

PARLIAMENTARY SERVICE COMMISSION

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A REPORT ON THE PARLIAMENTARY SERVICE COMMISSION (FINANCIAL PROCEDURES) REGULATIONS, 2005

(Presented to the Commission on 24th April, 2006)

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Introduction

Legal Notice No.76 of 15th July, 2005 in the Kenya Gazette Supplement No.52 established the Parliamentary Service Commission (Financial Procedures) Regulations after having been duly signed by the Speaker. The Speaker derives such power from the provisions of Section 36(1) and (2) (e) of the Parliamentary Service Act which stipulates that:-

36(1) The Commission may make regulations for prescribing anything required by this Act to be prescribed and generally for the better carrying out of the purpose of this Act.

(2) Without prejudice to the generality of subsection (1), regulation under this Act may provide for-

(e) the financial procedures of the Commission.

On the other hand, the Commission has been more keen to establish the National Assembly Fund in pursuant to the Provisions of Section 18 of the Parliamentary Service Act which stipulates that:-

18(1) There is established a fund to be known as the National Assembly Fund

(2) There shall be paid into the Fund-

(a) such moneys as may, from time to time, be provided by Parliament

(b) such moneys as may be borrowed by the Commission on such terms and for such purposes as the Commission, in consultation with the Minister for the time being responsible for finance, may determine;

(c) any moneys accruing to or received by the Commission from any other source.

- (3) There shall be paid out of the Fund all payments in respect of any expenses incurred in pursuance of the provisions of this Act.**
- (4) The Commission may, with the approval of the National Assembly signified by resolution, establish such other funds as it may deem necessary.**

When Section 45 of the Constitution was repealed in 1999 to create the Parliamentary Service Commission, the new Section 45B(5)(e) and (6) stipulates that:-

45(B)

(5) The Parliamentary Service Commission shall have power

(a) in such manner as may be prescribed by or under an Act of Parliament-

(i) to cause to be prepared and laid before the National Assembly in each financial year estimates of expenditure (which shall be a charge on the Consolidated Fund) of the Parliamentary Service for the next following financial year.

(6) In exercise of its powers or the performance of its functions under this Constitution, the Commission shall not be subject to the direction or control of any other person or authority.

In short, the National Assembly Fund is not established through a provision in the Constitution but through a provision in the Parliamentary Service Act. Section 45B(13) of the Constitution exempts the Parliamentary Service from the provisions of Sections 48 and 107(1) of the Constitution. That is all!

Be that as it may, Section 99(2) of the Constitution gives legitimacy to what Section 18 of the Parliamentary Service Act established by stating that:-

99(2) Provision may be made by or under an Act of Parliament for any revenues or other money received for the purposes of the Government of Kenya to be paid into some public fund (other than the Consolidated Fund) established for a specific purpose, or to be retained by the

authority that received them for the purpose of defraying the expenses of that authority, but no money shall be withdrawn from any such public fund unless the issue of those moneys has been authorized by or under a law.

In other words, through the annual Appropriations Act, the Government is authorized to withdraw money from the Consolidated Fund and apply it to running the various public services as authorized by Parliament. If the National Assembly Fund is established, it does appear that there would be need for a specific law to authorize withdrawals from that Fund as the usual Appropriations Act seems to lack the capacity to legally facilitate such withdrawals. An objective legal opinion on this matter should be sought so as to avoid any possible embarrassment.

Treasury Response

When the Permanent Secretary/Treasury was approached about the establishment of the National Assembly Fund and the proposed Financial Rules and Regulations forwarded to him for his perusal and advice, he responded very eloquently in letter No.AG.3/053/Vol.1(17) of August 1, 2005 to the effect that:-

..... the responsibility, supervision, control and direction of all matters pertaining to the financial affairs of the Kenya Government are vested in the Minister responsible for Finance under the Exchequer and Audit Act (Cap. 412). It is therefore important to note that it is only under the Exchequer and Audit Act and as authorized by the said Minister that such rules and regulations can be developed and the intentions therein approved.

He went on to argue that since the National Assembly draws its funding from the Exchequer it should be subjected to the Exchequer Act. He concluded by stating that:-

..... Treasury is not in a position to approve the proposed Financial Rules and Regulations, 2005 developed under the Parliamentary Service Act. You are therefore advised to consider this matter as closed.

Since the Parliamentary Service Commission was formed, two funds have been established, i.e., the Car Loan Scheme Fund and the Housing Mortgage Fund under the provisions of the Exchequer and Audit Act and there are officials both from

Treasury and the Attorney General's Chamber who sit in the two Loans Committees.

If established, the National Assembly Fund would be holding in excess of Kshs.5 billion, much higher in comparison with the two funds mentioned above.

Proper consultations between the Commission, Treasury and the Attorney General Chamber should therefore take place so as to remove ill feelings, misunderstandings and suspicions that might exist-which, indeed, exist at the moment. Moreover, the establishment of a Fund that is likely to have billions of Kenya shillings is such a serious matter that all those public officials who are charged with the responsibility of looking after public funds should speak with one voice on the matter. Indeed, such consultations should be extended to include the Controller and Auditor General whose powers under the provisions of Section 105 of the Constitution are enormous.

INCONSISTENCIES ALREADY IDENTIFIED IN THE RULES AND REGULATIONS IN LEGAL NOTICE NO. 76 OF 2005

There is no gainsaying the prudent management of funds in an organization is no longer a choice that has to be made by leaders in that organization. In the era of transparency and accountability, it is imperative that funds have to be properly managed under very clear and transparent rules and regulations that assign responsibility specifically to the officer in charge of those funds. Herebelow is a commentary on the Rules and Regulations, especially those paragraphs which appear to be contradictory, ambivalent, vague or simply unclear.

Section 21 of the Parliamentary Service Act commands the Clerk to ensure that "proper books and records of accounts of the Commission are kept and maintained." Sections 13 and 14 name the Clerk as the Chief Executive and allow him to delegate some functions to employees of the Parliamentary Service who are subordinate to him.

Yet Regulation No.3 and several other Regulations like Nos. 15, 19, 24, 32, 34, 37, e.t.c., allocate various functions directly to some officers whose titles are not mentioned in any other Act of Parliament, neither are those offices and officers explained under Section 2 on Interpretation, e.g. "Senior Deputy Clerk," "the Head of Finance," "the Chief Procurement Officer," "Head of Administration," "Procurement Officer," "the Principal Accounts Controller," "the Sergeant-at-

Arms,” “the Deputy Clerk/Committees and Research),” the Deputy Clerk in charge of Administration,” e.t.c.

All these are posts created through administrative circulars and the titles may change any time the Commission reviews the structure of the Parliamentary Service. The law only allocates responsibility to an office created by the same law or under another law. This is not the case here.

How did this come to arise?

Regulation 4 states that:-

4. The moneys of the Fund shall be –

(a) utilized in accordance with the provisions of the yearly Finance Act.

The correct Act in this regard is the annual Appropriations Act since under the Finance Act, the various taxes proposed by the Minister in order to raise revenue or give relief to some sections of the citizens are authorized.

A close look at Regulations 7(3) and 17(2) reveals a confused reference to paragraphs and sub-paragraphs. But specifically, so long as the Speaker is the Chairman of the Commission he should not be commanded to submit the budget to the National Assembly. The details as to who should submit the budget of the Commission to the National Assembly are unnecessary so long as it is understood the Commission shall do so.

Who drafted the Rules?

Regulation No. 9 states that:-

9. The Clerk shall administratively issue authority to incur expenditure to other members of the Commission

Members of the Commission are the Parliamentary Service Commissioners appointed under the provisions of Section 45B(1)(a)-(e) of the Constitution. May be this Regulation intended to allow the Clerk to issue AIE to officers subordinate to him. Members of the Commission are not.

As it is now, Regulation No. 10 is in direct conflict with Section 18 of the Exchequer and Audit Act which is quite elaborate on the issue of annual accounts. Furthermore, Regulation 10(1)(a) contradicts 10(2) because (a) states that:-

**10.(1) All appropriations approved by the National Assembly shall-
(a) be available for meeting obligations of the National Assembly
for the financial year to which they relate**

A clear reading of 10(2) waives that by stating that:

**10(2) Any funds not utilized after expiry of three months after the end
of the financial year shall be deposited in the National Assembly Fund.**

The same contradiction and lack of clarity is observable in Regulation 11 and 4.

Regulation 15 has to conform to the Public Procurement and Disposal Act in terms of membership of the Tender Board. Regulation 15(e) implies there are other members of the Board who may not be officers of the Parliamentary Service. This should be amended to remove such a doubt because, the Public Procurement and Disposal Act does not anticipate such a possibility.

While the Act is reticent on members of the Tender Board nominating other officers to represent them, Regulation No. 16 expressly allows for delegation. It is important to note that prior to the Act, Legal Notice No.51 of 2001 disallowed delegation.

The thresholds given in Regulation No.17 are not all in tandem with the provisions in the Procurement Act.

Regulation 18 mentions advertisement to tender appearing “in at least four major publications.” Again lack of clarity as the “Parents” Magazine could also be a major publication. The correct words, may be, are “four major daily newspapers.”

Regulation 21 on procurement of consultancy services is in direct conflict with the Architects & Quantity Surveyors Act Cap 525 for paying consultants like engineers, surveyors, e.t.c., whose consultancy consists, sometimes, of technical drawings only. Moreover, bringing the Commission into tendering is throwing the Commissioners into a field fraught with legal mines.

Regulation No.25(3) should be recast.

Regulation No.29(e) is in conflict with some sections of the Penal Code especially with regard to loss and misappropriation of Government stores. Furthermore, the

words “cash”, “stores” and “assets” are used interchangeably as if they meant and referred to the same thing throughout the paragraph.

Regulation No.31 is too abstract as public property cannot be given out for private use unless it is for hire at a certain agreed rate or it is tendered for. Otherwise other public institutions do borrow things from the National Assembly and the National Assembly also does the same.

Regulation No.32 on the Commission’s bank account is more specific than Section 19 of the Parliamentary Service Act. This requires to be reconciled.

Regulation No.35 allows for petty cash which is prohibited by the Financial Regulations.

Regulation No.37 is unclear and some parts contradict the current practice – e.g. signatures to bank accounts and authorization of cheques.

Regulation No.38 will cause inconvenience to the Members and staff and increase the amount of paper work for reconciliation.

Regulation No.39 should be redrafted by deleting the words “staff member” wherever they occur and inserting the word “officer” in place thereof.

AUTHORITY FOR USE OF PUBLIC FUNDS

The Financial Rules and Regulations have to take into account the provisions in the following Acts of Parliament which regulate and control the manner in which public funds are used in procuring goods, services and paying out salaries.

- The Public Procurement and Disposal Act, 2005
- The Government Financial Management Act, 2005
- The Public Audit Act, 2004
- The Exchequer and Audit Act
- The Constitution of Kenya

These Acts of Parliament are more elaborate on the manner public funds should be used.

Referring to the Public Procurement and Disposal Act, it is important to pay attention to Section 5(1) which stipulates that:-

5(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.

There is no doubt that looking at all these new Acts on financial reforms which have been legislated over the recent past, the role of Treasury in supervising an Accounting Officer has been tremendously enhanced as demonstrated in the following instances under the Government Financial Management Act.

In Section 2 of the Act, “government” is defined as including Commissions established under the Constitution and the courts.

Section 4 of the Act gives Treasury power to “superintend the expenditure of the government money to ensure that it can be properly accounted for.”

Sections 5 and 6 give Treasury powers to inspect and have access to all books, records, returns, reports, e.t.c. and demand explanation from the officers how they have used government money.

To crown it all, section 18 of the Act makes an Accounting Officer to be subordinate to Treasury in so far as the latter’s responsibility in complying with the rules regarding the voted funds for running his ministry or commission is concerned. For the avoidance of any doubt, section 20 of the Act gives Treasury power to deal with an Accounting Officer who fails to comply with its instructions.

CONCLUSION

A critical examination of the current Financial Rules and Regulations reveals that if they were to be implemented, the glaring contradictions would make the Commission appear as if it does not take public funds under its custody seriously. A fresh look at the Regulations to take into account all recent legal financial reforms which have been instituted would be necessary and imperative.

It is debatable whether the Financial Procedures and Regulations as published in Legal Notice No.76 of 15th July, 2005 would constitute a basis for opening and operating a National Assembly Fund as stipulated under the provisions of section 18 of the Parliamentary Service Act.

Finally, Section 36(2) of the Parliamentary Service Act was lifted from Section 34 of the Interpretation and General Provisions Act. It demands that Regulations must be laid before the National Assembly before they take effect. The current Financial Rules and Regulations have therefore to be laid.