REPUBLIC OF KENYA

Rt. Hon. Speaker
You may approve for tabling.
09/09/20

HARAMBEE

PARLIAMENT

THE SENATE

TWELFTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON FINANCE AND BUDGET

ON

THE PROMPT PAYMENT BILL (SENATE BILLS NO. 3 OF 2020)

CLERK CHAMBERS
THE SENATE
PARLIAMENT OF KENYA
<u>NAIROBI</u>

SEPTEMBER 2020

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PREFACE

Mandate and Functions of the Committee

Article 124 of the Constitution of Kenya, provides for the establishment of Committees by either House of Parliament. Committees are central to the workings, roles and functions of Parliament as set out in Article 94 and more specifically in Article 96 of the Constitution as regards the Senate.

Parliamentary Committees consider policy issues, scrutinize the workings and expenditure of the national and county governments and examine proposals for legislation. The end result of any process in Committees is the report, which is tabled in the House for consideration.

The Standing Committee on Finance and Budget is established pursuant to Standing Order 218(3) of the Senate *Standing Order and is mandated –*

a) *To investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to examine –*
   1. *the Budget Policy Statement presented to the Senate;*
   2. *report on the Budget allocated to Constitutional Commissions and independent offices;*
   3. *the Division of Revenue Bill, County Allocation of Revenue Bill, and cash disbursement schedule for county governments.*
   4. *to consider all matters related to resolutions and Bills for appropriations, share of national revenue amongst the counties and all matters concerning the National Budget, including public finance and monetary policies and public debt, planning and development policy; and*

b) *To pursuant to Article 228 (6) of the Constitution, to examine the report of the Controller of Budget on the implementation of the budgets of county governments.*

Membership of the Committee

The Standing Committee on Finance and Budget was constituted by the House on Thursday 14th December, 2017 during the First Session of the Twelfth Parliament. The Committee was later reconstituted on Wednesday, 24th June, 2020, during the Fourth Session of the Twelfth (12th) Parliament. The Committee as currently constituted, comprises the following Members-

1.	Sen. Charles Kibiru, M.P.	- Chairperson
2.	Sen. (Dr.) Ochillo Ayacko, MP	- Vice Chairperson
3.	Sen. Wetang'ula Moses Masika, EGH, MP	- Member
4.	Sen. Mutula Kilonzo Junior, MP	- Member
5.	Sen. Aaron Cheruiyot, MP	- Member
6.	Sen. Kimani Wamatangi, MP	- Member
7.	Sen. (Dr.) Rose Nyamunga, MP	- Member
8.	Sen. CPA Farhiya Haji, MP	- Member
9.	Sen. Milicent Omanga, MP	- Member

BACKGROUND AND EXECUTIVE SUMMARY

The main object of the 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.

Prudent management of public funds includes the meeting of financial obligations by procuring entities both in the national and county governments. The Bill further recognizes that apart from giving effect to the principles of public finance, prompt settlement of bills promotes trade and industry and by extension supports the robust growth of the economy.

Committee's Recommendations

The Committee recommends that the Bill be approved with amendments.

Acknowledgements

The Committee acknowledges the National Treasury, The Office of the Controller of Budget, the Council of Governors, International Budget Partnership Kenya and members of the public who made insightful contributions and recommendations to the Bill. Further, the Committee thanks the Offices of the Speaker and Clerk of the Senate for the support extended to the Committee in execution of its mandate.

Appreciations to all Members of the Committee for their patience, sacrifice and commitment to public service, which enabled the Committee complete the assigned task within the stipulated time.

It is now my pleasant duty and privilege, on behalf of the Standing Committee on Finance and Budget, to present to the Senate, this Report of the Committee on the Prompt Payment Bill (Senate Bills No. 3 of 2020).

SIGNATURE: ____________________

SEN. CHARLES KIBIRU, MP.

(CHAIRPERSON, STANDING COMMITTEE ON FINANCE AND BUDGET)

DATE: **2nd September, 2020**

CHAPTER ONE

HIGHLIGHTS OF THE PROMPT PAYMENT BILL, 2020

1. The Prompt Payment Bill was read a First Time in the Senate on 14th April, 2020. Thereafter the Bill was committed to the Standing Committee on Finance and Budget for consideration, facilitation of public participation and subsequently tabling of a report.

2. The main object of the 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.

3. Article 201 (d) and (e) of the Constitution provides for public finance principles including a requirement that public money shall be used in a prudent and responsible manner.

4. Prudent management of public funds includes the meeting of financial obligations by procuring entities both in the national and county governments. The Bill further recognizes that apart from giving effect to the principles of public finance, prompt settlement of bills promotes trade and industry and by extension supports the robust growth of the economy.

5. Thus, at micro level, the Bill seeks to solve a problem of late payments to the suppliers of goods and services and at a macro level to act as an impetus for growth of business and economic development.

Salient provisions of the Bill

6. The Bill proposes that a procuring entity in the national or county government pays a supplier by the prescribed payment date. Where a procuring entity fails to pay a

supplier by the prescribed payment date, the Bill provides that the procuring entity shall pay interest to the supplier in accordance with this section on the amount due under the contract for the supply of goods, works, or services. The Bill provides that the maximum interest rate chargeable shall be based on the base rate set and published by the Central Bank of Kenya;

7. The Bill proposes to place an obligation on a procuring entity to ensure that priority is given to the payment of any outstanding debts for the supply of goods and services. It provides that in determining which debts shall be given priority a procuring entity shall have regard to the dates upon which payment fell due and shall pay debts in chronological order;

8. The Bill acknowledges the fact that delayed payments for public contracts is usually compounded by disputes on the terms of the contract, and it proposes that where a procuring entity disputes an invoice, the procuring entity shall, within fourteen days, return the invoice to the supplier and identify in writing any defects in the invoice and require the supplier to correct the defects.

9. The Bill further provides that where a procuring entity disputes an invoice, it shall pay the supplier at least fifty percent of the amount due or as the procuring entity and the supplier may agree.

10. The Bill also provides that a supplier who receives a disputed invoice from a procuring entity shall, within fourteen days, deliver a corrected invoice to the procuring entity. 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;

11. To ensure implementation of the provisions of the law, the Bill provides that where a supplier has delivered an invoice to the procuring entity and the accounting officer

or the responsible officer of the procuring entity negligently, maliciously or without reasonable cause fails to return the invoice as provided for rectification or pay the amount due commits an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both;

12. The Bill delegates legislative powers to the Cabinet Secretary to make regulations generally for the better carrying into effect of any provisions.

CHAPTER TWO

2.0SUBMISSIONS FROM STAKEHOLDERS

13. This Chapter presents the deliberations of the Committee with various stakeholders. It highlights the views and recommendations submitted to the Committee.

2.1 SUBMISSION BY THE NATIONAL TREASURY

14. The National Treasury submitted its memorandum to the committee on the Bill through a letter dated 21st July 2020.
15. In their submission, they stated that all the concerns raised in the Prompt Payment Bill, 2020 are addressed fully under the provisions of the Public Procurement and Asset Disposal Act, 2015 and its attendant Regulations 2020.

2.2 SUBMISSION BY THE COUNCIL OF GOVERNORS

16. The Council of Governors submitted its memorandum to the Committee on the bill through a letter dated 26th June, 2020.
17. In the submission, the Council proposed-

a) To amend Clause 4 (1) to read -*a procuring entity shall pay a supplier eligible bills by the prescribed payment date subject to availability of funds*. This is because delayed payment of suppliers is sometimes occasioned by different factors such as:- Non-completion of work; Delayed disbursement of funds and deficit of projected own Source Revenue.

b) Deletion of Clause 4(2)(5) since procuring entity should not be subjected to pay interest for reasons cited on delayed payment

c) Deletion of clause 7 because subjected to pay interest on pending payments as the reason for non-payment of eligible is mostly occasioned by unavailability of funds. Further, charging of interest rate on pending bills would result into ballooning of public debt which would have a negative effect on Country fiscal policies.

d) Deletion of clause 9 since an accounting officer should not be held accountable but rather the reason for delayed payment should be established as other factors such as delayed disbursement and deficit in own source revenue are completely dependent on macroeconomic performance of the County and Country at large. In addition, an accounting officer should not be subject to pay interest for reasons cited on delayed payment.

2.3 The Institute of Certified Public Accountants of Kenya (ICPAK)

18. The Institute of Certified Public Accountants of Kenya (ICPAK) submitted its memorandum to the Committee on the bill.

19. In the submission, ICPAK proposed-

a) The long title should be amended to 'AN ACT of Parliament to provide for prompt payment for the supply of goods, works or services to the National and County governments, Ministries, Departments and Agencies; and private entities' - this is because it is important to have a law that applies to both public and private sectors.

b) Amend Clause 3 to ensure the law covers Government Parastatals, Ministries, Departments and Agencies. This should also include private sector and commercial entities.

c) Amend clause 4(3) to read- *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 last day of the month prior to the date on which payment of the amount due is made in full.* This will enable the procuring entity to determine with certainty the amount of interest due and process it alongside the payment due. Secondly, the matter of full payment to avoid mischief of partial payments to frustrate the spirit of the bill.

d) Amend Clause 5(2) to provide clarity on chronological order especially for auditing and accounting purposes. The provisions should read that - 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 using First-In, First-Out (FIFO) cost-flow assumption method.

e) Delete clause 6 (1) and amend clause 6(2) such that where a procuring entity returns an invoice under subsection (1), the procuring entity shall not pay the supplier until a corrected invoice is provided. This will safeguard the procuring entity for part payments which increase the risks of duplicate payments/Fraud and inefficiency due to additional workload. This is attributed to the fact that invoice is a vital accounting record supporting a payment; it should be amended and attached to the payment.

f) Clause 7(2) the recommended interest calculation on the basis of the Central bank should be clearly specified. There is need for a specific formula or rate.

g) Clause 9 delete the words 'or the responsible officer'. This is because the Accounting officer is the CEO of the organization and has the overall authority and responsibility for the management of the procuring entity.

h) Clause 9, there is need to provide the meaning in the context of this bill what "negligently", "maliciously" or "without reasonable" means. It will provide clarity and ease in implementation

2.4 Society of Clerks-At-The-Table (SOCATT)

20. The Society of Clerks At-The-Table (SOCATT) submitted its memorandum to the Committee on the bill.

21. In the submission, the Society proposed that-

a) County governments have to clear their monthly expenditure reports through the Integrated Financial Management system (IFMIS), and then seek approval on the same from the Controller of Budgets before funds can be released by the exchequer. This bill should consider amending the prescribed payment date in Part 1 clause 2(b) to be ninety days from when procuring entity receives funds from the exchequer for that particular expenditure. This will safeguard the procuring entities from bearing the cost of circumstances beyond their control which lay with the exchequer.

2.5 Ministry of Industrialization, Trade and Enterprise Development

22. The Ministry of Industrialization, Trade and Enterprise Development submitted its memorandum to the Committee on the bill.
23. In the submission, the Ministry proposed-

a) The Bill should cover both private and public institutions. They noted that the Bill only covers supply to National and County governments and leaves out government-owned agencies like Parastatals. They further note that the Bill does not apply to private entities such as Nakumatt and Uchumi. They recommended that the Bill should cover both public and private institutions.

b) The Bill prohibit inclusion of unfair terms of contract for instance where the contract excludes penalty for late payment or extending of credit limit beyond statutory limit.

c) The Bill should make provision for declaring any contract term deviating from good commercial practices, good faith and fair dealing as null and void.

d) Make provision for private entities applying for contract with government or government-owned agencies to declare how much they owe Small and Medium Enterprises (SMEs).

e) Provide that where payment period is not provided for in the contract, payment shall be due within 30 days from the date of delivery of goods and services or from the date of delivery of invoice whichever is earlier.

CHAPTER THREE

3.0 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.1 OBSERVATIONS

The Committee, having considered the bill and the submissions from various stakeholders, made the following observations-

a) The Bill is only focusing on payments by government instead of being an all-inclusive law that cuts across both public and private sectors. Parastatals, state agencies and private sector should be covered under the same law.

b) The bill does not provide clarity on the chronological order method for the settlement of pending bills. The payment should follow *First-In, First-Out (FIFO)* Principles.

c) The Bill intends to place culpability to other officers other than the Accounting Officers in case of delayed payments. The responsibility should solely rest on the Accounting Officer.

d) The Bill uses the words 'negligently, maliciously or without reasonable cause' these terms may be used subjectively since definition of the same has not been provided.

e) The proposal by the Ministry of Industrialization, Trade and Enterprise Development to ensure any person who wishes to enter into a contract with a national or county government entity shall make a declaration to the accounting officer of the entity on any pending payments owed to a small or micro enterprise is progressive in minimizing the effects of pending bills.

3.2 RECOMMENDATIONS

1. Long Title of the Bill be amended by deleting the words “to the government” appearing immediately after the words “goods, works and services”.
2. Clause 2 be amended by inserting the words “or a private entity entering into a contract for the supply of goods or services”. This will ensure the law applies both to public and private sector.
3. Clause 3 be amended by deleting the provision and replacing thereof with the following provision- *This Act shall apply to payment due for all goods, works, and services contracted for by the national government, county governments and private entities.*
4. Clause 5 be amended by deleting sub-clause (2) and replacing thereof with the following sub-clause- *In determining which debts shall be given priority under sub-section (1), a procuring entity shall have regard to the dates upon which payment fell due and shall pay debts using First-In, First-Out basis*. This is to provide clarity on the application of chronological order when making payments when they fall due.
5. Clause 9 be amended by deleting the phrase ‘or the responsible officer’. This is because it is the accounting officer who is solely responsible for making any payments.
6. Introduce a new clause to provide that-

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

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

   i. details on when the outstanding payment fell due;
   ii. reasons for the delay in payment; and
   iii. any agreements entered into between the supplier and the procuring entity for the settlement of the outstanding payment

APPENDIXES

(a) **Committee Stage Amendments**

(b) **Minutes of the Committee sittings**

(c) **Submission from Public Institutions and Members of Public**

2nd September, 2020

The Clerk of the Senate
Parliament Buildings
NAIROBI

RE: COMMITTEE STAGE AMENDMENTS TO THE PROMPT PAYMENT BILL, SENATE BILLS NO. 3 OF 2020

NOTICE is given that Sen. Charles Kibiru, Chairperson, Committee on Finance and Budget intends to move the following amendments to the Prompt Payment Bill, Senate Bills No. 3 of 2020, at the Committee Stage-

Long Title
THAT the long title of the Bill be amended by deleting the words "to the government" appearing immediately after the words "goods, works and services".

CLAUSE 2
THAT clause 2 of the Bill be amended by inserting the words "or a private entity entering into a contract for the supply of goods or services".

CLAUSE 3
THAT clause 3 of the Bill be deleted and substituted therefor with the following new clause-

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

CLAUSE 5
THAT clause 5 of the Bill be amended by deleting subclause (2) and substituting therefor the following new subclause-

(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 using First-In, First-Out basis.

CLAUSE 9
THAT clause 9 of the Bill be amended in the opening phrase by deleting the words "or the responsible officer" appearing immediately after the words "the accounting officer".

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause-

Declaration of pending payments.

8A. (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 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.