators.

15. Procuring entity not to restrict innovation

Procuring entity shall not restrict innovation with regard to the means that may include financing mechanisms, application of technologies and management approaches by which a potential private partner or a bidder may use to deliver the procured services or goods subject to the proposal being least cost and meeting the specified minimum technical requirements and delivery period.

16. Invitation for bids

(1) As soon as the procurement entity identifies a project that may be concluded as a public private partnership, the procurement entity shall, in writing, invite for prequalification or proposals from potential bidders through at least two newspapers with a national circulation and the same shall be posted on its website, if any.

(2) In inviting bidding for pre-qualifications or proposals under paragraph (1), the procuring entity shall state the eligibility to bid for award of a public private partnership contract provided for under regulation 17 and may require bidders to provide signed statements or documentary evidence to certify their eligibility.

[Subsidiary]

(3) Where a bidder is a foreigner the procurement entity shall permit the submission of equivalent documents from the relevant authorities in the bidder's country of origin and submission of statements certifying that equivalent documentation is not issued in the bidder's country of origin.

(4) All bidders shall be responsible for providing certified translations of all submitted documentation whose originals are not in English.

17. Qualification criteria

A person shall be qualified to bid for a public private partnership contract if—

- (a) the person or the consortium members possess or have contracted persons with technical capability and necessary experience in development and operation of the facility or equipment and have access to necessary financial resources;
- (b) the person has the legal capacity to enter into a contract for the procurement;
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) the procuring entity is not precluded from entering into the contract with the person under the Act;
- (e) the person is not debarred from participating in procurement proceedings under the Act; and
- (f) the person satisfies other criteria that may be set by the Steering Committee through issued circulars.

18. Disqualification of a bidder

The procuring entity may only disqualify a person from bidding for a public private partnership contract where the person submits false, inaccurate or incomplete information about his qualifications, or if the person colludes, connives or is involved in fraudulent, corrupt and other dishonest practices or contravenes the provisions of the Act or any relevant provisions of a written law in order to get unfair advantage in the award of the public private partnership contract.

19. Procurement procedure

The procurement procedure shall—

- (a) be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and
- (b) be for the period of not less than three months and not more than four months, unless otherwise approved by the Public Private Partnership Steering Committee, for preparation and submission of proposals from potential bidders.

20. Evaluation of bid proposals

(1) Evaluation of public private partnership bids shall be carried out by the procurement entity in accordance only with the procedures and criteria set out in the tender documents including any margin of preference provided in the tender documents in accordance with section 39 of the Act and regulation 28(2) of the Public Procurement and Disposal Regulations (L.N. 174/2006).

(2) The successful candidate shall be the bidder with the best ranked proposal based on evaluation carried out in accordance with the criteria set out in tender documents and relevant legislation provided for under paragraph (1).

(3) The evaluation shall be carried out within such period as is indicated in the tender documents, or if not indicated, a reasonable time as may be approved by the Steering Committee.

(4) After the evaluation of the bids, but prior to appointing the preferred bidder, the procuring entity shall prepare an evaluation report containing a summary of the evaluation criteria and how it was satisfied in the preferred bid in comparison to other bidders including any other relevant required information.

(5) The Steering Committee shall not be involved in the process of evaluating public private partnership bids in terms of this regulation.

21. Minimum contractual obligations

Each public partnership contract shall clearly provide minimum contractual provisions including but not limited to—

- (a) duration of the contract;
- (b) description of services, goods or works and where the facility has to be constructed, time periods within which key milestone activities should have been completed;
- (c) payment arrangement and basis in relation to service or goods and output levels;
- (d) relationship between the procuring entity and the service provider and a clear allocation of risks and responsibilities between the procuring entity and service provider;
- (e) assessment, allocation and mitigation of risks set out in the Second Schedule;
- (f) a set of monitoring and evaluation program based on quantified and measurable outputs;
- (g) a defined method of dispute resolution;
- (h) protection where appropriate of each party's intellectual property;
- (i) specific events that constitute default such as the failure of a public private partnership service provider to attain the contractually prescribed quality standards by the specified date;
- (j) the remedies that may be exercised in the event of a default, such as penalties or specified liquidated damages to compensate either party for imputed costs or damages suffered as a result of default; and
- (k) relevant governing law which in this case shall be the Kenyan law.

22. Contracting public private partnership agreements

(1) After the procurement procedure has been concluded but before the procuring entity concludes a public private partnership agreement the procurement entity shall obtain approval from the Steering Committee—

- (a) that the public private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfers;
- (b) for a management plan that explains the capacity of the procuring entity, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the public private partnership; and

[Subsidiary]

- (c) that a satisfactory due diligence including a due legal diligence has been completed in respect of the procuring entity and the proposed private party in relation to matters of their respective competence and capacity to enter into the public private partnership agreement.

(2) If the Steering Committee determines that a procuring entity lacks the necessary expertise to proceed with the procurement of a public private partnership agreement, it shall require that the procuring entity appoints a transaction advisor for this purpose.

23. Management of Public Private Partnership agreements

(1) The procuring entity that is a party to a public private partnership arrangement shall be responsible for ensuring that the Public Private Partnership arrangement is properly implemented by establishing public private partnership nodes to be headed by accounting officers or a senior officers who shall be appointed within the Ministry to—

- (a) measure the output of the public private partnership agreement;
- (b) monitor the implementation of the public private partnership agreement and the performances under the public private partnership agreement;
- (c) liaise with the private sector;
- (d) resolve disputes and differences within the private sector;
- (e) generally oversee the day-to-day management of the public private partnership agreement; and
- (f) report on the public private partnership agreement in the procurement entity's annual report;
- (g) carry out any other function assigned to it by procuring entity.

(2) A public private partnership agreement involving the performance of an institutional function does not divest the procuring entity of the responsibility for ensuring that its function is effectively and efficiently performed in the public interest or on behalf of public service.

(3) A public private partnership agreement involving the use of a public entity's property by the private party does not divest the procuring entity of the responsibility for ensuring that the procuring entity's property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

24. Publishing of information after conclusion of Public Private Partnership agreement

(1) Following the signing of the public private partnership agreement the procuring entity shall publish in at least one widely circulated national publication and posted on the website, if any, of the results of the public private partnership tender containing the following information—

- (a) name of the project;
- (b) winning bidder;
- (c) public private partnership price; and
- (d) duration of the public private partnership.

(2) The Steering Committee may prescribe a template to be used by the procuring entity when publishing the information under paragraph (1).

25. Amendment and variation of public private partnership agreements

(1) The prior written approval of the Steering Committee shall be required for any material amendments to a public private partnership agreement including any material variations to the outputs therein, or any waivers contemplated or provided for in the public private partnership agreement.

(2) The Steering Committee shall approve a material amendment only if it is satisfied that the Public Private Partnership agreement, if so amended, shall continue to provide—

- (a) value for money;
- (b) affordability;
- (c) substantial technical, operational and financial risk transfer to the private party; and
- (d) necessary service to the public.

26. Financial reporting

(1) In addition to reporting requirements under any applicable law, the private party shall, within six months after the end of financial year, submit annual financial statements duly audited by a reputable auditor and any other information as it may reasonably be required to the procuring entity.

(2) The Minister may prescribe financial standards for disclosure for the public private partnership's by procuring entity.

27. Auditing

All public private partnership programmes shall be audited annually in accordance with applicable law and standards.

28. Inspection of public private partnership premises etc.

The private party shall grant access to public private partnership premises, sites and storages as may be requested by the procuring entity for inspection in accordance with the public private partnership agreement.

29. Contract standardization

(1) The Steering Committee shall issue standard contracts for public private partnership's and guidelines to standardize practice across the public sector.

(2) Standard documents may be prepared for each sector activity such as, but not limited to, building and public works, medical services delivery, education services delivery, telecommunications and energy.

30. Unsolicited bids

(1) Procurement of unsolicited bids shall be authorized where—

- (a) innovative and related intellectual property associated with the proposed project's design and engineering costs incurred in developing the design has been considered and recognized; and
- (b) a feasibility study has been carried out and there is presently little interest in the private sector in the proposed project.

(2) The Minister shall issue detailed guidelines on the unsolicited bids under paragraph (1).

[Subsidiary]

FIRST SCHEDULE

[Rule 3(3).]

PUBLIC PRIVATE PARTNERSHIP PREPARATION AND APPROVAL STEPS

- (a) Project conceptualization, identification, prioritization, and pre-feasibility analysis by procuring entity promoting or sponsoring the project. Prior to preparation of the concept paper, the public sector agency is expected to conduct a systematic screening on all of their planned, priority infrastructure projects to determine which ones might better be delivered through public private partnership arrangements.
- Output: List of projects to be implemented through public private partnership framework and preliminary project concept and advise to the Steering Committee whether the procuring entity has required expertise to proceed with the public private partnership.
- (b) Approval of the preliminary concept by the Steering Committee; registration of public private partnership by the Screening Committee, advise by the Steering Committee to the procuring entity to procure advisory services if the procuring entity does not have the necessary expertise.

OutputApproved and registered list of public private partnership's and instructions to hire transaction advisors if this is considered necessary.

2. Carrying out of feasibility study. The activities should include feasibility analysis and proposed risk allocation structure. This should clearly outline the project's required output levels of services or goods, demand analysis, technical feasibility analysis, financial feasibility analysis, economic feasibility analysis, as well as preliminary environmental, legal, and institutional analysis. The procuring entity should also identify and analyse all material risks to public private partnership, and especially the important proposed risk allocation structure for the project as a public private partnership. It should also clearly outline the public private partnership concept including specific functions to be carried out by the private party and the procuring entity and any assets belonging to the procuring entity to be transferred to public private partnership.

Output: Clearly defined project concept, preliminary environmental and social impact analysis.

3. Submission by the procuring entity of the project concept and feasibility study to the Steering Committee and evaluation by the Secretariat.

Output: Well defined project proposals.

4. Consideration of the project concept and feasibility study including the risk sharing arrangements by the Steering Committee.

Output: Approval of the project concept including the risk sharing arrangements for public private partnership projects with an estimated value not exceeding US\$10 million and recommendations by the Public Private Partnership Steering Committee to the Minister for Finance and sector Minister for public private partnership project with estimated value exceeding US\$10 million. If project concept is not accepted, procuring entity will be given further guidance on any other work required to be done.

5. Submission to the Cabinet of Joint Cabinet Memorandum by the Minister responsible for the sector and the Minister for Finance for projects of US\$10 million and above.

Output: Signed Cabinet Memorandum and Cabinet approval or guidance.

6. Preparation of bid documents including the Request for pre qualifications (RfQ), the Request for proposals (RfP) and the proposed Public Private partnership contract.

Output: Bid documents.

- (a) Approval by the Steering Committee of the bid documents. Upon approval, authority will be granted to advertise for RfQ and or RfPs as necessary. Prequalified firms will be allowed to make comments on the RfPs. If there are any material changes to the RfPs and the proposed contract at this stage, further clearance will be required from the Secretariat. If the changes result in a material departure in the project concept and transaction structure from what had been approved by the Cabinet, Cabinet clearance will also be required.

Output: The Steering Committee approval for the bid documents; Short-listed bidders; final bid documents.

- (b) Request for Proposals, receipt of bids, evaluation of bids and submission of bid evaluation report to the Steering Committee for approval.

Output: The Steering Committee approval for the procuring entity to negotiate contract with the winning bidder (including approval of business plan).

8. Contract negotiation by the procuring entity.

Output: Negotiated contract.

9. Review of negotiated contract and granting of approval by the Steering Committee for the procuring entity to sign the approved public private partnership contract.

Output: Approved contract.

SECOND SCHEDULE

[Rule 21(e).]

MAJOR PUBLIC PRIVATE PARTNERSHIP RISKS

- (a) *Design risk:* The private party shall be responsible for designing the goods or services to meet a specified level. Contractually, this typically means that the private party accepts the design risk and must pay all redesign costs if the facility which does not meet the required performance standards.
- (b) *Construction risk:* The private party shall be required to construct a facility according to performance specifications and a time schedule. In the contract, this is often dealt with by letting the private party bear all costs of meeting specifications and schedules requirements.
- (c) *Site Risk:* The risk relates to underlying site conditions and soil contamination and results in clean up costs, addition construction costs or frustration of contract. The risk is borne by the procurement entity if it has provided the site or by the private party where such party has been responsible for obtaining the site.
- (d) *Operating risk:* The private party is allowed full control over operating costs, including staffing numbers and levels. Contractually, the private party shall be made responsible for all operating costs and shall be expected to absorb all increases except where such increased costs arise from discriminatory change in law or increase in tariffs and related taxes in regulated industries. The service provider shall bear all costs of meeting specifications and schedule requirements.
- (e) *Demand risk:* The private party's revenue depend on the willingness and ability of users to purchase its services or goods. Contractually, the private party shall be expected to identify and satisfy the demand for the services or goods. In situations where the Public Private Partnership does not sell directly to end users, the demand risk shall vest in the procuring entity.

[Subsidiary]

- (f) *Tariffs risk:* In regulated industries, payments for the goods or tariffs for the service are often set by the Government or the sector regulator. Contractually, the private party shall accept the tariffs may not be adjusted automatically and hence need to agree on measures to deal with situations such as tax increases that may affect the project's financial viability adversely.
 - (g) *Collection risk:* In some public private partnership's the private party collects tariff revenues without any collection rate guarantee from the Government, while in others, the private party sells to the procuring entity. In the first scenario, contractually, the private party shall bear all the risks for collecting revenues from users of the goods or services, while the collection risk in the other scenario shall rest with the procuring entity offtaker.
 - (h) *Credit risk:* The private party shall solely be responsible for paying its debt and the Government shall make no debt investment. The private party shall be responsible for its debt and debt service.
 - (i) *Force Majeure Risk:* Force majeure refers to events or circumstances that affects either party to the public private partnership and are not within the reasonable control (directly or indirectly) of the party affected, and which cannot be prevented, avoided or removed by such party acting in accordance with prudent operating practice such as acts of war, acts of God, epidemics, explosions, national wide labour disputes like strikes or lockouts and change in. Generally, if a party is prevented from or delayed in performing an obligation by reason of *force majeure* the affected party shall be relieved from the consequences of its failure to perform that obligation; and shall be allowed time extension.
 - (j) *Political Risk* including discriminatory change in law: Political risk include events or circumstances arising from an action or inaction of the government or any Governmental authority exercising authority over a party which adversely affect the public private partnership such as blockade, embargo, riots, discriminatory change in law, expropriation and non renewal or revocation of project licenses without default on the part of the private party. The political risks shall be best placed with the Government.
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**PUBLIC PROCUREMENT AND DISPOSAL (PREFERENCE
AND RESERVATIONS) REGULATIONS, 2011**

ARRANGEMENT OF REGULATIONS

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3. Application
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6. Registration of enterprises and groups
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8. Application by foreign contractors

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11. Exclusive preference
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13. Threshold for exclusive preference
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[Subsidiary]

- 33. Facilitation for financing of local purchase or service orders
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SCHEDULES

FIRST SCHEDULE —

APPLICATION FORM FOR SMALL, MICRO
ENTERPRISES AND DISADVANTAGED
GROUP TO SUPPLY GOODS, WORKS AND
SERVICES TO PROCURING ENTITIES

SECOND SCHEDULE —

TENDER-SECURING DECLARATION FORM

**PUBLIC PROCUREMENT AND DISPOSAL (PREFERENCE
AND RESERVATIONS) REGULATIONS, 2011**

[L.N. 58/2011, L.N. 114/2013, L.N. 210/2013.]

PART I – PRELIMINARY**1. Citation**

These Regulations may be cited as the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

2. Interpretation

In these Regulations, unless the context otherwise requires—

“**Constituency Development Fund**” shall have the meaning assigned to it under the Constituencies Development Fund Act, 2003 (No. 10 of 2003);

“**disadvantaged group**” means persons perceived to be denied, by mainstream society access to resources and tools which 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 without regard to their individual qualities, and includes enterprises owned by women, the youth and persons with disabilities;

“**disability**” shall have the meaning assigned to it under the Persons with Disabilities Act, 2003 (No. 14 of 2003);

“**furniture**” includes screens, fixed bench couches, garden furniture, wardrobes and light furniture;

“**Local Authorities Transfer Fund**” shall have the meaning assigned to it under the Local Authorities Transfer Fund Act, 1998 (No. 8 of 1998);

“**local preference**” means the right or opportunity to select a person from an identified target group that is considered more desirable than another in a constituency, local authority or county;

“**micro enterprises**” means a business undertaking with an initial—

- (a) staff establishment of not more than ten employees; and
- (b) annual turnover or investment not exceeding Kenya Shillings five hundred thousand;

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

“**region**” means a location designated by the Minister within which defined tenderers enjoy certain preferences and reservations;

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

“**small enterprises**” means a business undertaking with an initial—

- (a) staff establishment of not less than eleven and not more than fifty employees; and
- (b) annual turnover or investment not exceeding five million Kenya Shillings;

[Subsidiary]

“**target group**” means designated tenderers identified/by the Minister to benefit from the preference and reservations schemes;

“**youth**” means persons who have attained the age of eighteen years but have not attained the age of thirty-five years.

[L.N. 114/2013, r. 2]

3. Application

These Regulations shall apply to procurements by public entities when soliciting tenders from the following target groups—

- (a) small enterprises;
- (b) micro enterprises;
- (c) disadvantaged groups;
- (d) citizen contractors;
- (e) local contractors; or
- (f) citizen contractors in joint-venture or subcontracting arrangements with foreign suppliers.

4. Purpose of the Regulations

The purpose of these Regulations is to promote local, national and regional industry and support socioeconomic development by defining—

- (a) the target group and eligibility requirements for benefitting from the preference and reservations schemes;
- (b) the percentage margin of the preference, where applicable;
- (c) the goods, works and services set aside or reserved for specified target groups;
- (d) the regions within which to apply the scheme; and
- (e) the means of measuring its effectiveness in achieving the objectives.

PART II – QUALIFICATION OF TARGET GROUPS

5. Eligibility criteria

(1) A person shall be qualified to benefit from the preference and reservations schemes if the person—

- (a) has the necessary qualifications, capability, experience, and, where appropriate, resources, equipment and facilities to provide the goods or services intended to be procured;
- (b) has the legal capacity to enter into a contract for the procurement;
- (c) is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) is among the persons with whom the procuring entity may enter into a contract, not being precluded from doing so under section 33 of the Act;
- (e) is not debarred from participating in procurement proceedings under Part IX of the Act; and
- (f) is registered by the Ministry of Finance under regulation 6.

- (2) A person shall not be qualified to benefit from preference and reservation scheme—
- (a) as a contracting firm, unless that person is qualified as a local contractor or a citizen contractor; or
 - (b) as a, micro enterprise or an enterprise owner by a disadvantaged group unless the person is registered by the Ministry of finance as such upon application.

6. Registration of enterprises and groups

(1) Small or micro enterprise or a disadvantaged group wishing to participate in public procurement shall apply for registration with the National Treasury or the respective county treasury with which they operate and are located in the form set out in the First Schedule to these Regulations.

(2) All lists of registered enterprises from the national and county levels shall be submitted to the Authority for consolidation and publication.

[L.N. 114/2013, r. 3.]

7. Qualifications of contractors

A firm shall be qualified as—

- (a) a local contractor, if it is registered in Kenya; or
- (b) a citizen contractor, if its owners and shareholders are Kenyan citizens.

8. Application by foreign contractors

Notwithstanding the foregoing, a foreign contractor may apply benefit from the preference and reservation scheme where it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a local contractor, where the local contractor has a majority share.

PART III – ADMINISTRATION OF PREFERENCE AND RESERVATION SCHEMES

9. Regions where schemes apply

For purposes of section 39(4)(c) of the Act the regions preference and reservations schemes is applied shall be—

- (a) constituencies;
- (b) counties; and
- (c) local authorities.

10. Local preference

Local preference and reservations shall be applicable in the constituencies, local authorities and counties where citizen contractors are based and operate.

11. Exclusive preference

Local contractors who are based and operate in the regions specified in Regulation 10 shall be given exclusive preference when participating in procurements using funds from the Constituency Development Fund and the Local Authority Transfer Fund, except where it is established that local capacity is not available.

12. National Reservations

For purposes of section 39(4)(d) of the Act, public entities shall grant exclusive preference to local contractors offering—

- (a) motor vehicles, plant and equipment that are assembled in Kenya;

[Subsidiary]

- (b) construction material and other material used in the transmission and conduction of electricity of which such material is made in Kenya;
- (c) furniture, textiles, foodstuffs and other goods made or locally available in Kenya.

[L.N. 114/2013, r. 4.]

13. Threshold for exclusive preference

For the purposes of section 39(8)(a)(ii) of the Act, the threshold below which exclusive preference shall be given to citizen contractors, shall be the sum of—

- (a) one billion shillings for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya;
- (b) five hundred million shillings for procurements in respect of other works;
- (c) one hundred million shillings for procurements in respect of goods; and
- (d) fifty million shillings for procurements in respect of services.

[L.N. 114/2013, r. 5.]

14. National preference

For the purposes of section 39(8)(b)(i) of the Act, a fifteen percent margin of preference in the evaluated price of the tender shall be given to candidates offering goods manufactured, mined, extracted or grown in Kenya.

15. Margin of preference

For the purposes of section 39(8)(b)(ii) of the Act, the margin of preference shall be—

- (a) six per cent of the evaluated price of the tender, where percentage of shareholding of the Kenyan citizens is less than twenty per cent;
- (b) eight per cent of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty-one per cent but above twenty percent; and
- (c) ten per cent of the evaluated price of the tender, where the percentage of shareholding of the Kenyan citizens is more than fifty per cent.

16. Preference for joint-ventures with citizens contractors

Where citizen contractors have entered into contractual arrangements with foreign contractors pursuant to regulation 8, a ten percent margin of preference in the evaluated price of the tender shall be applied.

PART IV – GENERAL PRINCIPLES

17. Single preferences

A candidate shall be entitled to tender for one preference and reservation scheme at a time in a procurement proceeding.

18. More than one preference

Where a candidate is entitled to more than one preference scheme, the scheme with the highest advantage to the tenderer shall be applied.

19. Unbundling of procurements

(1) For the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small and micro-enterprises in public procurement, procuring entities may unbundle goods works and services in practicable quantities pursuant to section 31(7) of the Act.

(2) For greater certainty, a procuring entity in unbundling procurements in paragraph (1), may be lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings.

[L.N. 114/2013, r. 6.]

20. Preference to disadvantaged groups

For greater certainty, unbundled procurement proceedings shall be restricted to disadvantaged groups, small and micro-enterprises.

21. Tender security

(1) No tender securities shall be required from small and micro enterprises or enterprises owned by disadvantaged groups participating in procurement proceedings.

(2) Notwithstanding paragraph (1), target groups all be required to complete and sign the Tender Securing Declaration Form set out in the Second Schedule.

(3) Any bidder from the target group who fails to adhere to the terms of the Tender Securing Declaration Form shall be liable to debarment pursuant to section 115 of the Act.

22. Term limit

An enterprise registered by the Authority in a Term limit. target group benefitting from the preference and reservation schemes shall be entitled to such benefits for a period of five years, which may be renewed once.

23. Open tender advertisement

An advertisement relating to open tender under these Regulations shall state that such tender is open to small and micro enterprises and to disadvantaged groups registered with the Ministry of Finance.

24. Procurement to be competitive

Procurement of goods, works and services under these Regulations shall be conducted on competitive procedure among the qualified target groups pursuant to regulation 6.

25. Framework contracts with target groups

Procuring entities shall make use of existing framework contracts with disadvantaged groups, small and micro enterprises wherever appropriate to provide an efficient, cost effective and flexible means to procure goods, works and services that are required repeatedly or continuously over a set period of time.

PART V – MONITORING OF COMPLIANCE**26. Monitoring and evaluation**

Application of the preference and reservations schemes by procuring entities shall be monitored by the Authority.

27. Authority to maintain register

The Authority shall maintain and update a register of all small and micro enterprises and disadvantaged groups qualified to benefit from the scheme and post it in its website or dedicated portal.

28. Integration of preference and reservations schemes

Procuring entities shall integrate preference and reservations schemes in their procurement plans.

29. Procurement plan

A procuring entity shall 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.

30. Report to the Authority

All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported to the Authority on a quarterly basis.

31. Budgetary Reservations

(1) A procuring entity shall allocate at least thirty percent of its procurement spend for purposes of procuring goods, works or services from enterprises owned by youth, women and persons with disability.

(2) For the purpose of implementing paragraph (1), a procuring entity shall implement the requirement through its budgets, procurement plans, tender notices, contract awards and submit quarterly reports to the Authority.

[L.N. 114/2013, r. 7, L.N. 210/2013, r. 2.]

32. Qualification for preference and reservation schemes

For the purpose of benefiting from preference and reservations schemes, an enterprise owned by youth, women or persons with disabilities shall be a legal entity that—

- (a) is registered with the relevant government body; and
- (b) has at least seventy per cent membership of youth, women or persons with disabilities and the leadership shall be one hundred per cent youth, women and persons with disability, respectively.

[L.N. 114/2013, r. 7.]

33. Facilitation for financing of local purchase or service orders

A procuring entity shall facilitate financing of enterprises owned by youth, women or persons with disabilities that have been awarded contracts, by authenticating their notifications of tender awards and local purchase or service orders and subsequently entering into an agreement with the relevant financing institution with conditions that shall include paying the contracted enterprise through their account opened with the financier.

[L.N. 114/2013, r. 7.]

34. Prompt payments for performed contracts

(1) For the purpose of ensuring sustained growth for enterprises owned by youth, women or persons with disabilities, procuring entities shall make prompt payments for all performed contracts through electronic media where possible and shall not delay beyond thirty days.

(2) Where delay is inevitable, a procuring entity shall make at least fifty per cent part-payment and shall give a written explanation for the delay to the enterprises referred to in paragraph (1).

(3) Where delay of payments for works performed are likely to happen, a procuring entity may facilitate invoice discounting arrangements with a financial institution for the purpose of advancing credit to the affected enterprises stated in paragraph (1).

[L.N. 114/2013, r. 7.]

35. Sourcing supplies to citizen contractors by international tenders

For the purpose of ensuring sustainable promotion of local industry, 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 per cent of their supplies from citizen contractors prior to submitting a tender.

[L.N. 114/2013, r. 7.]

FIRST SCHEDULE

[Regulation 6.]

APPLICATION FORM FOR ENTERPRISES OWNED BY YOUTH, WOMEN,
OR PERSONS WITH DISABILITY AND SMALL, MICRO ENTERPRISES
TO SUPPLY GOODS, WORKS OR SERVICES TO PROCURING ENTITIES

[Subsidiary]

The registration of suppliers is aimed at building a profile for each supplier regarding information on general particulars of the company. You are advised that it is a serious offence to give false information on this form.

ART I: DETAILS OF THE APPLICANT

Name of Applicant:

Physical Address:

Postal Address:

Postal Code:

E-mail:

Phone No.:

Fax No.:

Contact Person:

Overview of the Enterprise

Type of ownership (please tick one)	Sole Proprietor	Partnership Limited Company	Others Specify
Number of employees	[0-5]	[6-25]	[26-49] [50-59] [100-250]
Total Investments (KES)			
Total Annual Sales (Turnover KES)			
Experience in the sector in years			
Type of Ownership Details			

FIRST SCHEDULE—*continued*

Part 12(2)(a) – Sole Proprietor
Name in Full
Identity/Passport No. Age Sex
Date of incorporation/registration
Certificate of Incorporation/Registration No.

Part 12(2)(b) – Partnership Details					
No.	Name	Gender	Nationality	ID/Passport No.	% Shares

Part 12(2)(c) – Registered Company					
State the nominal and issued capital of company					
Nominal KES.			Issued KES.		
Date of Incorporation					
Certificate of Incorporation No.					
Director's Details					
No.	Name	Gender	Nationality	ID/Passport No.	% Shares

13. Target Groups

(Fill only one table relevant to your target group i.e. (1) or (2). Cancel inapplicable table)

Part 13(1) – Small and Micro Enterprises (SMEs)		
Parameter	Range	Target Group (Please tick one as appropriate)
Number of employees	0 – 10	(Micro)
	11 – 50	(Small)
Initial Investments/Total Annual Sales (Turnover) (KES)	0 – 500,000	(Micro)
	500,000 – 5,000,000	(Small)

[Subsidiary]

FIRST SCHEDULE—*continued*

Part 13(2) – Disadvantaged Group such as enterprises owned by Youth, Women or Persons with Disability (NB: the thresholds for SMEs on Number of employees, Initial Investments or Total Annual Sales (Turnover) are not applicable to these disadvantaged groups)		
	Target Group	(Please tick one as appropriate)
Category of Disadvantaged Group	Youth	
	Women	
	Persons with disability	

14. Bank Account Name:

15. Branch of the Bank:

16. Bank Account Number:

17. Bank SWIFT Code

18. VAT Registration Number:

19. PIN Number

20. Type of business: (tick as appropriate)

CATEGORY OF BUSINESS	DETAILS
GOODS	Stationery, Computer Accessories, Furniture, Agricultural commodities, foods stuffs, Supply of medicines, etc.
SERVICES	Conference and accommodation, Transport, Consulting, Web design, cleaning services, software development, etc.
WORKS	County roads, Building markets, Construction of dams/shallow wells, Water supply and sanitation, etc.

21. Prepared by (full name in capital letters):

Title:

Signature: Date:

PART II: LIST OF ATTACHMENTS

The following attachments are essential for appraisal and you are required to ensure that they are all attached, failure to which your application may be rejected:

1. Copy of certificate of incorporation/registration;
2. Tax PIN Certificate;
3. Valid Tax Compliance Certificate;
4. Original Bank Statement/Bank reference of not more than six months old from date of applying;
5. Copy of certificate of registration with relevant regulatory bodies;
6. Business/Company profile;
7. Evidence of having paid the non-refundable fee for the Application Form;
8. Copies of Annual Return Forms, filed by Limited Companies, the Business Names for business names (sole trader and partnerships), and a stamped receipt which bears the Accounts Stamp from the Registrar of Companies/Societies; and
9. Annual Return Status Report from Registration Office.

SECOND SCHEDULE

[Rule 22.]

TENDER-SECURING DECLARATION FORM

TENDER-SECURING DECLARATION FORM

[The Bidder shall fill in this Form in accordance with the instructions indicated.]

Date: [insert date (as day, month and year) of Tender Submission]

Tender No. [insert number of tendering process]

To: [insert complete name of Tenderer]

We, the undersigned, declare that:

1. We understand that, according to your conditions, tenders must be supported by a Tender-Securing Declaration.
2. We accept that we will automatically be suspended from being eligible for tendering in any public procurement proceeding for the period of time of not less than five years, if we are in breach of our obligation(s) under the tender conditions, because we:
 - (a) have withdrawn our Tender during the period of tender validity specified by us in the Tender Data Sheet; or
 - (b) having been notified of the acceptance of our Tender by the Procuring Entity during the period of bid validity,
 - (i) fail or refuse to execute the resultant Contract, if required; or
 - (ii) fail or refuse to furnish the Performance Security, in accordance with the Instructions To Tenderers.
3. We understand this Tender Securing Declaration shall expire if we are not the successful Tenderer, upon thirty days after the expiration of our Tender validity period.
4. We understand that if we are a Joint Venture, the Tender Securing Declaration must be in the name of the Joint Venture that submits the bid. If the Joint Venture has not been legally constituted at the time of bidding, the Tender Securing Declaration shall be in the names of all future partners as named in the letter of intent.

Signed: [insert signature of person whose name and capacity are shown] in the capacity of [insert legal capacity of person signing the Tender Securing Declaration]

Name: [insert complete name of person signing the Tender Securing Declaration]

Duly authorized to sign the tender for and on behalf of: [insert complete name of Tenderer]

Dated on the day of [insert date of signing]

[Subsidiary]

**PUBLIC PROCUREMENT AND DISPOSAL
(COUNTY GOVERNMENTS) REGULATIONS, 2013**

ARRANGEMENT OF REGULATIONS

1. Citation.
2. Interpretation.
3. Application
4. Purpose of the Regulations
5. County public entities
6. Corporate decisions, segregation of responsibilities and threshold matrix
7. Establishment of Committees.
8. Composition of tender committees.
9. Responsibilities of County Accounting Officers.
10. Compliance.
11. County preference and reservations.
12. Transfer of procurement and contractual records and responsibilities.
13. Termination of procurement and disposal proceedings.
14. Deployment of supply chain management staff.

SCHEDULE

—

TENDER COMMITTEES AND THEIR COMPOSITION

PUBLIC PROCUREMENT AND DISPOSAL (COUNTY GOVERNMENTS) REGULATIONS, 2013

[L.N. 60/2013.]

1. Citation

These Regulations may be cited as the Public Procurement and Disposal (County Governments) Regulations, 2013.

2. Interpretation

In these Regulations, unless the context otherwise requires—

“Act” means the Public Procurement and Disposal Act, 2005 (Cap. 412A);

“Authority” means the Public Procurement Oversight Authority established under section 8 of the Public Procurement and Disposal Act, 2005, (Cap. 412A);

“city” means an area conferred with the status of a city under section 8 of the Urban Areas and Cities Act, 2011 (No. 13 of 2011);

“county assembly” means a county assembly established under Article 176 of the Constitution;

“county government” means the county government provided for under Article 176 of the Constitution;

“County executive committee” means the county executive committee provided for under Article 179 of the Constitution;

“county government entities” means entities under a county government which include county corporations and institutions as may be determined to be county government entities by the county executive committee;

“county procuring entity” means a public entity within the county making a procurement as provided for in the Act;

“Directorate of Supply Chain Management Services” means the public procurement and asset disposal policy department of the National Treasury;

“institute” means Kenya Institute of Supplies Management established under section 3 of the Supplies Practitioners Management Act, 2007 (No. 17 of 2007);

“local preference” means the right or opportunity to select a person from an identified target group that is considered more desirable than another in a constituency, city, urban area or county;

“National Treasury” means the national treasury established under section 11 of the Public Finance Management Act, 2012 (No. 18 of 2012);

“micro enterprises” means a business undertaking with an initial—

- (a) staff establishment of not more than ten employees; and
- (b) annual turnover or investment not exceeding five hundred thousand shillings;

[Subsidiary]

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

“**reservations**” means setting aside goods, works, or services to a defined target group in a county within a specified threshold;

“**Review Board**” means the Public Procurement Administrative Review Board established under section 25 of the Public Procurement and Disposal Act 2005 (Cap. 412A);

“**service delivery co-ordination unit**” means the unit established under section 14 of the National Government Co-ordination Act 2013 (No. 1 of 2013) for the purpose of co-ordinating national government functions at county level;

“**small enterprises**” means a business undertaking with an initial—

- (a) staff establishment of not less than eleven and not more than fifty employees; and
- (b) annual turnover or investment not exceeding five million shillings; and

“**urban area**” means an area designated as such under the Urban Areas and Cities Act, 2011 (No. 13 of 2011) as contemplated in Article 184 of the Constitution.

3. Application

These Regulations shall be applicable to procurements and asset disposals by public entities within a county.

4. Purpose of the Regulations

The purpose of these Regulations is to operationalise the application of the Public Procurement and Disposal Act, 2005 (Cap. 412A) in the county governments, promote local industry and support socio-economic development in the counties.

5. County public entities

For the purpose of section 3(1) (k) and 3(2) of the Act, public entities within a county shall include—

- (a) county government, or entity of the county government;
- (b) county assembly;
- (c) city;
- (d) urban area; or
- (e) county service delivery co-ordinating unit.

6. Corporate decisions, segregation of responsibilities and threshold matrix

(1) A county procuring entity shall independently as a devolved unit be responsible for all its procurement and asset disposal decisions and shall ensure that they are made in a systematic, corporate and structured manner.

(2) All procurement shall be handled by different officers in respect of procurement initiation, processing and receipt of goods, works or services as set forth in the Threshold Matrix of the First Schedule of the Public Procurement and Disposal Regulations, 2006 (L.N. 174/2006).

7. Establishment of Committees

(1) For the purpose of ensuring that procurement and asset disposal decisions are made in a systematic, corporate and structured manner, a county procuring entity shall establish the following standing committees from within its members of staff—

- (a) tender committees specified in the Schedule to these Regulations;
- (b) disposal committee; and
- (c) such other bodies as prescribed under the Act.

(2) For greater certainty, a county procuring entity shall establish the following *ad hoc* committees—

- (a) tender opening committee;
- (b) tender evaluation committee;
- (c) negotiation committee; and
- (d) inspection and acceptance committee.

(3) Where a county public entity lacks capacity to comply with paragraph (2), the accounting officer shall seek advice from the Authority.

8. Composition of tender committees

(1) The membership of the tender committees shall be as set out in the Schedule.

(2) The accounting officer shall inform the Authority on the composition of the county public entity's tender committee and respective alternates within fourteen days from the date of appointment in a format as prescribed under these Regulations.

(3) The accounting officer or head of the procuring entity shall appoint an alternate member for each member of the county and designated tender committee and only the alternate shall attend any meeting of the county and designated tender committee whenever the member is unable to attend.

9. Responsibilities of County Accounting Officers

In addition to the responsibilities set out under section 27(2) the Act, a County Accounting Officer shall—

- (a) establish procuring entities within the counties;
- (b) establish a county tender committee which may be classified under threshold matrix A; and
- (c) establish designated tender committees which may be classified under thresholds matrix A, B or C as set out in the Public Procurement and Disposal Regulations, 2006 (L.N. 174/2006).

10. Compliance

A county procuring entity shall ensure that it complies with the provisions of the Act, all the Public Procurement and Disposal Regulations, 2006 (L.N. 174/2006) these Regulations, the directions of the Authority and the Administrative Review Board in respect of its procurement and disposal activities.

11. County preference and reservations.

County governments shall apply preference and reservations to small and micro enterprises and other disadvantaged groups that are located and operate within the counties as specified in the Public Procurement (Preference and Reservations) Regulations (L.N. 58 of 2011).

[Subsidiary]

12. Transfer of procurement and contractual records and responsibilities

All existing procurement and contractual records and responsibilities by—

Cap. 265.

- (a) local authorities under the repealed Local Government Act (Cap. 265); or
- (b) district commissioners under the Districts and Provinces Act (No. 5 of 1992)

shall be transferred to the respective county service delivery coordinating unit.

13. Termination of procurement and disposal proceedings

(1) Any procurement and disposal proceedings commenced but not finalized by any local authority, district, any health unit other than a referral hospital, the roads development fund, or any constituency development fund committee, before the coming into operation of these Regulations are terminated.

(2) For the purposes of this regulation, a procurement and disposal proceeding is finalized when a contract has been entered into between the parties in accordance with section 67 and 68 of the Act.

14. Deployment of supply chain management staff

Any procurement officer or supply chain management staff currently employed by the Public Service Commission and who is currently deployed in a local authority, district, a health unit other than a referral hospital, the roads development fund, or any constituency development fund committee shall report to the Interim County Head of Supply Chain Management for deployment upon commencement of these Regulations.

SCHEDULE

TENDER COMMITTEES AND THEIR COMPOSITION

(Regulation 7(1)(a) and 8(1))

TENDER COMMITTEES AND THEIR COMPOSITION

1. County Government Tender Committee

An officer appointed in writing by the Secretary of the county;	Chairperson
County Chief Officer (head of department) appointed in writing by the chief secretary of the county;	Deputy Chairperson
Five county chief officers (heads of departments) appointed in writing by the chief secretary of the county; and	Members
The procurement professional heading the procurement unit of the county Government.	Secretary

2. County Government Entities Tender Committee

An officer appointed in writing by the accounting officer of the county government entity;	Chairperson
County government entity chief officer (head of department) appointed in writing by the accounting officer;	Deputy Chairperson
Five county government entity chief officers (heads of departments) appointed in writing by the accounting officer; and	Members
The procurement professional heading the procurement unit of the county government entity.	Secretary

3. County Assembly Tender Committee

An officer appointed in writing by the county assembly clerk;	Chairperson
Head of department of the county assembly appointed in writing by the county assembly clerk;	Deputy Chairperson

Five heads of departments appointed in writing by the county assembly clerk; Members
The procurement professional heading the procurement unit of the county Secretary
assembly.

4. City Tender Committee

An officer appointed in writing by the city manager; Chairperson
Head of department of the city appointed in writing by the city manager; Deputy
Chairperson
Five heads of departments appointed in writing by the city manager; and Members
The procurement professional heading the procurement unit of the city. Secretary

5. Urban Area Tender Committee

An officer appointed in writing by the municipal or town manager; Chairperson
Head of department of the urban area appointed in writing by the municipal or Deputy
town manager; Chairperson
Five heads of departments appointed in writing by the municipal or town Members
manager;
The procurement professional heading the procurement unit of the urban Secretary
area.

6. County Service Delivery Co-ordinating Unit Tender Committee

An officer appointed in writing by the county commissioner; Chairperson
Head of department of the service delivery co-ordinating unit of the county Deputy
appointed in writing by the county commissioner; Chairperson
Five heads of departments appointed in writing by the county commissioner; and Members
The procurement professional heading the procurement unit of the service delivery co-ordinating unit of the county. Secretary