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THE PROMPT PAYMENT BILL, 2021**A Bill for**

AN ACT of Parliament to provide for prompt payment for the supply of goods, works or services; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I – PRELIMINARY

1. This Act may be cited as the Prompt Payment Act, 2021.

Short title.

2. In this Act —

Interpretation.

“accounting officer” means —

(a) an accounting officer of a national government entity referred to in section 67 of the Public Finance Management Act;

No. 18 of 2012.

(b) an accounting officer of a county government entity referred to in section 148 of the Public Finance Management Act;

No. 18 of 2012.

(c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or

(d) in the case of the Parliamentary Service Commission, the Clerk of the Senate in respect of the Senate and the Clerk of the National Assembly in respect of the National Assembly;

“amount due” means the principal sum owing based on a commercial transaction, including the applicable taxes, duties, levies or charges specified in the invoice, or provided for in the contract and relating to the said transaction;

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

“commercial transaction” means a transaction between a supplier and a purchaser for the supply of goods, works or services;

“interest” means the prevailing central bank interest rate provided for under section 6 of this Act;

“invoice” means a written document, including an electronic document, provided by a supplier requesting for payment for the supply of goods, works or services to or on the directions of a purchaser;

“micro and small enterprise” means a micro and small enterprise registered under section 4 of the Micro and Small Enterprises Act;

“prescribed payment date” means in relation to a commercial contract —

- (a) the date on which payment is due under the terms of any written contract for the supply of goods, works or services, or
- (b) where there is no written contract or the written contract does not provide for the date of payment, ninety days after —
 - (i) receipt by the purchaser of an invoice for the amount due, where the invoice is received after the completion of works or completed delivery of the goods or provision services;
 - (ii) the completion of works, delivery of the goods or provision of services, where the completion or delivery is made at the time of or after receipt by the purchaser of an invoice; or
 - (iii) such lesser number of days as the Cabinet Secretary may, by notice in the *Gazette* under section 10(2), prescribe;

No. 33 of 2015.

"procuring entity" means a public entity making a procurement to which the Public Procurement and Asset Disposal Act applies;

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

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

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

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

3. This Act shall apply to payment due for all goods, works, and services procured by the national government, county governments and private entities.

Application of the Act.

4. (1) A procuring entity shall pay a supplier by the prescribed payment date.

Prompt payment of accounts.

(2) A procuring entity who fails to pay a supplier by the prescribed payment date shall, unless otherwise agreed to and subject to sections 5 and 6, pay an interest to the supplier in accordance with this section on the amount due under the contract for the supply of goods, works, or services.

(3) A procuring entity shall pay an interest under this Act for the period beginning on the day after the prescribed payment date and ending on the date on which the payment of the amount due is made.

(4) For purposes of subsection (3), payment shall be taken to have been made when —

- (a) the amount due is received by the supplier;
- (b) the amount due is credited by, on behalf of, or at the direction of, the procuring entity to an account nominated by the supplier; or
- (c) the supplier is put in a position by the procuring entity to be able, by the supplier’s own actions, to credit the amount due to such an account.

(5) An interest shall not be waived by the supplier, and shall be included with the amount due for the supply of goods, works or services without demand for its payment being made by the supplier.

5. (1) Notwithstanding the provisions of section 4, a procuring entity shall ensure that priority is given to the payment of any outstanding debts for the supply of goods and services to the procuring entity.

Priority payments.

(2) In determining which debts shall be given priority under subsection (1), a procuring entity shall have regard to the dates upon which payment fell due and shall pay debts on the basis of first-in, first-out.

6. (1) A procuring entity who disputes an invoice may, within fourteen days of receipt of the invoice –

Return of invoice.

- (a) return the invoice to the supplier; and
- (b) identify in writing any defects in the invoice and require the supplier to correct the defects.

(2) Where a procuring entity returns an invoice under subsection (1), the procuring entity shall pay the supplier at least fifty percent of the amount due or as the procuring entity and the supplier may agree.

(3) A supplier who receives an invoice from a procuring entity under subsection (1) shall, within fourteen days, deliver a corrected invoice to the procuring entity.

(4) Interest shall accrue upon the expiration of fourteen days after the receipt by the procuring entity of a corrected invoice or after the prescribed payment date, whichever is the later.

7. (1) Where a supplier has fulfilled all contractual and legal obligations relating to the supply of goods, services or works and a procuring entity fails to pay for the goods, works, or services by the prescribed payment date the procuring entity shall pay to the supplier interest on the amount due under the relevant contract.

Interest.

(2) The maximum interest rate chargeable under subsection (1) shall be based on the base rate set and published by the Central Bank of Kenya.

8. A supplier and a procuring entity shall, at all times, deal with each other fairly and lawfully.

Fair dealing

9. (1) A person who wishes to enter into a contract for the supply of goods, works or services with a national or county government entity shall make a declaration to the

Declaration of pending payments.

accounting officer of the entity on any pending payments owed to a small or micro enterprise.

(2) A declaration under subsection (1) shall be made in writing and shall include-

- (a) details on when the outstanding payment fell due;
- (b) reasons for the delay in payment; and
- (c) any agreements entered into between the supplier and the procuring entity for the settlement of the outstanding payment.

10. Where a supplier has delivered an invoice to the procuring entity and the accounting officer of the procuring entity negligently, maliciously or without reasonable cause fails to —

Offences.

- (a) return the invoice as provided for under section 5 of this Act; or
- (b) pay the amount due by the prescribed payment date or the interest,

commits an offence and is be liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.

11. (1) The Cabinet Secretary shall, within one year of coming into force of this Act, make regulations for the better carrying into effect of any provisions of this Act.

Regulations.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary may make regulations to provide for —

- (a) the prescribed payment date that is earlier than the ninety days prescribed in the definition of the word “prescribed payment date” in section 2 of this Act;
- (b) any fee which may be charged for anything done under this Act; and
- (c) any other matters as may be necessary for the promotion of the objects this Act.

(3) For the purpose of Article 94(6) of the Constitution

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- (a) the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect the provisions of this Act
 - (b) the authority of the Cabinet Secretary to make regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;
 - (c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act.

Cap. 2.
No. 23 of 2013.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to put in place a legal framework to facilitate prompt payment for supply of goods, works and services procured by government entities both at the national and county level.

Clauses 1 to 3 of the Bill provide for the title of the Bill, interpretation of various terms used and application of the law. The Act shall apply to all procurement transactions by the national government and the county governments.

Clauses 4 to 6 of the Bill provide for processing of payment. The Bill requires that a procuring entity shall pay for the goods, works or services provided by the prescribed payment date. Failure to pay amount due within the stipulated time, a procuring entity shall be liable to pay an interest calculated on the basis of the Central Bank base rates.

Clause 8 of the Bill provide for offences. An accounting officer who, without reasonable cause or negligently fails to pay the amount due commits an offence and shall be liable to pay a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both fine and imprisonment.

Clauses 7 and 9 on the other hand provide for the requirement for the procuring entity and the supplier to deal with each other fairly and lawfully, and the power to make regulations by the Cabinet Secretary.

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

Clause 9 of the Bill delegates legislative powers to the Cabinet Secretary to make regulations generally for the better carrying into effect of any provisions of this Act. However, the Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Fourth Schedule to the Constitution provides for the functional areas of both the county governments and the national government. In the performance of these functions and exercise of powers, a county government may procure goods, works or services. This Bill seeks to put in place a legal framework to fast-track the payment for works, goods or services procured. The Bill therefore concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Constitution.

The Bill is therefore a Bill concerning county governments in terms of Article 110(1)(a) of the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 11th January, 2021.

FARHIYA HAJI,
Senator.

JOHNSON SAKAJA,
Senator.