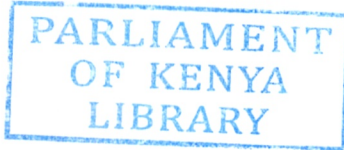




REPUBLIC OF KENYA

THE SENATE



PAPER LACED
By Sen. Billow Kiarow
on Wednesday
16th July 2014.
Mogere



ELEVENTH PARLIAMENT – SECOND SESSION

**REPORT OF THE SENATE STANDING COMMITTEE ON FI-
NANCE, COMMERCE & BUDGET ON THE CONSIDERATION
OF**

**THE PUBLIC PROCUREMENT AND DISPOSAL
(AMENDMENT) BILL, 2013**

**PARLIAMENT BUILDINGS
NAIROBI**

JULY, 2014

PREFACE

Mr. Speaker, Sir

The Standing Committee on Finance, Commerce and Budget is established pursuant to Standing Order No. 208 and is mandated, *to investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to:*

A. Discuss and review the estimates of County governments and make recommendations to the Senate;

B. Examine the Budget Policy Statement presented to the Senate;

C. Examine and report on the Budget allocated to constitutional commissions and independent offices;

D. Examine bills related to the Counties;

E. Examine the Budget, including the Division of Revenue Bill; and

F. Examine and 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, monetary policies and public debt, trading activities and commerce, tourism, investment and divestitures policies, planning and development policy.

Mr. Speaker, Sir

The Committee on Finance, Commerce and Budget was constituted by the House on Thursday 13th March 2014 during the Second Session of the Eleventh (11th) Parliament and comprises of the following members:

- | | |
|---|--------------------------|
| 1. The Hon. Sen. Billow Kerrow, MP. | -Chairperson |
| 2. The Hon. Sen. Peter Ole Mositet, MP. | -Vice-Chairperson |
| 3. The Hon. Sen. Moses Wetang'ula, MP. | |
| 4. The Hon. Sen. Beatrice Elachi, MP. | |
| 5. The Hon. Sen. Mutahi Kagwe, MP. | |
| 6. The Hon. Sen. Boni Khalwale, MP. | |
| 7. The Hon. Sen. (Prof.) Peter Anyang' Nyong'o, MP. | |
| 8. The Hon. Sen. Zipporah Kittony, MP. | |
| 9. The Hon. Sen. James Mungai, MP. | |

10. The Hon. Sen. Catherine Mukite Nabwala, MP.
11. The Hon. Sen. Mutula Kilonzo Junior, MP.
12. The Hon. Sen. (Prof.) John Lonyangapuo, MP.
13. The Hon. Sen. Paul Njoroge Ben, MP.
14. The Hon. Sen. (Dr.) Wilfred Machage, MP.

Mr. Speaker, Sir,

Following the submission to the Senate of the Public Procurement and Disposal (Amendment) Bill, 2013 by the National Assembly, the Bill was read a first time on 4th June, 2014 and thereafter committed to the Committee for consideration pursuant to Standing Order 130.

Mr. Speaker, Sir,

The principle object of the Bill is to amend the Public Procurement and Disposal Act, 2005. The amendments seeks to provide for affirmative action in public procurement by ensuring that at least thirty percent of the annual procurement by public entities is allocated to the youth, women and persons with disabilities.

Mr. Speaker, Sir,

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 130 (4), the Committee on invited interested members of the public to submit representations on the Bill. The submissions were made both orally and through submission of written memoranda.

Mr. Speaker, Sir,

In examining the Bill, the Committee was in agreement with the general contents of the Bill. However, the committee proposed amendments to some sections as contained in the Committee recommendation. The Committee in deliberations on the Bill noted the following:

1. **Section 1** of the Principal Act is amended to provide for the short title and the commencement of the Act as, the Public Procurement and Disposal (Amendment) Act, 2014 which shall come into operation after ninety days from the date of publication.

2. **Section 2** of the Principal Act has been amended to provide for affirmative action with respect to involvement of the youth in procurement matters in accordance with Articles 55 and 227 of the Constitution.
3. **Section 3** of the Principal Act is amended to provide for definitions of the words, disadvantaged groups, persons with disability, women and youth.
4. **Section 9** of the Principal act is amended to make it compulsory for the Public Procurement Oversight Authority established under the Section 8 of the Act, ensures that procurement entities implement the preference and reservations. The Authority is also mandated to provide for and have a database for the number of disadvantaged groups that have secured tenders.
5. **Section 39** of the Principal Act is amended to entrench the policy of the issuance of thirty percent (30%) of tenders to the youth, persons with disabilities and women. It further provides for a reporting and implementation mechanism of the thirty percent policy and facilitates the implementation of Articles 27, 54, 55, 56, 94 and 227 of the Constitution in the procurement process.
6. **Section 129** of the Principal Act is amended to provide that only such persons as are licensed under the Environmental Management and Co-ordination Act, 1999 may be allowed to dispose electronic waste.

This Bill aims to amend the Public Procurement and Disposal Act, 2005 so as to make the Act conform to the practical challenges in implementation arising out of the enactment of the Constitution.

Mr. Speaker, Sir,

The Committee will propose appropriate amendments to the Bill in clauses 2, 3, 9 (a) (b) and 39 (9) (14) (15 (a)(b)) with a view to improving the Bill. The Committee will further introduce new sub clause (c) to Clause 12.

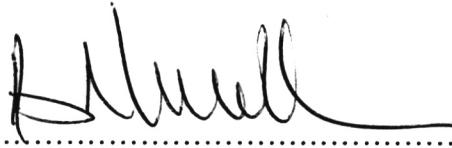
Mr. Speaker, Sir,

The Committee is thankful to the Offices of the Speaker and the Clerk of the Senate for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank all

the stakeholders for their participation in scrutinising the Bill. Finally, I wish to express my appreciation to the Honourable Senators of the Committee who sacrificed their time to participate in the activities of the Committee and preparation of this report.

Mr. Speaker, Sir,

It is therefore my pleasant duty and privilege, on behalf of the Standing Committee on Finance, Commerce and Budget, to table its report in the House on the consideration of the Public Procurement and Disposal (Amendment) Bill, 2013 for consideration and adoption pursuant to Standing Order 134.



Signed

(SEN. BILLOW KERROW, MP)

CHAIRPERSON,

STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET

Date: 15th July, 2014

COMMITTEE RECOMMENDATIONS

The Committee proposes to introduce the following amendments to the Public Procurement and Disposal (Amendment) Bill, 2013.

1. Clause 3 is amended by inserting the following new sub section (a) and (b) and (c) in the definition of a “public entity”.

A new sub section (a) the National Government or any department of the National Government

A new sub section (b) the County Government or any department of the County Government

Justification

This amendment proposes to include county governments and independent offices as procuring entities to ensure their compliance to the preferential and reservation schemes as proposed by the Bill. This was informed by public submissions raising concerns about the non implementation of the 30% directive of procurement spend for disadvantaged groups by some County Governments.

2. **Clause 2** of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the principal Act”) is amended by inserting the following new paragraph immediately after paragraph (f)—

“(g) to facilitate affirmative action for disadvantaged groups in accordance with Articles 55 and 56 of the Constitution and also advance their participation in the procurement process in accordance with Article 227 of the Constitution”.

Justification

This amendment proposes to include, for the purposes of affirmative action, women and persons with disabilities among disadvantaged groups as the previous clause had only catered for the youth

3. **Clause 39, paragraph (9)** inserted immediately after subsection (8) be substituted with,

COMMITTEE RECOMMENDATIONS

The Committee proposes to introduce the following amendments to the Public Procurement and Disposal (Amendment) Bill, 2013:-

1. **Clause 3** is amended by deleting the definition of the words "Public entity" and substituting therefor the words.

Public entity means-

- a. the National Government or any department of the National Government;
- b. The County Government or any department of the County Government;
- c. the Courts;
- d. Commissions and independent offices established under the Constitution;
- e. a state corporation within the meaning of the State Corporations Act;
- f. the Central Bank of Kenya established under the Constitution
- g. a co-operative society established under the Co-operatives Societies Act;
- h. a public school within the meaning of the Education Act;
- i. a public university within the meaning of the Universities Act;
- 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

Justification

This amendment proposes to include county governments and independent offices as procuring entities to ensure their compliance to the preferential and reservation schemes as proposed by the Bill. This was informed by public submissions raising

concerns about the non implementation of the 30% directive of procurement spend for disadvantaged groups by some County Governments. The amendment further refines the definition to delete reference to Local Authorities under the repealed Local Governments Act and amends to provide for the establishment of the Central Bank of Kenya under the Constitution and not an Act of Parliament.

2. Clause 2 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the principal Act”) is amended by inserting the following new paragraph immediately after paragraph (f)—

“(g) to facilitate affirmative action for disadvantaged groups in accordance with Articles 27, 54, 55 and 56 of the Constitution and also advance their participation in the procurement process in accordance with Article 227 of the Constitution”.

Justification

This amendment proposes to include, for the purposes of affirmative action, women and persons with disabilities among disadvantaged groups as the previous clause had only catered for the youth

3. Clause 39, paragraph (9) inserted immediately after subsection (8) be replaced with,

Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the disadvantaged groups.

Justification

This amendment proposes to include replace the terms youth, women and persons with disability as these groups have been defined in the Bill as disadvantaged groups.

4. **Clause 39, paragraph (14)** inserted immediately after subsection (8) be replaced with,

The Cabinet Secretary shall prescribe the preferences with the approval of Parliament that shall facilitate the attainment of the quota specified in subsection (9) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

Justification

This amendment proposes to that the Cabinet Secretary shall table in Parliament for its approval the prescribed preferences to facilitate the attainment of the quota specified in subsection (9).

5. **Clause 39, paragraph 15 (b)** inserted immediately after subsection (8) be replaced with,

The preferences referred to in subsection (14) shall-

(b) be subject to such conditions as the Cabinet Secretary may specify therein but such shall not pose any unnecessary impediment to the disadvantaged groups from participating in public procurement.

Justification

This amendment proposes to include, in the development of preferences, women and persons with disabilities among disadvantaged groups as listed in Clause 3 of the amendment Bill.

6. **Clause 39, paragraph 16 (a) and (b)** inserted immediately after subsection (8) be replaced with,

(a) *Facilitating affirmative action to ensure that the disadvantaged groups access employment and have opportunities to participate in economic spheres of line as contemplated by Articles 54, 55, 56 and 227 of the Constitution.*

(b) *Protection or advancement of the disadvantaged groups in accordance with Article 227 of the Constitution who have previously been disadvantaged by unfair competition or discrimination in the procurement process*

Justification

This amendment proposes to include, in the development of preferences, women and persons with disabilities among disadvantaged groups as listed in Clause 3 of the amendment Bill.

INSERTING NEW CLAUSES

7. NEW CLAUSE 3 SUB CLAUSE 12 (C)

THAT the Bill be amended in Clause 3 by inserting the following new Sub Clause 12 (C)–

“(c) Provide explanation for failure to comply with the provisions of this section and efforts made by the entity to ensure future compliance.”

8. NEW CLAUSE 4

Section 3 of the Principal Act is amended by deleting the definition of the words accounting officer and substituting therefor with the following new definition

“accounting officer” means-

(a) *For a Public entity other than a county government, the person appointed by the principal secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity.*

(b) *For the County Government a person appointed by the County Executive Committee Member responsible for Finance or if there is no such person, the chief executive of the public entity.*

9. **NEW CLAUSE 5**

That the Principal Act be amended by deleting the word “Minister” wherever it appears and replacing therefor with the word “Cabinet Secretary”

ANNEXES

1. Minutes of the Committee proceedings on the Bill
2. Submissions from stakeholders

MINUTES OF THE 75TH MEETING OF THE STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET HELD ON TUESDAY 14TH JULY, 2014 AT THE GROUND FLOOR BOARDROOM, COUNTY HALL, PARLIAMENT BUILDINGS AT 9.00 AM

PRESENT

1. Sen. Billow Kerrow - Chairman
2. Sen. (Prof.) Peter Anyang' Nyongo
3. Sen. Mutahi Kagwe
4. Sen. Beatrice Elachi
5. Sen. Paul Njoroge Ben
6. Sen. Zipporah Kittony
7. Sen. Catherine Mukiite
8. Sen. Mutula Kilonzo Junior

ABSENT WITH APOLOGIES

1. Sen. Peter Ole Mositet - Vice Chair
2. Sen. Mungai James
3. Sen. Moses Wetang'ula
4. Sen. Boni Khalwale
5. Sen. (Dr.) Wilfred Machage
6. Sen. (Prof.) John Lonyangapuo

IN ATTENDANCE

The Kenya Senate

1. Mr. Okello Johnson - Deputy Director Legal Services
2. Ms. Emmy Chepkwony - Senior Clerk Assistant
3. Ms. Brenda Ogembo - First Clerk Assistant

MIN. NO. 214/2014: PRELIMINARIES

The proceedings commenced at 9.15 a.m. Thereafter a word of prayer was offered by the Committee Clerk.

MIN. NO. 215/2014: ADOPTION OF THE AGENDA

The agenda was adopted after being proposed by Sen. Zipporah Kittony and Seconded by Sen. Boni Khalwale.

MIN. NO. 216/2014: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTINGS

The minutes of the following sittings were confirmed as a true record of the sittings proceedings and signed by the acting Chairman:

- i. Minute of the 74th sitting held on Thursday 10th July, 2014 after being proposed by Sen. Paul Njoroge Ben and seconded by Sen. Mutula Kilonzo (Junior).
- ii. Minute of the 75th sitting held on Tuesday 14th July, 2014 after being proposed by Sen. Paul Njoroge Ben and seconded by Sen. Beatrice Elachi.

MIN. NO. 217/2014: DELIBERATION ON THE SUBMISSIONS ON THE PUBLIC FINANCE MANAGEMENT (AMENDMENT) BILL, 2014

1. The Committee deliberated on the submissions by the Controller of Budget and noted that in her submission to the Committee noted the following:

- i. In the FY 2014/15, Counties have allocated 42 per cent of total budgets to development expenditure. The allocation complies with the current fiscal responsibility principle that a minimum of 30 per cent of County governments budgets be allocated to development expenditure.
- ii. In order to increase development expenditure allocation, Counties will be required to cut down on the recurrent budget. Analysis of the recurrent expenditure by economic classification for the first nine (9) months of FY 2013/14 shows that about 58 per cent of the expenditure goes towards Personal Emoluments, 39 per cent to operations and maintenance, while 3 per cent was spent on debt repayment and pending liabilities. There is need for a national policy to rationalise the wage bill. Lean and effective staff at the counties will free more resources to fund development projects.

The Committee observed that the Controller of Budget in concluding her recommendations noted that an increase of the development budget allocation from 30 percent to 60 percent is untenable in the short term. This she noted may result in fiscal stress. In addition, inadequate capacity to implement development projects may impose challenges in fund absorption. Her final recom-

mentation in light of the foregoing was an increase of development expenditure allocation from 30 per cent to 40 per cent at this time. The Controller's full submission is annexed to this report.

2. The Committee deliberated on the submissions by the Commission on Revenue Allocation with regard to the effect the amendment would have on the county budgets:

- i. County governments' functions are concerned mainly with service delivery. It therefore follows that a huge percentage of county budgets go towards service delivery and operational expenses.
- ii. County Governments inherited a huge workforce from the former local authorities and the national government. This has resulted in a huge wage bill that contributes substantively to county governments' recurrent expenditure. Until and unless the matter of the wage bill is resolved, county budgets will largely comprise of recurrent expenditure.

MIN. NO. 218/2014: DELIBERATION AND ADOPTION OF THE COMMITTEE REPORT ON THE PUBLIC FINANCE MANAGEMENT (AMENDMENT) BILL, 2014

The Committee proposes to introduce the following amendments to the Public Finance Management (Amendment) Bill, 2014.

- 1. Section 107 sub section 2(b)** of the Public Finance Management Act, 2012 (hereinafter referred to as "the principal Act") is amended by deleting the words "thirty percent" appearing immediately after the words "minimum of" and substituting therefor the words "forty percent".

Justification

This amendment proposes to reduce the percentage minimum allocation for development expenditure from 60% as proposed in the Bill to 40%, as the proposed minimum in the Bill is not an economically viable option.

MIN. NO. 219/2014: DELIBERATION AND ADOPTION OF THE COMMITTEE REPORT ON THE PUBLIC PROCUREMENT AND DISPOSAL (AMENDMENT) BILL, 2013

The Committee proposes to introduce the following amendments to the Public Procurement and Disposal (Amendment) Bill, 2013.

1. **Clause 3** is amended by deleting the definition of the words "Public entity" and substituting therefor the words.

Public entity means-

1. the National Government or any department of the National Government;
2. The County Government or any department of the County Government;
3. the Courts;
4. Commissions and independent offices established under the Constitution;
5. a state corporation within the meaning of the State Corporations Act;
6. the Central Bank of Kenya established under the Constitution
7. a co-operative society established under the Co-operatives Societies Act;
8. a public school within the meaning of the Education Act;
9. a public university within the meaning of the Universities Act;
10. a college or other educational institution maintained or assisted out of public funds; or
11. an entity prescribed as a public entity for the purpose of this paragraph

Justification

This amendment proposes to include county governments and independent offices as procuring entities to ensure their compliance to the preferential and reservation schemes as proposed by the Bill. This was informed by public submissions raising

concerns about the non-implementation of the 30% directive of procurement spend for disadvantaged groups by some County Governments. The amendment further refines the definition to delete reference to Local Authorities under the repealed Local Governments Act and amends to provide for the establishment of the Central Bank of Kenya under the Constitution and not an Act of Parliament.

2. **Clause 2** of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as “the principal Act”) is amended by inserting the following new paragraph immediately after paragraph (f)—

“(g) to facilitate affirmative action for disadvantaged groups in accordance with Articles 27, 54, 55 and 56 of the Constitution and also advance their participation in the procurement process in accordance with Article 227 of the Constitution”.

Justification

This amendment proposes to include, for the purposes of affirmative action, women and persons with disabilities among disadvantaged groups as the previous clause had only catered for the youth

3. **Clause 39, paragraph (9)** inserted immediately after subsection (8) be replaced with,

Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the disadvantaged groups.

Justification

This amendment proposes to include replace the terms youth, women and persons with disability as these groups have been defined in the Bill as disadvantaged groups.

4. **Clause 39, paragraph (14)** inserted immediately after subsection (8) be replaced with,

The Cabinet Secretary shall prescribe the preferences with the approval of Parliament that shall facilitate the attainment of the quota specified in subsection (9) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

Justification

This amendment proposes to that the Cabinet Secretary shall table in Parliament for its approval the prescribed preferences to facilitate the attainment of the quota specified in subsection (9).

5. **Clause 39, paragraph 15 (b)** inserted immediately after subsection (8) be replaced with,

The preferences referred to in subsection (14) shall-

(b) be subject to such conditions as the Cabinet Secretary may specify therein but such shall not pose any unnecessary impediment to the disadvantaged groups from participating in public procurement.

Justification

This amendment proposes to include, in the development of preferences, women and persons with disabilities among disadvantaged groups as listed in Clause 3 of the amendment Bill.

6. **Clause 39, paragraph 16 (a) and (b)** inserted immediately after subsection (8) be replaced with,

(a) Facilitating affirmative action to ensure that the disadvantaged groups access employment and have opportunities to participate in economic spheres of line as contemplated by Articles 54, 55, 56 and 227 of the Constitution.

(b) Protection or advancement of the disadvantaged groups in accordance with Article 227 of the Constitution who have previously been disadvantaged by unfair competition or discrimination in the procurement process

Justification

This amendment proposes to include, in the development of preferences, women and persons with disabilities among disadvantaged groups as listed in Clause 3 of the amendment Bill.

INSERTING NEW CLAUSES

7. NEW CLAUSE 3 SUB CLAUSE 12 (C)

THAT the Bill be amended in Clause 3 by inserting the following new Sub Clause 12 (C)–

“(c) Provide explanation for failure to comply with the provisions of this section and efforts made by the entity to ensure future compliance.”

8. NEW CLAUSE 4

Section 3 of the Principal Act is amended by deleting the definition of the words accounting officer and substituting therefor with the following new definition

“accounting officer” means-

(a) For a Public entity other than a county government, the person appointed by the principal secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity.

(b) For the County Government a person appointed by the County Executive Committee Member responsible for Finance or if there is no such person, the chief executive of the public entity.

9. **NEW CLAUSE 5**

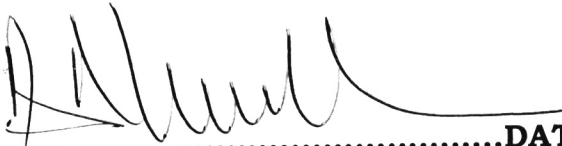
That the Principal Act be amended by deleting the word “Minister” wherever it appears and replacing therefor with the word “Cabinet Secretary”

MIN. NO. 230/2014: DATE OF NEXT MEETING

The date of the next meeting was agreed as Thursday 17th July, 2014 from 9.00 am at the Ground Floor, Boardroom of County Hall.

MIN. NO. 231/2014: ADJOURNMENT

There being no other business and the time being fifty minutes past Eleven O'clock in the morning, the meeting adjourned.

SIGNED:  **DATE:** 15th July 2014

CHAIRPERSON -Sen. Billow Kerrow



REPUBLIC OF KENYA

THE SENATE

SEVENTH - SECOND SESSION

COMMITTEE ON FINANCE, COMMERCE & BUDGET ON THE

DISPOSAL

PARLIAMENT BUILDINGS

PAPER 1413

By Sen. Billau Keenani
on Wednesday
6th July 2014.

NOPE



ELEVENTH PARLIAM

REPORT OF THE SENATE STANDING
FINANCE, COMMERCE & BUDGET ON THE
OF

THE PUBLIC PROCUREMENT AND DISPOSITION
(AMENDMENT) BILL, 2013

JULY, 2014

PARL
LIBRARY

The Committee deliberated on the submission by the Council of Governors on the Public Procurement and Disposal (Amendment) Bill, 2013 as annexed to the minutes.

MIN. NO. 204/2014:

**SCRUTINY OF SUBMISSIONS FROM THE
COUNCIL OF GOVERNORS ON THE PUBLIC
FINANCE MANAGEMENT (AMENDMENT) BILL,
2014- Senate Bill No.11 of 2014**

The Committee deliberated on the submission by the Council of Governors on the Public Finance Management (Amendment) Bill, 2013 as follows

The Bill Seeks to amend section 15(2) (a) and section 107(2) (b) of the Public Finance Management Act, 2012 (PFM) in order to provide, as a county government fiscal responsibility principal, that a minimum of sixty percent of the budget of the county governments be allocated to development expenditure.

Specific recommendations are as follows:

- The proposed 60:40 formula undermines service delivery which is the essence of the devolution. The Bill is based on unprincipled excuse for cost cutting and is motivated by Constituency Development Fund the management frameworks which do not consider the recurrent expenditure. For instance some county development portfolios are labour and service intensive thereby requiring significant recurrent expenditure. There is need to re-define development expenditure to make it realistic. The presumptions in the Bill are based on the CDF framework which does not capture the recurrent expenditure.
- The intended amendment is unnecessary restraint on the powers of the County Government and is not feasible as it does not appreciate the reality of running a government.
- Wage still a burden to Counties especially in light of workers absorbed from the National Government.
- Ensure that the Bill appreciates how operational expenditure relates with Capital Projects.
- Provide for amendments on how Counties can access funds in the event of a delay of release of funds.
- Provide for revenue raising measures by the County Governments

Min. No. 205/2014: Any Other Business

The Committee reviewed its work programme and confirmed that it will conduct a public hearing on the Public Finance Management (Amendment) Bil, 2014 on Monday 7th July, 2014 and Shimba Hall, Senate Old Chamber, KICC Buildings from 8.00am.

Min. No. 206/2014: Adjournment

Having dispensed with the business for the day, the Committee adjourned its sitting at half past twelve O'clock in the afternoon.

SIGNED:

CHAIRPERSON- SEN. BILLOW KERROW, MP

DATE:

10/9/2014

**MINUTES OF THE 71st MEETING OF THE STANDING COMMITTEE ON FINANCE,
COMMERCE AND BUDGET HELD ON TUESDAY 1ST JULY, 2014 AT THE GROUND
FLOOR BOARDROOM, COUNTY HALL, PARLIAMENT BUILDINGS AT 10.00 AM**

Present

1. Sen. Billow Kerrow - **Chairman**
2. Sen. Peter Ole Mositet - **Vice Chair**
3. Sen. (Dr.) Wilfred Machage
4. Sen. Paul Njoroge Ben
5. Sen. Catherine Mukiite
6. Sen. Mutahi Kagwe
7. Sen. Mutula Kilonzo Junior
8. Sen. (Prof.) John Lonyangapuo

Absent with Apologies

1. Sen. Mungai James
2. Sen. (Prof.) Peter Anyang' Nyongo
3. Sen. Boni Khalwale
4. Sen. Moses Wetang'ula
5. Sen. Beatrice Elachi
6. Sen. Zipporah Kittony

In Attendance

The Kenya Senate

1. Ms. Emmy Chepkwony - Senior Clerk Assistant
2. Ms. Brenda Ogembo - First Clerk Assistant
3. Ms. Carol Cheruiyot - Legal Counsel

Public Procurement Oversight Authority

1. Mr. Maurice Juma - Director General
2. Mr. Chris Gachanja - PPOA

Min. No. 189/2014: Preliminaries

The proceedings commenced at 10.20 a.m. Thereafter a word of prayer was offered by the Committee Secretariat. The Chairman welcomed all who were present to the meeting and requested all in attendance to introduce themselves.

Min. No. 190/2014 Adoption of the agenda

The agenda presented was adopted as follows:-

1. **Preliminaries,**
 1. *Prayer,*
 2. *Introductions,*
 3. *Remarks by the Chairperson*
2. **Adoption of the Agenda**
3. **Meeting with the Public Procurement Oversight Authority (PPOA) on the Public Procurement and Disposal (Amendment) Bill, 2013**
4. **Any Other Business**
5. **Adjournment**

Min. No. 191/2014: Brief by Public Procurement Oversight Authority (PPOA) on the Public Procurement and Disposal (Amendment) Bill, 2013

The Director General began his presentation to the Committee with a short overview of the evolvement of procurement in Kenya. He then proceeded to brief the Committee as follows;

1. Most of the definitions in the Bill are similar to this contained in the Public Procurement and Disposal Act, 2005 (the Act). Some definitions require review to conform to the current Constitution.
2. Section 2 of the Bill has expounded the meaning of youth that had been prescribed in the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 (the Regulations, 2011).
3. Section 3(9) of the Bill provides for the youth to be allocated at least thirty percent of procurement opportunities in every financial year. This provision counters regulation 31(1) of the regulations, 2013 which had provided for the youth, women and persons with disability to be allocated at least thirty percent of procurement opportunities in every financial year.

In addition to the above comments, monitoring of compliance as envisaged in the Regulations of 2011 has posed a challenge since most procuring entities have not been submitting their procurement plans demonstrating application of preference and reservation schemes as required by Regulation 29 of the Preferences and Reservations Regulations, 2011.

PPOA has noted the aforementioned no-compliance during assessments and procurement reviews/audits carried out during visits to selected procuring entities. Procuring entities have also not been submitting mandatory reports for procurement awards where preference and reservations have been applied pursuant to Regulation 30. To ensure compliance, there is need to propose serious sanctions be imposed on procuring entities who fail to comply with the procurement law.

Whereas we trust that the Bill is well intentioned, our view is that the proposed Layman's Public Procurement and Asset Disposal Bill which is being finalised by the National Treasury has comprehensively reviewed the Public Procurement and Disposal Act, 2005 (the Act). We have proposed comprehensive changes to the Act pursuant to

Section 9 (d) of the Act which empowers PPOA to initiate amendments to the aforementioned Act. The basis which have informed the review of the Act as follows:

1. Stakeholders conferences (Annual and Regional) held since 2007
2. Constitution of Kenya, 2010
3. Stakeholders Consultative Forums for professional organisations
4. East African Public Procurement Forums held annually in the East African Countries since 2008
5. Benchmarking study tours in Germany, USA, Mauritius, Chile etc.
6. Research studies on procurement matters
7. Procurement Reviews, Assessments, Audits and Investigations
8. UNCITRAL Model Public Procurement Law (Revised), 2011

Some of the key highlights of the Layman's Bill are:

1. Re-alignment of the Act to the Constitution
2. E-Procurement
3. New expeditious methods of procurement such as competitive negotiations, e-reverse auctions, force account etc.
4. Restructuring of Supplies Branch currently under Ministry of Lands, Housing and Urban Development
5. Creation of an agency to manage procurement of items commonly procured in the public sector
6. Efficient inventory management
7. Effective Contract Management
8. Increased sanctions against offences, among others.

Challenges Faced by Governors and County Executives

1. Irregularities in evaluation of bids
2. Failure in responding to clarifications sought by bidders
3. Failure to notify bidders and provisions of reasons why the bid was not successful
4. Unclear/tailored specifications
5. Delays in payments to suppliers/contractors
6. Poor record keeping
7. Non implementation of the 30% directive of procurement spend for the youth, women and persons with disabilities
8. Insufficient manpower

The County Executives in charge of Finance have complained of not being involved in the procurement function since the Public Procurement and Disposal (County Government) Regulations of 2013 have stipulated that the County Secretary is the appointing authority for the various procurement and disposal related committees. They argue that the Public Financial Management Act states that CEC, Finance are the Accounting Officers and as such there is need for recommendation to be made for urgent revision of the County Government Regulations. This is with a view to place procurement under the Finance Docket in the Counties in order to deal with the confusion that could lead to loss of public funds where some Departments exercise control of funds but redirect the accountability of using such resources to the Finance Docket.

Areas of Focus

1. Capacity building in all the Counties to improve awareness of the procurement law, updated publications, directives, manuals, and standard documents prepared and distributed by PPOA and placing professionals in the procurement unit.
2. The Counties should employ qualified procurement professionals
3. The Counties should prepare procurement plans as part of budget preparation activity
4. Submit mandatory reports on procurement preference to PPOA to enable us monitor compliance
5. Improve the monitoring of contract management processes and update the procurement files; and
6. Improve liaison with PPOA on matters where the law and regulations need clarification and support in interoperation of the law and regulations

The Director General in expounding on his remarks to the Committee indicated that the Supplies Branch had not functioned effectively since the procurement law came into place. He informed the Committee that the authority was now proposing the restructure of this office and for it to be anchored in the law and it would then be in a position to advise on the cost of commonly procured items by government.

The Director General also expressed concern about the delays to the procurement process brought on by slow response from the judicial review board on procurement issues brought before it for determination.

The Authority in its submissions, submitted to the Committee a number of annexes including circulars and regulations issued by the Authority and by National Government on the implementation of preference and reservation schemes in procurement. Copies of the annexes are attached to these minutes.

Min. No. 192/2014: Committee Deliberations with Procurement Oversight Authority (PPOA)

The Committee raised concerns about the existing procurement rules in County Governments that allowed them to place newspaper advertisements calling for tenders for items whose total cost in many instances was far less than the cost of the newspaper advertisement. The Director also informed the Committee that where Counties opted to use direct procurement, they needed to inform PPOA as well as submit the reasons why direct procurement was chosen.

The Committee was concerned with the fact that close to fifty percent of procurement processes end up challenged in a court of law. The Committee sought to know if penalties could not be introduced for people filing frivolous court proceedings and resultantly delaying procurement processes.

The Committee was concerned with the issue of payment delays by most procuring entities. The Committee noted that this was a huge challenge and in many instances, vendors were forced to pay bribes to authorising officers in order to get their payment certificates authorised which in turn significantly eroded their profit margins.

The Committee also raised concerns about the emergence of numerous briefcase companies that have perfected that art of meeting all necessary tender requirements with the exception of the ability to carry out actual implementation/ execution of the tender work.

The Committee took note of a proposal that the Senate Information Communication and Technology (ICT) Committee working together with the Senate Finance, Commerce and Budget Committee should sponsor a Counties operations transparency Bill. The Bill the Committee deliberated would demand the use of ICT in procurement through the establishment of a website for all county procurements. The Committee noted that a similar system was being applied successfully in the County of Hamburg in Germany and Kenya could use that system as a model.

The Committee sought to know how effectively the different procuring entities were implementing Article 56 of the constitution which mandates that the State shall put in place in all sphere of ordinary life affirmative action programmes for Minorities and marginalised groups. The Committee sought to know how effectively Article 56 was being implemented as relates to the procurement process and what the Public Procurement Oversight Authority was doing to ensure compliance. The Committee further sought to know what measures could be taken to empower women, youth and persons living with disabilities to take advantage of these opportunities created for them while at the same time ensuring that procuring entities comply with the provisions made for affirmative action.

The Committee highlighted that the procurement process is complex and in many cases expensive and resultantly remained out of reach for the targeted groups for which it was intended despite the creation of preferential treatment. The Committee sought to know how the Authority could streamline and simplify the bidding process for the target groups as well as carry out sensitisation to make it easier for the targeted groups to participate.

The Committee also addressed concerns of award of tenders to the least deserving. The Committee noted that in most tender cases in Kenya it was not the most deserving who got awarded the contract. The Committee sought to know how companies or individuals who do not deliver could be blacklisted by procuring entities.

The challenge of restricted tendering was also noted with the Committee acknowledging that in most cases the procuring entity would continually only select people they know which in turn raised key questions of integrity. The Committee further queried instances where there was a government to government procurement why the delivering entity had the ability to determine the agency to deliver the goods or services being procured.

The Committee raised concerns about the reservations list set aside for the preferential procurement and noted that the items provided for may not add up to 30% of the procurement value. The Committee sought to know how the Authority would ensure compliance of the same by procuring entities. The Committee also stated concerns where people in the Counties alleged that despite the advertisement of tenders and what appeared to be a transparent procurement system, those to be awarded the tenders were already known and in reality most bids were already pre-determined.

Min. No. 193/2014 : Responses by PPOA on the Bill

The PPOA Director General (DG) informed the Committee that in 2011 the push for a revised procurement law had been very intense and the pressure to deliver the law saw has led to some challenging included provisions. The DG informed the Committee that there were certain provisions of the law that had now been tested and been found not to be working very well and were in need of urgent review. He cited the example of the provision for judicial review in the law. He informed the Members that the process for judicial review did not have constraints of time despite the fact that all procurement processes as per the law should be concluded within a specific timeframe. He further clarified to Members that no decisions could be taken on a matter under judicial review until a decision was given by the courts. He emphasised that it was important to review the law to ensure that all matters going for judicial review were completed in good time. This he stated would perhaps mean designating a specific court to deal with all procurement matters requiring judicial review.

The DG informed the Committee that there were strict timelines for the procurement process. He informed the Committee that for all procuring entities as per the law procurement plan needed to be in place before the process begun and money for the procurement was not meant to be released by the Controller of Budget (COB) at the stage for allowing expenditure to be occurred, until the procurement plan was in place. On the matter of value for money in the procurement processes, the DG advised that the regulations were very clear on the matter and procuring entities were not expected not advertise goods/services that cost less than the cost of advertisement. He informed the Committee that in such instances the accounting officer should be held accountable for such decisions. The DG informed the committee that PPOA had issued guidelines on this matter. The DG further expressed concern that entities within the same Ministry could not consolidate their procurement advertisements and run them at the same time. He informed the Committee that these suggestions were all part of the guidelines issued by PPOA but were not always followed by procurement entities.

On the issue of many procurement processes ending up in courts; the Dg informed the Committee that PPOA had no control over the right of people to seek redress in court if unsatisfied. The DG informed the Committee that the enlarged democratic space had allowed people the right to seek redress in the courts if they were unsatisfied with any aspect of the procurement process. The DG acknowledged the Committees suggestion on introducing penalties for individuals lodging frivolous suit proceedings. This are the DG noted was one that needed urgent redress and he challenged the Committee to consider practices adopted by other countries to tackle this issue.

The dg advised the Committee that there was a timeframe for payment of suppliers and penalties included for late payment. He however concurred and accepted that these are frequently ignored. The Committee in turn challenged the DG to create a provision for reporting to PPOA on dates of issue of tenders and expected and dates of payment as well as request for regular reports on outstanding payments.

The Committee sought to know from the DG how complaints to PPOA regarding procurement processes were handled to protect the privacy of the complainant as well as to ensure that the agency against which the complainant was complaining did not get to see the letter/ complaint.

The DG informed the Committee that on the issue of the reservations list, the disadvantaged groups were free to apply for any tender and not just those on the reservations list. He further briefed the Committee that in the roads sector, there was a specific regulation for roads that reserved an amount of 1 billion for citizen contractors (small and medium enterprises).

The Authority took note of the Committees recommendations that all procurements should be put up on a website. The DG reiterated that anchoring the thirty percent preferential treatment in law was good as it would ensures that procuring entities were now forced to comply with the law.

On the issue of the complicated bidding process, PPOA advised the Committee that it had issued a procurement manual to try and simplify the process. The DG further informed the Committee that when the Authority held forums to try and sensitise the people as well as engage on how to improve the process, people in most instances did not turn up.

On the issue of youth, women and persons with disabilities facing challenges of resources to participate in the tender process, the Authority advised that regulations provided for discounting of tenders.

On the issue of compliance and award in many cases to people who do not qualify; the Authority advised that in many instances the challenges had been with staff who lacked integrity. The DG informed the Committee that PPOA had investigated and forwarded many cases to Ethics and Anti Corruption Commission for action.

The DG informed the Committee that PPOA had recommend debasement of suppliers who had not delivered.

On the issue of government to government procurement PPOA advised the Committee that it had been engaged in the process of reviewing the law and the new law would include regulations and mechanisms for this type of procurement so as to give guidelines to both entities. The DG highlighted to the Committee that there was need to re-align the part of the Procurement Act that allowed for waiving of the law where money for procurement comes from donors in the form of a grant or loan. The Authority noted that the provision in that Act dealing with conflict was unconstitutional as it gave superseding authority to the negotiated agreement signed with the donor over the procedure laid down in the Act.

The Committee noted that the main reason Counties were using restricted tendering was a strategy to skip the long procurement process. This they emphasised needed to be addressed and guidelines put in place for this type of procurement by the Counties.

In conclusion the Committee observed that on the issue of designated courts to deal with issues of judicial review, this would not be necessary as Milimani commercial court was set up to deal with commercial matters and there was provision for fast track matters.

Min. No. 194/2014: Any Other Business

The Committee thanked the Director General and his team for taking time to meet with the Committee.

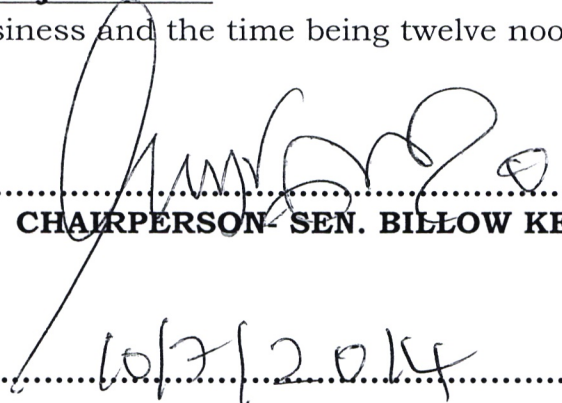
Min. No. 195/2014: Date of Next Meeting

The date of the next meeting was agreed as Wednesday 2nd July, 2014 from 11.00 am at the Ground Floor, Boardroom of County Hall.

Min. No. 196/2014: Adjournment

There being no other business and the time being twelve noon, the meeting adjourned.

SIGNED:


CHAIRPERSON SEN. BILLOW KERROW, MP

DATE: 10/7/2014

MINUTES OF THE 70TH MEETING OF THE STANDING COMMITTEE ON FINANCE, COMMERCE AND BUDGET HELD ON THURSDAY 26TH JUNE, 2014 AT THE GROUND FLOOR BOARDROOM, COUNTY HALL, PARLIAMENT BUILDINGS AT 9.00 AM

Present

1. Sen. Billow Kerrow - **Chairman**
2. Sen. (Dr.) Wilfred Machage - **Chairing**
3. Sen. (Prof.) Peter Anyang' Nyongo
4. Sen. Beatrice Elachi
5. Sen. Zipporah Kittony
6. Sen. Paul Njoroge Ben
7. Sen. Catherine Mukiite
8. Sen. Moses Wetang'ula

Absent with Apologies

1. Sen. Peter Ole Mositet - **Vice Chairman**
2. Sen. Mutahi Kagwe
3. Sen. Mungai James
4. Sen. Mutula Kilonzo Junior
5. Sen. Boni Khalwale
6. Sen. (Prof.) John Lonyangapuo

In Attendance

The Kenya Senate

1. Mr. Njenga Njuguna - Director Committee Services
2. Ms. Emmy Chepkwony - Senior Clerk Assistant
3. Ms. Brenda Ogembo - First Clerk Assistant
4. Mr. Gichohi Mwaniki - Fiscal Analyst
5. Mr. Hussein Salat - Fiscal Analyst
6. Ms. Carol Cheruiyot - Legal Counsel

Min. No. 181/2014: Preliminaries

The proceedings commenced at 9.30 a.m. Thereafter a word of prayer was offered by Senator Machage who was chairing the meeting. Those in Secretariat advised the Committee that due to urgent matters requiring the attention of the Fiscal Analyst making the presentation, they would begin with agenda item four and then return to agenda item three. The Chairman accepted the proposal and invited the officer from the Budget Office to make his presentation.

Min. No. 182/2014: Adoption of the agenda

The agenda presented was adopted as follows:-

1. Preliminaries

1. Prayer
2. Introductions
3. Remarks by the Chairperson

2. Adoption of the Agenda

3. Briefing by Parliamentary Budget Office on the Public Procurement and Disposal (Amendment) Bill, 2013

4. Deliberation of matters outstanding before the Committee

1. Progress Report on Mediation on the Division of Revenue Bill
2. Statements
3. Bills

5. Consideration of the Public Finance Management (Amendment) Bill, 2014

6. Any Other Business

7. Adjournment

Min. No. 183/2014: Briefing by Parliamentary Budget Office on the Public Procurement and Disposal (Amendment) Bill, 2013

The budget officer took the Committee through a brief on the Public Procurement and Disposal (Amendment) Bill, 2013 as follows;

I. Overview of the Bill

The Public Procurement and Disposal (Amendment) bill, 2013 is a bill for an Act of Parliament to amend the Public Procurement and Disposal Act, 2005 to provide for affirmative action

II. Situational Analysis

The Public Procurement System in Kenya has evolved from a crude system with no regulations to an orderly legally regulated procurement system. The Government's Procurement system was originally contained in the Supplies Manual of 1978, which was supplemented by circulars that were issued from time to time by the Treasury. The Director of Government Supply Services was responsible for ensuring the proper observance of the provisions of the Manual. The Manual created various tender boards for adjudication of tenders and their awards.

A review of the country's public procurement systems was undertaken in 1999 and established that:

- i. There was no uniform procurement system for the public sector as a whole
- ii. It did not have sanctions or penalties against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed
- iii. The Supplies Manual did not cover procurement of works
- iv. The dispute settlement mechanisms relating to the award procedures as set out in the Manual were weak and unreliable for ensuring fairness and transparency

- v. Records of procurement transactions in many cases were found to be inaccurate or incomplete or absent, which led to suspicions of dishonest dealings at the tender boards.
- vi. The systems had other institutional weaknesses that not only undermined its capacity for carrying out their mandates effectively but also led to a public perception that the public sector was not getting maximum value for money spent on procurement.

In view of the above shortcomings it was found necessary to have a law to govern the procurement system in the public sector and to establish the necessary institutions to ensure that all procurement entities observe the provisions of the law for the purpose of attaining the objectives of an open tender system in the sector. Consequently the establishment of the Exchequer and Audit (Public Procurement) Regulations 2001 which created the Public Procurement Directorate (PPD) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB).

The PPD and PPCRAB, though largely independent in carrying out their activities, had been operating as departments in the Ministry of Finance on which they relied for staff, facilities and funding. Since these institutional arrangements have a potential for undermining the impartiality of these bodies in the long run it was found necessary to create an oversight body whose existence was based on a law. The Public Procurement and Disposal Act, 2005 was thus enacted and it became operational on 1st January, 2007 with the gazettelement of the Public Procurement and Disposal Regulations, 2006.

The Public Procurement and Disposal Act, 2005 created the Public Procurement Oversight Authority (PPOA), the Public Procurement Advisory Board (PPAB) and the continuance of the Public Procurement Complaints, Review and Appeals Board as the Public Procurement Administrative Review Board (PPARB). The PPAB and PPARB are autonomous bodies.

The PPOA is mandated with the responsibility of:

1. Ensuring that procurement procedures established under the Act are complied with;
2. Monitoring the procurement system and reporting on its overall functioning;
3. Initiating public procurement policy
4. Assisting in the implementation and operation of the public procurement system by:
 - preparing and distributing manuals and standard tender documents,
 - providing advice and assistance to procuring entities, and
 - develop, promote and support training and professional development of staff involved in procurement

Observations

The Following issues are noted with regard to the Bill:

1. **Amendment to clause 2 of the Act:** The bill introduce a new objective into the Public Procurement and Disposal Act, 2005 that provide for affirmative action for the youth in accordance with Article 55 of the constitution and also advance-

ment of youth participation in the procurement process in accordance with Article 227 of the constitution. This will ensure the youth to engage in income generating activities and access to employment thus result into economic growth.

2. Amendment to clause 3 of the Act: The bill seeks to amend the Principal Act by introducing a new definition that includes: disadvantaged group, persons with disability, women and youth. These are the marginalized groups in the society thus this amendment caters for them hence provide for preference and reservation in public procurement in accordance with Article 227 2(a, b) of the Constitution.

3. Amendment to clause 9 of the Act: The bill seeks to amend clause 9 of the principal Act, 2005 by introducing a new function of the Public Procurement Oversight Authority (PPOA) which give the Authority the mandate to implement the preference and reservation and to provide data to the Authority disaggregate to indicate the number of disadvantaged groups that have benefitted. This ensures economic freedom for the disadvantages group and overall economic growth.

4a. Amendment to clause 39 of the Act: The bill introduces a new amendment into the Act by separating clause 39 4(a) into two sub-sections that is, candidates such as disadvantaged groups and micro, small and medium enterprises that were initially one sub-section in the Act.

b. The bill introduces new regulations and guidelines into the act by including new sub-sections (9, 10,11,12,13,14,15,16 and 17) into clause 39 of the Act which include:

i. That every procuring public entity shall ensure that at least thirty percent (30%) of its procurement in every financial year be allocated to the youth, women and persons with disability .This regulation will enable disadvantaged groups to fully participate in public procurement process

ii. That every public procuring entity shall ensure that all money paid out to an enterprise owned by youth, women and persons with disability is paid into account where mandatory signatory is a youth, woman or persons with disability. This will ensures transparency in public procurement allocations.

iii. That public procuring entities at the national and county level shall make a quarterly report to the public procurement oversight Authority (PPOA) this is a new regulations that that was not provided for in the Act and will ensures efficiency, transparency and accountability in the Public Procurement process which ensures proper resources allocations thus improve the economy.

iv. That the report in sub-section 11 shall certify compliance with provision of this Act and shall provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and service have been procured by the procuring entity.

v. That the Authority shall make a quarterly report to parliament for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, of which the report shall contain details of the procuring entities and how they have complied with the provision of this Act.

vi. That the Cabinet Secretary shall prescribe the preference that shall facilities the attainment of the quota specified in sub-section (9) in order to achieve the objectives of Article 55 and 227(2) of the Constitution. This will enhance both the national and county government procurement process to be underline with section (9).

vii. That the preference under sub-section 14 shall be prescribed within 90 days after commencement of this Act and the conditions the Cabinet Secretary may specify, such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

viii. That the right of equality and freedom from discrimination under Article 27 of the constitution shall be limited as specified under this section for the purpose of facilitating affirmative action to ensure that the youth access employment and have opportunities to participate in economic spheres of life as contemplated in Articles 54,55,56 and 227b of the constitution and also protection or advancement of the youth in accordance with Article 227 of the constitution who have previously been disadvantaged by unfair competition or discrimination in the procurement process.

ix. That the Cabinet Secretary to devise mechanisms that safeguards against possible abuse in the legislative endeavor for the attainment of the objects specified in paragraphs (a) and (b) of subsection (12) and the principles and standards applicable to the regulations made under this subsections are set out in this Act.

5. Amendment to clause 129 of the Act: The bill introduce a new method of disposing of which the disposal committee shall recommend to the Accounting officer that radioactive or electronic waste shall be disposed only to a person licensed to handle the respective waster under section 88 of the Environmental Management and Co-ordination Act ,1999.This regulation will minimize environmental pollution that results from this radioactive or electronic wastes.

Salient Issues requiring consideration

1. Thresholds for the various adhoc committees
2. Number of Committees
3. Speed of Procurement
4. Value for Money- Market Prices

III. Policy Options

1. The following policy options are available for the Committee's consideration

No.	Policy Option	Impact
1.	Pass the Bill as Draft	The will lead to affirmative action where thirty percent of public procurement will benefit the disadvantaged groups.

2.	Reject the Bill	The present situation where the youth, women and persons with disabilities are not catered for public procurement process will still exist
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Min. No. 184/2014: Committee Deliberation on the Public Procurement and Disposal (Amendment) Bill, 2013

The Committee sought guidance on the issue of dealing with suppliers when during procurement process only one tender comes in and the procuring entity is forced to cancel and proceed to re-tender. The Budget Office advised that one of the amendments that could be considered to address this issue was the application of fixed price procurement that would allow procuring entities to make a determination even with the submission of only one tender.

The Committee noted that the issue on value for money in the procurement process was an issue of key importance and it was important to put in place measures to ensure that exploitation of Ministry's is stopped.

The Committee also sought to know how the amendment would ensure fair distribution of the 30% preferential procurement among the three identified disadvantaged groups. They Committee deliberated on how the amendments proposed would ensure that all three identified groups achieve equal opportunities in the preferential earmarked procurement. The Committee was advised that the danger with a ring fenced amount for each identified disadvantaged group would lead to complications in instances where one marginalised groups does not take up its procurement allocation at all. The Committee was advised that the best way to address their concerns was to task the Cabinet Secretary with developing regulations for the Bill that would define the criteria for preferential allocation and table the same before the Committee and the Committee on delegated legislation for review prior to gazettelement.

The Committee also sought to know if an amendment or legislation could be passed that would mandate procuring entity tender committees to determine fair market prices for tendered goods and make a decision at that level. The Committee was advised that the best way to address this issue would be for the Public Procurement Oversight Authority to issue guidelines on fair market prices for goods that would guide the procurement of commonly sourced items used by government. This list would then be reviewed from time to time to ensure a true reflection of listed items and their current market prices.

The Committee was informed by the Secretariat that the civil society advocacy group, Transparency international had submitted a memorandum proposing amendments to the Public Procurement and Disposal (amendment) Bill, 2013. The organisation in its memorandum had noted that the Bill sought to amend the Act to provide for allocation of at least thirty percent of total annual public procurement to youth. The organisations concerns lay in the fact that women and persons with disabilities had not been included in the Bill. The memorandum stated that this departed from constitutional provisions seeking to protect and advance not only youth but also, women and persons

with disabilities and marginalised groups. The memorandum recommended that women and persons with disabilities be included in the Bill for them to have equal legal status in the same capacity as youths. The Committee noted that the act had been amended and did incorporate the concerns listed in the memorandum. It was however noted that certain clauses in the Bill still needed to have the language refined to ensure it provided for all disadvantaged groups and not just the youth. The submitted memorandum is annexed to these minutes.

Min. No. 185/2014: Deliberation of matters outstanding before the Committee

On the first issue of the formation of a mediation committee on the Division of Revenue Bill, the Committee was informed by the Director of Committee Services that Mediation Committee had been established and was scheduled to have its first meeting the following week on Monday morning at 9 A.M.

The Committee was also briefed on the two Statements outstanding before the Committee and advised that the same had been shared with Chair to issue to the House. The Committee was informed that on the further information sought from the Ministry on the Statement by the Committee, a letter had been dispatched and the Ministry's response was being awaited.

The Committee noted the procurement challenges facing the Counties and which was resulting in challenges of Counties absorbing their allocations. The Committee noted that the issue of procurement challenges in the counties was one that required urgent action to ensure counties are able to absorb their allocations as budgeted.

On the Public Finance Management (Amendment) Bill, 2014 the secretariat advised the Committee that during the pre-publication scrutiny, the Committee had advised that the Bill was ill advised and unenforceable. The Committee had further advised that the Bill should not proceed to publication. The Secretariat advised the Committee that the Bill had however proceeded to publication and now stood committed to the Committee. The Secretariat presented a schedule to the Committee proposing how the Committee should process the two Bills currently committed it. The Committee endorsed the proposed schedule.

Min. No. 186/2014: Any Other Business

The Committee noted that there was need for urgent action to draw regulations to guide the distribution of the Equalisation fund.

Min. No. 187/2014: Date of Next Meeting

The date of the next meeting was agreed as Tuesday 1st July from 10.00 am at the Ground Floor, Boardroom of County Hall.

Min. No. 188/2014: Adjournment

There being no other business and the time being thirty minutes past eleven o'clock in the morning, the meeting adjourned.

SIGNED:



CHAIRPERSON SEN. BILLOW KERROW, MP

DATE:

10/7/2014

**MINUTES OF THE 69TH MEETING OF THE STANDING COMMITTEE ON FINANCE,
COMMERCE AND BUDGET HELD ON TUESDAY 20TH JUNE, 2014 AT THE GROUND
FLOOR BOARDROOM, COUNTY HALL, PARLIAMENT BUILDINGS AT 9.00 AM**

Present

1. Sen. Billow Kerrow - **Chairman**
2. Sen. (Prof.) Peter Anyang' Nyongo
3. Sen. Beatrice Elachi

Absent with Apologies

1. Sen. Peter Ole Mositet - **Vice Chairman**
2. Sen. Moses Wetang'ula
3. Sen. Catherine Mukiite
4. Sen. Mutahi Kagwe
5. Sen. (Dr.) Wilfred Machage
6. Sen. Zipporah Kittony
7. Sen. Mungai James
8. Sen. Paul Njoroge
9. Sen. Mutula Kilonzo Junior
10. Sen. Boni Khalwale
11. Sen. (Prof.) John Lonyangapuo

In Attendance

The Kenya Senate

1. Ms. Emmy Chepkwony - Senior Clerk Assistant
2. Ms. Brenda Ogembo - First Clerk Assistant
3. Ms. Carol Cheruiyot - Legal Counsel
4. Mr. Hussein Salat - Fiscal Analyst

Min. No. 174/2014 Preliminaries

The proceedings commenced at 9.15 a.m. Thereafter a word of prayer was offered by the Committee Clerk followed by welcome remarks by the Committee Chair to Members present. The Committee constituted itself into a subcommittee to facilitate urgent processing of pending Bills before the committee. The Committee was advised by the Secretariat that the Directorate of Legal Services would be briefing them on the two Bills listed on the agenda.

Min. No. 175/2014 Adoption of the agenda

The agenda presented was adopted as follows:-

- 1. Preliminaries,**
 - i. *Prayer,*

- ii. *Introductions,*
- iii. *Remarks by the Chairperson*
- 2. **Adoption of the Agenda**
- 3. **Legislative Bills and Proposals:-**
 - a. The County Trade Development Loans Scheme Bill, 2014;
 - b. The Public Procurement and Disposal (Amendment) Bill (National Assembly Bill No. 31 of 2013)
- 4. **Any Other Business**
- 5. **Adjournment**

Min. No. 176/2014: Briefing by Directorate Legal Services on the Public Procurement and Disposal (Amendment) Bill, 2013

The Legal Counsel from the Directorate of Legal Services briefed the Committee as follows:

The Public Procurement and Disposal (Amendment) Act, 2014 is a National Assembly Bill forwarded to the Senate for concurrence. The Bill seeks to amend the Public Procurement and Disposal Act, No. 3 of 2005 (herein referred to as the Principal Act) to facilitate affirmative action for the youth in accordance with Article 55 of the Constitution and also advance the youth participation in the procurement process in accordance with Article 227 of the Constitution.

The Bill further seeks to ensure that at least thirty percent of the annual procurement by public entities is allocated to the youth, women and persons with disabilities.

Summary of the Proposed Amendments

1. Section 1 of the Principal Act is amended to provide for the short title and the commencement of the Act as, the Public Procurement and Disposal (Amendment) Act, 2014 which shall come into operation after ninety days from the date of publication.
2. Section 2 of the Principal Act has been amended to provide for affirmative action with respect to involvement of the youth in procurement matters in accordance with Articles 55 and 227 of the Constitution.
3. Section 3 of the Principal Act is amended to provide for definitions of the words, disadvantaged groups, persons with disability, women and youth.

4. Section 9 of the Principal act is amended to make it compulsory for the Public Procurement Oversight Authority established under the Section 8 of the Act, ensures that procurement entities implement the preference and reservations. The Authority is also mandated to provide for and have a database for the number of disadvantaged groups that have secured tenders.

No	Clauses of Bill	Proposed amendment	Provision in the Principal Act being amended	Remarks
	Clause 1	Seeks to amend the short title to read, the Public Procurement and Disposal (Amendment) Act, 2014 which shall come into operation ninety days from the date of publication.	This Act may be cited as the Public Procurement and Disposal Act, 2005 and shall come into operation on such date as the Minister may by notice in the Gazette, appoint.	
	Clause 2	provide for affirmative action by involving the youth in procurement matters pursuant to Articles 55 and 227 of the Constitution.	Section 3. A new paragraph is inserted immediately after paragraph (f) of the Principal Act.	

	Clause 3	seeks to amend section 3 by inserting the words, “disadvantaged group”, “persons with disability”, “women” and “youth”.	Section 3 on definitions.	
	Clause 4	seeks to make it compulsory for the Authority established under the Act to ensure procurement entities implement the preference and reservations as provided for and have a database of the number of disadvantaged groups that have gotten access to tenders.	Section 9. A new paragraph is inserted immediately after paragraph (d) of the Principal Act.	Renumbers the existing paragraph (e) as paragraph (f)

Clause 5	Seeks to-	<ul style="list-style-type: none"> • entrench the policy of issuance of 30% of tenders to the youth, persons with disabilities and women; • provide for reporting and implementation mechanism of the 30% policy; and • facilitate the implementation of Articles 27, 54, 55, 56, 94 and 227 of the Constitution in procurement processes. 	<ul style="list-style-type: none"> • Section 39 subsection (4) is deleted and substituted with a new section. • New subsections are inserted immediately after subsection (8). 	
Clause 6	Makes a provision to the effect that, only persons licensed under the Environmental Management and Coordination Act, 1999 may be allowed to dispose electronic waste.		Section 129. A new subsection is inserted immediately after subsection (3).	

5. Section 39 of the Principal Act is amended to entrench the policy of the issuance of thirty percent (30%) of tenders to the youth, persons with disabilities and women. It

further provides for a reporting and implementation mechanism of the thirty percent policy and facilitates the implementation of Articles 27, 54, 55, 56, 94 and 227 of the Constitution in the procurement process.

6. Section 129 of the Principal Act is amended to provide that only such persons as are licensed under the Environmental Management and Co-ordination Act, 1999 may be allowed to dispose electronic waste.

This Bill aims to amend the Public Procurement and Disposal Act, 2005 so as to make the Act conform to the practical challenges in implementation arising out of the enactment of the Constitution.

Min. No. 177/2014: Deliberations by the Committee on the Public Procurement and Disposal (Amendment) Bill, 2013

Following on the presentation by the Directorate of Legal Services, the Committee in its deliberations initially proposed an amendment to Clause 5(12) of the amendment inserting a new section to read as follows:

c) Provide explanation for failure to comply with the provisions of this section and efforts made by the entity to ensure future compliance

The Committee resolved to streamline the use of disadvantaged groups in the Bill to replace the terms youth, women and persons with disability as the term disadvantaged groups had already been defined in the Bill to include the three category of persons.

The Committee recommended that with those changes the Committee approved the Bill but would consider any further views submitted by the public.

Min. No. 178/2014: Briefing by Directorate Legal Services on the Committee on the County Trade Development Loans Scheme Bill

The Legal Counsel briefed the Committee as follows. :

Background

The Bill has been drafted by the Directorate of Legal Services of the Senate. If the committee approves, instructions may be given to the Directorate for publication of the Bill in the name of the Chairman of the Committee or a member designated by the Committee.

Summary

The Bill proposes to establish the County Trade Development Loans Scheme to facilitate access to affordable credit by micro, small and medium scale entrepreneurs.

The Bill further seeks to establish the National Trade development Loans Board which will disburse money to the County Trade Development Joint Loans Board in form of loans.

History of the Joint Loan Board Credit Scheme

The Trade Development Joint Loan Board Program was established by the British colonial government in 1954 but the institutional framework was formalized at independence through legal notice No. 265 of 1963 of Local Government Regulation 104 and came into operation in 1966.

The program's objectives were to provide financial support and an opportunity to gain commercial experience to Kenyan industrialists, artisans and businessmen. Over time, loans were intended to assist in business expansion and were focused mainly on rural areas where the financial sector was underdeveloped. The initiatives also were intended to check rural-urban migration.

The repealed Local Authorities Act, Cap 265, governed its establishment and operations with membership of the Boards drawn from both the Central Government and the local authorities. Through the Interpretation and General Provision Act, Cap 2, the then Minister for Local Government delegated to the Permanent Secretary of the Ministry of Trade and Industry the powers to regulate and run the activities of Joint Loan Boards.

The Credit Scheme is administered through the District Trade Development Offices that are spread countrywide with secretary and treasurer of the Fund being a trade officer an officer in the Ministry of East African Affairs, Commerce and Tourism. However, appointments to the Boards of the Chairperson and other Board members were done by the then Ministry of Local Government through the various local authorities. Grants to the board were expected to come from both the central government and the then local authorities.

The Credit Scheme issues loans ranging between Kshs. 20,000.00 to Kshs. 50,000.00 for a maximum period of two years with the current interest charged at 12% per annum.

With the enactment of a new Constitution, the County Governments Act and related legislation, the District Loan Boards ceased to exist and were replaced with the County Loans Board. However, only those counties that had local authorities continue to benefit from the scheme. Currently, the fund is managed by the Directorate of Commerce (Formerly Ministry of Trade) under the Ministry of East African Affairs, Commerce and Tourism.

The lack of an adequate policy, legal, regulatory and institutional framework has ensured that only those counties that were local authorities benefit from the scheme. The County Trade Development Loans Scheme Bill, 2014 therefore aims to address these issues by-

- (a) establishing a legal and institutional framework to facilitate access to affordable credit to micro, small and medium scale entrepreneurs;
- (b) setting uniform standards in the management of the Scheme throughout the country; and
- (c) ensuring equal and fair treatment of micro, small and medium entrepreneurs when accessing loans.

No	Clause	Provision	Remarks
Part I – Preliminary Provisions (Clauses 1 to 3)			
	Clause 1	Short title	It merely identifies and describes the Bill.
	Clause 2	Interpretation section	It provides for description of unclear or contentious terms used in the Bill and how those expressions apply.

	Clause 3	Objective of the Bill	To establish a legal and institutional framework to facilitate access to affordable credit to micro, small and medium scale entrepreneurs.
Part II – Establishment, Functions and Powers of the County Trade Development Loans Scheme (Clauses 4 to 11)			
	Clause 4	County Trade Development Loans Scheme	Provides for the establishment of the scheme with the headquarters being in the capital city.
	Clause 5	National Trade Development Loans Board	Provides for the establishment of the national Board.
	Clause 6	Composition of the Board	<ul style="list-style-type: none"> (i) A non executive chairperson appointed by the Cabinet Secretary; (ii) the Principal Secretary responsible for matters relating to trade; (iii) the Principal Secretary in the National Treasury; (iv) the Principal Secretary responsible for matters relating to devolution; (v) two persons nominated by the Council of Governors; (vi) one person nominated by the Kenya National Chamber of Commerce and Industry; and (vii) three other members from private sector appointed by the Cabinet Secretary.

	Clause 7, 8 and 9	Relates to the composition, qualifications for appointment as a member and the functions of the Board respectively	
	Clause 10	Secretary to the Board	Appointed by the Cabinet Secretary on the recommendation of the Board for a term of five years and may be re-appointed once. The secretary is responsible for management of the affairs of the Scheme and implementing decisions of the Board.
Part III – County Trade Development Joint Loans Board (Clauses 12 to 16)			
	Clause 12	County Trade Development Joint Loans Board	Provides for the establishment of the county Board.
	Clause 13, 14 and 15	Relates to the composition, qualifications for appointment as a member and the functions of the County Trade Development Joint Loans Board respectively	<p>The membership of the Board consists of-</p> <ul style="list-style-type: none"> (i) three members from the private sector appointed by the County Executive Committee Member and the appointed, one member designated in writing as Chairperson; (ii) two members from the private sector appointed by the Cabinet Secretary and among the appointed, one member designated in writing as the Treasurer; (iii) a representative from the National Chamber of Commerce and Industry; and

			(iv) the Secretary to the County Governing Board who shall be the respective Chief Officer responsible for trade and designated in writing by the County Executive Committee Member.
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Part IV – General Provisions Relating to the Board and County Joint Board
(Clauses 17 to 25)

	Clause 17	Board	Interpretation of the word, Board for this particular part to include both the national and the county Boards.
10.	Clause 18	Committees of the Boards	gives the Boards powers to establish committees for efficiency in service delivery.
11.	Clause 19	Tenure of office of the Board members	Each member holds office on a part time basis for a term of three years and may be reappointed once.
12.	Clause 20	Remuneration of members of the Boards.	Remuneration is to be determined by the Cabinet Secretary.
13	Clause 21	Meetings of the Boards	To be conducted in accordance with the provisions of the First Schedule
14.	Clause 22	Procedure and reasons for the removal from office of the members of the Boards.	

15.	Clause 24	Filling a vacancy in the membership of the Boards	
16.	Clause 25	Common seal	
Part V – Administration of the County Trade Development Loans Scheme (Clauses 26 to 34)			
17.	Clause 26	Eligibility criteria for benefitting from the scheme	
18	Clause 27	Interest rate on credit facilities	To be prescribed both in the Kenya and the County Gazettes.
19.	Clause 28	Maximum limit available for a credit facility	To be prescribed both in the Kenya and the County Gazettes.
20.	Clause 29	Administration fees	These includes- a) training fees payable by the trainees; b) loan processing fees; and c) such other fee as may be authorized under this Act or by any other law.
21.	Clause 30	Mode of credit facility approval	
22.	Clause 33	Obligations of the County Joint Board	They include- a) evaluating credit applications; b) approving commercially viable proposals; and c) Conducting the account of the borrowers with finan-

			cial prudence.
23.	Clause 34	Review of the Scheme	<p>The Board may review operations of the Fund to conform to government policy on facilitating accessible and affordable credit to Kenyans.</p> <p>The Cabinet Secretary has power to conduct review of the operations of the Scheme and report in writing to the relevant National Assembly committee the findings of the review.</p>
<p>Part VI – Administration of the County Trade Development Loans Fund (Clauses 35 to 37)</p>			
24.	Clause 35, 36 and 37	The County Trade Development Loans Fund	<p>Provide for the establishment and administration of the Fund and the functions of the Board in relation to the Fund. The main object of the Fund is to receive funds and disburse monies to the County Joint Boards to lend to micro, small and medium scale entrepreneurs through provision of financial assistance.</p> <p>It further provides for the establishment and role of the Fund Manager.</p>
<p>Part VII – Financial Provisions (Clauses 38 to 40)</p>			

25.			Make provisions on preparation of annual estimates of income and expenditure of the scheme, and preparation and auditing of the accounts.
Part VIII – Miscellaneous Provisions (Clauses 41 to 48)			
26.		Miscellaneous Provisions	Provides for- a) establishment of a registry and database of the scheme; b) oversight by the Cabinet Secretary; c) management of information of the scheme; d) enactment of regulations by the Cabinet Secretary; e) protection from personal liability of the scheme's members and employees; and f) offences and penalties under the Act.
Part IX – Transitional Provisions (Clause 49)			
27.			Contains the savings and transition provisions. Persons who immediately before the commencement of this Act, were employees of the former Joint Boards, shall, upon the commencement of this Act, be considered to be employees of the Scheme.
SCHEDULE			
28.			Contains provisions relating to the meetings of the Boards and their conduct.

Min. No. 179/2014: Deliberations by the Committee on the County Trade Development Loans Scheme Bill

The Committee sought to understand in more depth what informed the drafting of the Bill and the benefits of establishing know what had informed the rationale to establish the County Trade Development Joint Loans Board at the national level and not at individual county level. The Committee also sought to understand the rationale behind not sharing the money that the Board would be issuing to traders as shareable revenue and letting each County determine how to go about issuing the loans.

The Committee on further review of the bill and resolved to meet with the drafter of the Bill, The National Treasury and the Council of Governors Committee concerned with matters of trade to review the legislative proposal and suggest amendments to it prior to publication.

Min. No. 180/2014 Any Other Business

The Chairman advised the Committee that the National Assembly had rejected the Senate Amendments to the Division of Revenue Bill and accordingly as per the Constitution and Standing Orders the Bill would proceed to mediation.

The Committee observed that the ongoing government negotiations on the Economic Partnership Agreements (EPAs) with the European Union it as imperative that the Senate pass a resolution that the national government cannot proceed with a decision on EPAs until concurrence was obtained from county governments. The Committee noted that this was critical as the EPAs agreements would have a direct impact on the Counties especially on matters of agriculture. The Committee resolved to invite the Ministry of Foreign affairs to meet with the Committee and discuss the proposal put before the ACP and impact of the same on agriculture in the counties. The Committee further resolved to invite relevant Non-Governmental Organisations working on the issue to make a presentation to the Committee on the same issue.

Min. No. 181/2014 Date of Next Meeting

The date and venue of the next sitting was agreed to be communicated by way of notice.

Min. No. 182/2014 Adjournment

There being no other business and the time being thirty minutes past ten o'clock in the morning, the meeting adjourned.

SIGNED:
CHAIRPERSON- SEN. BILLOW KERROW, MP

DATE: 10/7/2014



BRIEF TO THE SENATE COMMITTEE ON FINANCE, COMMERCE AND BUDGET ON PREFERENCES AND RESERVATION SCHEME ON 1ST JULY 2014

The Public Procurement and Disposal (Preference and Reservations) Regulations 2011 (the Regulations) were gazetted by the Minister for Finance on 8th June, 2011 with the aim of operationalizing Section 39 of the PPDA for the purpose of promoting the growth of local, national and regional industry and supporting socio-economic development by extension.

Under Regulation 29, procuring entities are required to submit to the Authority the part in the procurement plan demonstrating application of preference and reservation schemes in relation to the procurement budget within sixty days after commencement of the financial year. Also, Regulation 30 requires procuring entities to submit quarterly reports to PPOA on all procurement awards where a preference or reservation scheme has been applied.

The National Treasury and the Authority have issued the following circulars informing procuring entities on the need to apply preferences and reservations and requiring them to submit quarterly reports as required:

- PPOA CIRCULAR NO. 10/2011 – dated 29th November 2011 on Mandatory Reports on the Implementation of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011;
- Treasury Circular No. 11/2011 – dated 7th September 2011 Implementation of Section 39 of the Public Procurement and Disposal Act, 2005: Following the



- gazettement of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011;
- PPOA CIRCULAR NO. 4/2012 – dated 1st August 2012 on Conformity with the Public Procurement and Disposal Act, 2005;
 - Treasury Circular No. 14/2013 – dated 25th September 2013 on Presidential Directive:- 30% of all Government Procurement be allocated to the Youth, Women and Persons with Disabilities;
 - PPOA Circular No. 1/2014 – dated 29th January 2014 on Implementation of Procurement Reservation Schemes;

The Cabinet Secretary (National Treasury) gazetted the Public Procurement and Disposal (Preference and Reservations)(Amendment) Regulations, 2013 on 18th January 2013 further enhancing benefits that should accrue to target groups under preference and reservations. These amendments went further to reserve thirty percent of all public procurement for the youth, women and persons with disability.

Regulation 26 requires the Authority to monitor application of the preference and reservations schemes. To that end, PPOA issued a template for procuring entities to submit procurement awards where a preference or reservation scheme has been applied vide PPOA Circular No. 10/2011 dated 29th November 2011.

While the Governments intention to empower youth, women and persons with disability is realistic, these efforts can be enhanced if procuring entities are not reigned in to ensure proper implementation of the procurement policy. Of utmost importance is the need to provide for and apply sanctions on public officials and public entities that do not meet their legislated obligations.



**TRANSPARENCY
INTERNATIONAL
KENYA**

Transparency International-Kenya
P.O. Box 198, 00200 City Square
Nairobi, Kenya
3rd Floor, ACK Garden House, Wing D
1st Ngong Avenue off Bishop's Road
Tel: 254-20-2727763/5, 2730324/5
Mobile: 254-722-296589 / 733-834659
Fax: 254-20-2729530

Email: transparency@tikenya.org
<http://www.tikenya.org>

Clerk of the Senate,
Office of the Clerk, 2nd Floor,
County Hall, Parliament Buildings,
Nairobi – Kenya,

25th June 2014

Dear Sir,

**RE: SUBMISSIONS ON THE PUBLIC PROCUREMENT AND DISPOSAL
(AMENDMENT) BILL, 2013**

Transparency International- Kenya aims to promote a transparent corruption-free Kenya that respects good governance and social justice. TI-Kenya works to support governance institutions in enhancing transparency and accountability. Transparency International Kenya (TI-Kenya) has been actively involved in strengthening institutions of good governance by promoting active citizen participation. Under its governance and policy program, TI-Kenya works to support governance institutions in enhancing transparency and accountability as well as to strengthen the watchdog and legislative roles of Parliament; enhance effective policy and legislation in the fight against corruption; and, nurture a consistent culture of transparency and accountability in Kenya. To this end, TI-Kenya supports enactment and implementation of enabling policy/legislation incidental to the realization of its objectives.

Transparency International –Kenya would like to commend the National Assembly for the Amendment Bill. The Bill realigns the public procurement framework to the requirements of Articles 227 of the Constitution. This provision addresses the policies and laws to provide for advancement of youth previously disadvantaged by unfair competition and discrimination in a fair and equitable procurement system.

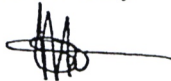
CONTINUATION

Further, the Bill also promotes Article 55 on affirmative action by youths and article 232 on the principles of public service to ensure equal opportunities are given to youths.

We note that the Bill seeks to amend the Public Procurement and Disposal Act, 2005 by providing for allocation of at least thirty per centum (30%) of total annual public procurement to youth. Our concern lies with the fact that women and persons with disabilities have not been included in the Bill. This departs from constitutional provisions seeking to protect and advance not only youth but also, women and persons with disabilities and marginalised groups.

We therefore recommend that women and persons with disabilities be included in the Bill for them to have equal legal status in the same capacity as the youths. The three classes of persons usually suffer from unfair competition more so in procurement process for various reasons among them, lack of experience, age and standing, gender and perception in the society. They should thus be covered by the thirty percent provision for them to compete fairly. This will also be in line with the Public Procurement and Disposal (Preference and Reservations) Amendment Regulations, 2013 which reserves the 30% of public procurement to youth, women and persons with disabilities (regulation 31).

Yours faithfully



Samuel Kimeu

Executive Director



COUNCIL OF GOVERNORS

MEMORANDUM ON THE REVIEW OF THE PROCUREMENT AND DISPOSAL ACT 2005 TO MAKE THE PROCUREMENT PROCESS EASY FOR COUNTIES

**PREPARED BY THE COUNCIL OF
GOVERNORS**

JUNE 2014

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1. INTRODUCTION

1.1 Background of the Assignment

As an economic activity, it is hardly necessary to emphasise the importance of public procurement. The importance of public procurement comes from the increased awareness of governments worldwide, that (i) the expenditure in public procurement represents a substantial percentage of the GDP; and (ii) a considerable part of the country resources are channelled through the procurement systems. Therefore, making procurement efficient and ensuring value for money would translate into more schools and text books for children, more health care centers, and overall better public services for the people. Being an instrument of economic control, the law on public procurement is required to contain the substantive, predictable and workable principles. Besides, the legal framework must comply with the Constitution- the supreme law of the land.

Public procurement, which refers to the purchase of goods and services by the government/public bodies, is a relevant topic not only in Kenya but also in many other developing countries. Any form of regulation is by nature instrumental. Public Procurement regulation like other forms of regulation should therefore be viewed as instruments of policy used by the government to pursue socially desirable ends.

The new Constitution has recognised the importance of public procurement in the economy and has outlined provisions stating the policy objectives of the public procurement system. Besides, the provisions in the Constitution require that a statutory enactment is put place to implement the policy objectives it sets for public procurement. Moreover, the devolved structure of government(the county system) has brought to fore the need to review the procurement system, for instance, to clarify whether the proposed counties are procuring entities as defined by the Public Procurement and Disposal Act, 2005. This has significant implication in the procurement system given that the counties shall

be the focal point of expenditure of huge sums of public funds as required by the constitution.

2. IMPACT OF DEVOLUTION ON PUBLIC PROCUREMENT AND DISPOSALS

2.1 Meaning Of Devolution

Devolution is essentially a political term that implies the concept of shared governance. It involves giving power to a region or county to allow them to govern some or all aspects of life themselves. The success of a devolved system depends on the architecture, design and implementation of the system. This part of the report examines the regulation of public procurement and disposals in the context of devolution.

2.2 The General Features of a Good Devolved System

The good devolved system of government exhibits the following characteristics:

- (a) The constitutional creation of two or more orders or levels of government with each having sovereignty and acting directly on its own citizens. This requirement is found in article 1, 184 and Sec.18 of the 6th schedule of the Constitution.
- (b) The constitutional creation of geographic units of governance at the sub-national level in to which the country is to be divided and the clear delineation of their boundaries. This is reflected in Article 5 of the Constitution
- (c) A formal constitutional distribution of governance and development functions of each level of government clearly delineated and ensuring some areas of autonomy for each. Often, these functions are legislative and executive. In purely federal systems, these may include judicial functions. This requirement is implemented by Article 186 and the 4th schedule of the Constitution.

- (d) Constitutional provisions setting out clear rules for the allocation of revenue resources among the two or more levels of government ensuring that each level is able to finance the functions assigned to it. This has been captured in Articles 202, 203 and 209 of the Constitution.
- (e) The constitutional establishment of governance institutions at each level of government with designated representation of distinct regional views within the national policy-making processes and institutions.
- (f) A supreme written constitution that is not unilaterally amendable by any one level of government, but instead, requires the consent of a significant proportion of the constituent units.
- (g) A constitutionally entrenched system of intergovernmental relationship with provision for an umpire, such as the Constitutional or Supreme Court to rule on any disputes between governments
- (h) Constitutional provisions for processes and institutions to facilitate intergovernmental co-operation and collaboration for those areas where governmental responsibilities are shared or inevitably overlap. This is reflected in Article 189.

2.3 The Constitutional Levels of Government

Article 1 (4) of the Constitution creates two (2) levels of government; at the national and the county level. The constitution makes provision for further decentralization by the county governments at Article (176) (2). Besides, Article 197 of the constitution provides for transfer of functions from one level to another. The constitution also provides for governance of cities and urban areas under Article (184). The national and the county governments are required by Article 6 (2) & 189 of the Constitution to co-operate with one another in the exercise of their constitutional functions. Because of the concept of cooperative governments, institutions for intergovernmental relations will be very important.

2.4. Objects of Devolution

Article 174 of the Constitution lists the objects of the devolution of government are as follows:

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognizing diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote the interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and
- (i) to enhance checks and balances and the separation of powers.

2.4 Distribution of Functions

Article 186 of the Constitution recognizes these three categories of functions in its distribution of functions. These are – exclusive functions, concurrent functions and residual functions. An analysis of the 4th schedule of the Constitution which sets out the list of functions indicates that the new constitution has created a very strong devolved system of government and very powerful county governments.

2.5 Public Procurement & Disposals in the Devolved Structure

2.5.1 The Constitutional Implications

Having laid down the conceptual understanding of devolution, the critical question which begs for an answer at this point is this – is the regulation of public procurement an exclusive function of the national government, a concurrent function of the national and county governments or a residual function of the national government? To answer these questions it is important to review the Fourth Schedule of the Constitution. The Fourth Schedule lists the functions of the national government and county governments. In part 1 of the schedule, the following are listed as some of the exclusive functions of the national government:

- (a) National economic policy and planning;
- (b) Monetary policy, currency, banking (including central banking), the incorporation and regulation of banking, insurance and financial corporations.

The regulation of public procurement is not listed as one of the functions in this part as well as part two of the schedule that provides for exclusive functions of the county governments. Therefore, the regulation of public procurement, it appears, is a residual function of the national government. This position is supported by the provisions of Article 186 (3) of the Constitution which provides that a function or power not assigned by the Constitution or national legislation to a county is a function or power of the national government.

This interpretation is further fortified by the provisions of Article 227 (2) which provides that an ‘Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented...’ The word ‘parliament’ contemplated in this section is at the national level and not at the county level. Moreover, under Article 227 (1) of the Constitution it is required that when State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In the

interpretation clause (Article 260), a 'State organ' is defined to mean a commission, office, agency or other body established under the Constitution. The word 'State', it is interpreted, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic of Kenya. The government of the Republic of Kenya, undoubtedly, includes the national and the county governments.

2.5.2 The findings and recommendations

Based on the foregoing analysis, the following legal statements are correct:

- (a) The regulation of public procurement and disposal is a residual function of the national government.
- (b) County governments have not constitutional powers to regulate public procurement and disposal within their territorial jurisdictions.
- (c) County governments, Constitutional commissions and independent offices ought to be included as procuring entities within the meaning of the Public Procurement & Disposal Act or other legislation covering the subject.

'Public entity' means:

- (a) the national government, or any organ or department of the national government;
- (b) the county government and any organ or department of the county government
- (c) the courts;
- (d) Commissions and Independent Offices established under the Constitution,
- (e) a local authority under the Local Government Act;
- (f) a state corporation within the meaning of the State Corporations Act,
- (g) the Central Bank of Kenya established under the Constitution

- (h) a co-operative society established under the Co-operative Societies Act,
- (i) a public school within the meaning of the Education Act,
- (j) a public university within the meaning of the Universities Act;
- (k) a college or other educational institution maintained or assisted out of public funds; or
- (l) an entity prescribed as a public entity by the Authority.

(d) Due to the concept of shared and co-operative government that is enshrined in Article 6 (2) of the Constitution the national and the county governments shall co-operate in the formulation of policies that affect procurement and disposals at the county level. It is recommended that this requirement be implemented in the revised Public Procurement & Disposal Act. To give effect to this proposals, a new section should be inserted in the Preliminary part of the Act providing as follows:-

‘The national and the county governments shall co-operate in the development of policies that affect public procurement and disposal at the county level.’

3. GENERAL AMENDMENTS OF THE ACT

3.1 The Constitutional implications on the Policy objectives of the Act

One of the most problematic issues in the Public Procurement and Disposals Act is the fact that the key policy objectives of the Act lack a comprehensive working definition. This often confuses decision makers who may be faced with tough questions as to which policy objective overrides the other one. In this respect, it is not very clear whether the stated objectives of the Act ('section 2') establish a hierarchy of norms or whether they are mutually exclusive. Besides, it is unclear whether the outlined objectives are exhaustive or merely indicative. Moreover, apart from section 39¹ and the last paragraph of section 2², all other sections of the Act have more to do with processes than using procurement as a policy tool. Furthermore, there are no set guidelines, judicial or statutory, that ought to guide decision makers in the interpretation and application of the policy objectives.

Article 227 of the Constitution provides useful guidelines in so far as it sets out the key policy objectives of public procurement system. It provides as follows

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—
 - (a) categories of preference in the allocation of contracts;

¹ Section 39 deals with margin of preference

² The paragraph lists one of the policy objectives of the Act as to 'facilitate the promotion of local industry and economic development'

- (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
- (c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
- (d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

Besides, Article 201 in relevant text outlines key provision on the principles of public finance which undoubtedly affect the policy objectives of the procurement legislation. Article 201 (a) requires ‘openness and accountability, including participation in financial matters.’ Besides, Article 201 (d) stipulates that ‘public money shall be used in a prudent and responsible.’ Moreover, Article 201 (e) requires that ‘financial management shall be responsible, and fiscal reporting shall be clear.’

These provisions directly affect public procurement. They reinforce the need for increased transparency in public procurement; and greater concerns about efficiency, fairness and equity. For instance, it is imperative procuring entities invest in emerging technologies that lessens procurement costs while increasing product choice. In sum, the legal framework affecting public procurement and disposals should be revised to take on board the foregoing broad financial management principles as well as balancing the dynamic tension between (a) competing socioeconomic objectives, (b) national economic interests vis-à-vis- global competition as required by regional and international trade agreements, (c) satisfying the requirements of fairness, equity and transparency, (d) maintaining an overarching focus on maximizing competition; and (d) utilizing new technology to enhance procurement efficiency.

Therefore, it is recommended that the entire section 2 of the Act is revised to accord to the foregoing stipulations as well as providing the overriding objectives of the Public Procurement and Disposals Act in very clear perspectives.

The new section 2 of the Act is proposed as follows:

- (1) The overriding objective object of this Act is to provide a comprehensive, harmonized, efficient and effective legal and regulatory framework for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives:
 - (a) To promote effective and efficient procurement practices and systems to enable national and the county governments to timeously deliver the quantity and quality of services demanded by Kenyans.
 - (b) To achieve continuing improvement in value for money based on whole life cost and quality.
 - (c) To enhance the competitiveness of suppliers through the development of world class procurement systems and practices.
 - (d) To ensure that control and accountability is maintained through comprehensive auditing.
 - (e) To achieve a uniform procurement system with standardised tendering procedures, policies and contract documentation for implementation at all levels.
 - (f) To ensure that public sector procurement complies with the provisions of the constitution.
 - (g) To ensure consensus within government on the reform of the public procurement process, and to encourage the adoption of the reformed process by all public sector procurement agencies.
 - (h) To seek value for money on behalf of all taxpayers.
 - (i) To eliminate corruption in the procurement process.
 - (j) To make the public procurement process accessible to all by

simplifying the process, and by encouraging fairness and transparency.

- (k) To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.
- (2) The national government, the county governments, the Constitutional Commissions , Independent offices, state corporations, public agencies, public servants and other bodies charged with procurement and disposal of unserviceable, obsolete or surplus stores and equipment shall at all times have due regard to, and observe, the overriding objective of this Act as set out in subsection (1).
- (3) Whenever there is any conflict between this Act and any other law, having a bearing on the overriding objective of this Act, the provisions of this Act shall prevail.’

3.2 Review of the language of the Act to conform to the Constitution

It is necessary to review the Public Procurement and Disposal Act to ensure the concepts, words and phrases used in the legislation are consonant with the language of the constitution. The table below contains some the words and phrases in the Act that require revisions:

PHRASE/WORD IN THE ACT	NEW/PROPOSED PHRASE
Minister	Cabinet Secretary
Parliament	National Assembly(except in the citation
Permanent Secretary	Principal Secretary
Armed Forces	Kenya Defence Forces

Kenya Police Force	National Police Service
National Security Intelligence Service	National Intelligence Service
Administration Police Service	-delete-
Government	National Government or County Government where appropriate

3.3 National values & principles of governance

Article 10 of the Constitution has prescribed key national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever they apply or interpret the constitution enact, apply or interpret any law make or implement public policy decisions. The national values and principles of governance that have a direct bearing on public procurement include: (a) to ensure good governance, (b) integrity, (c) transparency, and (d) accountability.

Article 73 of the Constitution also enunciates principles of good governance in the exercise of public responsibilities. The clause provides that the authority assigned to a State Officers (this include officers in the procurement sector) is a trust to be exercised in a manner that:

- (a) is consistent with the purpose and objects of the Constitution ;
- (b) demonstrates respect for the people ;
- (c) brings honour to the nation and dignity to the office; and
- (d) Promotes public confidence in the integrity of the office.

The constitution further lists the guiding principles of leadership and integrity which include:

- (a) objectivity and impartiality in decision making;

- (b) ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corruption;
- (c) selfless service based solely on public interest demonstrated by honesty in the execution of public duty ;
- (d) declaration of any personal interest that may conflict with public duties;
- (e) accountability to the public for decisions and actions;
- (f) Discipline and commitment in service to the people.

Taken into context good governance is epitomized by predictable, open and enlightened policy-making, a bureaucracy imbued with professional ethos acting in furtherance of the public good, the rule of law, transparent processes, and a strong civil society participating in public affairs. It is essential that the Act is revised to incorporate the foregoing constitutional principles by:

- (a) removing provisions allowing poor governance in public procurement ;
- (b) inserting provisions that weed out arbitrary decision making and unaccountable bureaucracies in the tender process; un enforced or unjust legal systems,
- (c) Deleting provisions encourage abuse of executive power and discourage the civil society’s engagement in public procurement process, and
- (d) Generally discouraging corruption in the procurement process.

These recommendations are based on the fact that meant to weed out unethical practices and corruption in the procurement process. Corruption thrives on secrecy. Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources “administrative efficiency” or providing guarantees for fair competition.

In order to ensure overall value for money, the challenge the constitution poses is to define an appropriate degree of transparency and accountability to reduce

risks to integrity in public procurement while pursuing other aims of public procurement. Particular areas which these principles affect include:

- (a) The pre-bidding and post-bidding phases, from needs assessment to contract management and payment .and
- (b) Exceptions to competitive procedures, that is to say special circumstances such as extreme urgency and low-value contracts.

3.4 Principles of Public Service

Article 232 of the Constitution lists important values & principles of public service that must be observed at all times by all state officers. These principles include:

- (a) High standards of professional ethics;
- (b) Efficient, effective and economic use of resources;
- (c) Responsive, prompt, effective, impartial and equitable provision of services;
- (d) Accountability for administrative acts;
- (e) Transparency and provision to the public of timely, accurate information

Article 232 (2) of Constitution provides that these values and principles apply to public service in all State organs in national and county governments and in all State corporations. They have a direct bearing on public procurement, which is generally considered as the single most important source of corruption in the public sector. It is important that the Act is amended to insert these principles in the policy objectives of the Act and re-alignment of procurement rules and regulations.

3.5 Protection of Public Officers

The Constitution does not only make demands on public officers. It also protects them under Article 236. This Article provides that a public officer shall not be victimized or discriminated against for having performed the functions of office in accordance with the Constitution or any other law.

Besides, a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. Hence, procurement professionals called upon to act within the law, and advance the values and principles of the Constitution without fear of victimization. It is important to reproduce this clause in the Act to encourage whistle blowing in the procurement sector.

3.6 The Bill of Rights

The Constitution has elaborate Bill of Rights that list a catalogue of rights, some of which directly affect public procurement. For instance, Article 35 that guarantees every citizen the right of access to information held by the State or another person if it is required for the exercise or protection of any right or fundamental freedom, puts procurement profession under greater scrutiny.

Besides, Article 125 that provides that Parliament or any of its committees has power to summon any person to give information on any documents implies that procuring entities are now required avail more information on procurement matters is now greater than it was previously. Therefore, it is important to review and redraft the entire Act to delete provisions that negatively impact on this without compromising the requirements of confidentiality that may be present in certain procurement decisions.

4. REINFORCING THE INSTITUTIONAL FRAMEWORK

4.1. The Public Procurement Oversight Authority

The *Public Procurement Oversight Authority*³ is presently established in Part 2 of the Act as part of the institutional structure for the administration of the public procurement.⁴ The Authority is headed by the Director-General. The main functions of the Authority are listed as follows:- (i) to ensure that the procurement procedures established under the Act are complied with, (ii) to monitor the public procurement system and (ii) to assist in the implementation and operation of the system.⁵

The public procurement regime in which the Authority is set was essentially intended to operate in a centralised hence the present institutional framework does not contemplate devolution. There is need for the Authority to decentralise its operations. This is based on the fact that as the national institution charged with the regulation and development of public procurement and disposals in Kenya; the Authority is a national State organ and is required by Article 6 of the Constitution to ensure reasonable access of its services in all parts of the Republic. To implement this requirement, the following legislative actions should be implemented:

New subsections 4 and 5 should be inserted in Section 8 of the Current Act providing as follows:

(4) The headquarters of the Authority shall be in Nairobi.

(5) The Authority shall, for purposes of ensuring access to its services in all parts of the country, establish such offices in the counties, and may establish such offices in such other locations as it may deem necessary.

4.3. The Public Procurement Administrative Review Board

³ Hereinafter referred to as '*the Authority*'

⁴Section 8(1)

⁵Section 9

4.3.1. The Structure of the Review System

The *Public Procurement Administrative Review Board*⁶ ('the Board') is established by section 25 of the Act and provides a forum to review the decision of the procuring entity upon formal requests being lodged by unsuccessful bidders. The jurisdiction of the *Review Board* is invoked by filing a request for review in the prescribed format within 14 days of the occurrence of the breach complained of or the notification of the outcome of the tender.⁷

The applicant is required to state the reasons for the complaint, including any alleged breach of the Act or the Regulations.⁸ The requests are filed with the Secretary of the Review Board upon payment of the requisite fees.⁹ The Secretary is required to acknowledge filing of the request for review and immediately serve a copy thereof on the procuring entity.¹⁰ The Procuring entity upon being served with a notification of a request is required to submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.¹¹

4.3.2. Suggested administrative review framework

Given that significant public funds shall be channeled in the counties, it necessary for the institutional set up of the Review Board to be examined, to create a body that shall be capable of dealing with the increased volume of work that is expected in the devolved system. Besides, the provisions of Article 47 of the Constitution which every person has right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action may cast doubt

⁶ Hereinafter referred to as '*the Review Board*'

⁷ Regulation 73(1), c

⁸ *Supra*

⁹ *Supra*

¹⁰ Regulation 74(1)

¹¹ *Supra*

on the efficacy of the existing structure and composition of the present administrative review procedures as contained in the Act.

Therefore, it is proposed that section 25 of the Act is reviewed to establish the Review Board as an independent tribunal, the Public Procurement Administrative Review Tribunal, with its composition prescribed by statute and not regulations. The Tribunal should have power to run its own secretariat including the hiring of its own staff. The new section 25 of Act should look as follows:

- (1) For the purpose of hearing and determining reviews and exercising other powers conferred on it by this Act, there is established a Tribunal to be known as the Public Procurement Administrative Review Tribunal hereinafter referred to as the Tribunal;
- (2) The Tribunal shall comprise seven persons including the Chairperson and Vice-Chairperson.
- (3) A person shall be qualified to be appointed under this section if such person-
 - (a) **Has considerable knowledge, competence and at least ten years' experience in a managerial capacity in insurance, law, accounting, finance, actuarial science , architecture, public procurement, pharmacy, engineering, and arbitration;**
 - (b) **Has not at any time been convicted of any offence involving fraud, theft, dishonesty, breach of trust or moral turpitude; and**
 - (c) **Is not disqualified under any other written law from holding public office.**
- (3) The Chairperson and Vice chairperson shall be appointed by the Cabinet Secretary upon recommendation by the Judicial Service

Commission from among persons qualified to be judges of the High Court.

- (4) The members of the Tribunal shall hold office for a term of four years from the date on appointment and shall be eligible for reappointment for one further term.
- (5) A member shall not hold office after attainment of the age of sixty-five years:
- (6) Notwithstanding anything contained in sub-section (6), a member may relinquish his office by giving in writing to the appointing Authority notice of not less than three months.
- (7) The Cabinet Secretary may remove from office any member who-
 - (a) Has been, adjudged as an insolvent; or
 - (b) Has become physically or mentally incapable of acting as a member; or**
 - (c) Has been convicted of any offence which, in the opinion of the Cabinet Secretary, involves moral turpitude; or**
 - (d) Has so abused his position as to render his continuation in office detrimental to the public interest.**
- (8) A member shall not be removed under clause (d) or clause (e) of sub-section (1), unless he has been given a reasonable opportunity of being heard in the matter.
- (9) The provisions set out in the First Schedule shall have effect in relation to the membership and conduct of business and affairs of the Tribunal.

(10) The Cabinet Secretary shall take steps to ensure that the Tribunal is adequately funded and has capacity to hire its own staff including the Secretary.

5. OTHER KEY REFORM ISSUES

5.1 The Principle of non-discrimination

5.1.1 Technical Standards

Beside section Article 227 of the Constitution that proscribes discrimination in the procurement and disposal process and procedures, clause 27 of the document also provides for a general non-discrimination. Stakeholders have identified the preparation of Technical standards and specifications of tender documents as the single source of discrimination in the procurement procedures. Procuring entities have often been accused of introducing technical specifications which mention products of a certain make or source, or a particular process which favours or eliminates certain undertakings.

To weed out discrimination in tender specifications, the Authority must make sure that unless the specifications in question are justified by the subject and nature of the contract, tender specifications that are out rightly discriminative are proscribed. The bottom-line is that considerable margin of discretion should not be left in the hands of the procuring entities, which may abuse it during the selection and qualification stages of the procurement process.

5.2.2 Selection and Qualification of bidders

Another area where discrimination occurs is in the selection and qualifications of bidders. The relevant provisions of the procurement procedures relating to the qualitative selection and qualification criteria often refer to the technical ability and knowledge of tenderers, where proof may be furnished by evidence of educational or professional qualifications, previous experience in performing public contracts and statements on the contractor's expertise. The references, which the tenderers may be required to produce, must be specified in the notice or invitation to tender. The rules relating to technical capacity and eligibility of tenderers represent an exhaustive list and are capable of producing direct effect. Although in tender documents, discretion is often given to the procuring

entities to request further evidence of technical capacity, other than the mere certificate of registration in official lists of approved contractors, the Authority should look out for deviation that may permit discrimination on the grounds that such lists might not be referring to uniform classifications.

For instance, holding company which does not itself carry out works may not be precluded from registration on an official list of approved contractors, and consequently, from participating in tendering procedures, if it shows that it actually has available to it the resources of its subsidiaries necessary to carry out the contracts, unless the references of those subsidiaries do not themselves satisfy the qualitative selection criteria specified in the tender documents. It is necessary that authorities responsible for the compilation of lists of approved contractors take into account evidence of the technical capacity of companies belonging to the same group, when assessing the parent company's technical capacity for inclusion into the list, provided the holding company establishes that it has available to it the resources of the companies belonging to the group that are necessary to carry out public contracts.

5.2 The Principle of Objectivity in Public Procurement

5.2.1 Award Procedures

The process of reforming/liberalising public procurement relies to a great extent on the principle of objectivity in the award of public contracts which is now a constitutional requirement (Article 227). Despite, the introduction of watertight policy objectives and procurements procedures in the legislation, the principle of objective is rarely adhered to. In this regards, the Authority, the Review Board and Courts of law should be encouraged in administrative guidelines or regulations to give a restrictive interpretation on award procedures, particularly those without prior advertisement. For instance, procuring entities should be required to develop a justification test based on the

proportionality principle, as well as the existence of a causal link between the alleged urgency and the unforeseen events.

5.2.2 Award Criteria

Another aspect which Article 227 of the Constitution affects is the award criteria. The Public Procurement & Disposal Act (section 66 {4}) provides the conditions under which contracting authorities award public contracts: the lowest evaluated price.

This criterion indicates that, subject to the qualitative criteria and financial and economic standing, procuring entities should not rely on any other factor than the price quoted to complete the contract. The tenderer who submits the cheapest offer must be awarded the contract. However, it is important for the procurement regulations to provide for an automatic disqualification of an "obviously abnormally low offer." On the other hand, the regulations can also provide procuring entities must give an opportunity to tenderers to furnish explanations regarding the genuine nature of their tenders, when those tenders appear to be abnormally low.

It is also suggested an amendment of section 66 (4) to include the phrase the 'lowest evaluated price or the most economically advantageous offer'. The latter simply includes an assessment of a series of factors chosen by the procuring entity, including price, delivery or completion date, running costs, cost-effectiveness, profitability, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitments with regard to spare parts and components and maintenance costs, and security of supplies. The above list is not exhaustive and the factors listed therein serve as a guideline for procuring entries in the weighted evaluation process of the contract award.

5.2.3 The Public Nature of Public Procurement

The phrase adopted in Article 227 of the Constitution ‘when a State organ or any other public entity contracts...’ has significant implication on public procurement. It inherently affects the entities that are covered by public procurement law. Inherently, the remit and thrust of public procurement legislation relies heavily on the connection between procuring entities and the Government. A comprehensive and clear definition of the term procuring entities, a factor that determines the applicability of the procurement rules, is probably the most important element of the public procurement legal framework. The spirit and structure of the legislation should be in such a manner as to embrace the purchasing behaviour of all entities that have a close connection with the Government. These entities, although not formally part of the Government, disperse public funds in pursuit or on behalf of public interest. Therefore, the Act should be revised to describe as procuring entities, all state organs and departments at the national and county level, urban level or municipal level, as well as all bodies governed by public law. Provision should be made to also cover entities that are subsidized by more than 50% by the national or the county Government or other procuring entities.

5.2.4. The Public Participation in the Procurement & Disposal Process.

Article 201 of the Constitution has introduced the concept of ‘public participation’ in financial matters. Tied with the provisions of Article 46 on consumer rights, it is necessary to review the provisions of the Public Procurement & Disposal Act to insert provisions that introduce the right of the public to participate in the procurement and disposals. These instances include:

- (a) The right to participate in periodic review of the legislation governing public procurement and disposals;

- (b) Provisions on public surveillance of the procurement and disposal system without incurring personal liability; and
- (c) The right to participate in procurement and proceedings as independent observers.

6. CONCLUSION

Public procurement is increasingly recognised as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the Constitution of Kenya has set thresholds for public procurement law reform by amongst others:

- (a) prescribing new standards of ethics and responsibilities for public officers,
- (b) including the policy objectives of the procurement system in its provisions;
- (c) creating an institutional framework of government depicted by devolution that requires the review the existing procurement system;
- (d) re-casting the role of procurement officials and ascribes key responsibilities to them;
- (e) enunciating principles that weed out risks to integrity at each stage of the public procurement process.
- (f) Outlining principles that promotes transparency and good governance in the procurement process;
- (g) Enhancing professionalism as a key element to prevent risks to integrity in public procurement; and
- (h) Ensuring accountability and control in public procurement.

The upshot is that the entire legal and institution framework for public procurement requires review to conform to these new constitution principles and dictates. This is important in ensuring that:

- (a) Public procurement procedures are transparent and promote fair and equal treatment;
- (b) Public resources linked to public procurement are used in accordance with intended purposes;
- (c) Procurement officials' behavior and professionalism are in line with the public purposes of their organization;
- (d) Systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny

ANNEX 1: SUMMARY OF ARTICLES THAT NECESSITATE A REVIEW OF THE ACT

PROVISION	CHALLENGE POSED	HOW THE CHALLENGE IS TO BE ADDRESSED
Article 6	Provides that the national and county governments shall be distinct but inter-dependent but shall operate on the basis of mutual consultation and inter-dependent.	The current PPD Act creates a procurement regime for the national government. There is need to create an institutional framework for procurement within the counties. The procurement agencies within the counties should be distinct but inter-dependent in terms of their relationship with PPOA.
Article 10	Provides that national values and principles of governance shall bind all state organs, state officers, public officers and all persons whenever any of them inter alia makes or	Since these principles bind all persons, organs and institutions created by the current laws governing procurement. There is need to review the PPD Act to incorporate these principles. The reviewed

	implements public policy decisions.	PPD Act should provide that these principles will bind procuring entities and other agencies involved in public procurement.
Article 21(4)	Provides that all state organs shall address the needs of vulnerable groups within the society. This implies that the procurement regime should address the needs of vulnerable groups, especially those who may not, for various reasons, meet the competitive or other standards set by the procurement regime.	This requires that the current legal framework be reviewed to provide ways and means of addressing the needs of the vulnerable groups. This might involve relaxing in appropriate cases, the application of procurement laws, with regards to them.
Article 22	Provides that every person has a right to institute court proceedings where he claims that a fundamental right or other right has been breached. The making of a procurement decision may involve a breach of fundamental right or other right.	PPD Act should be reviewed to facilitate the making of such applications in appropriate cases. The rules of procedure governing the right to institute complaints or other proceedings before the Public Procurement Review and Appeals Board or similar Tribunal should be reviewed in the light of this Section.

Article 25(c)	Article 25(c) provides that the right to a fair trial shall not be limited. PPD Act limits the right to a fair trial in the interest of expedition, and also to limit the filing of frivolous complaints.	There is need to redefine the parameters of a “fair trial” within the meaning of PPD Act. The rules of procedure for Public Procurement Appeals and Review Board should be reviewed to bring them in line with the constitutional standards of a fair trial.
Article 31	Article 31(c) and (d) provides the right to privacy in respect of family or private affairs or communications. This means that all such communications contained in tender documents submitted to procuring entities need to be treated with utmost confidentiality.	New provisions should be introduced in the PPD Act to entrench this new right to privacy. Specific provisions should be included in the PPD Act to guide the exercise of this right and also to balance the need to protect the privacy of bidders and others as against other interests involved in Public Procurement.
Article 35	Article 35(1) (b) provides that every citizen has a right to any information held by any other person and which is required	PPD Act should be reviewed to entrench the exercise of this right. Provisions should be included in the PPD Act to govern for example

	for the exercise or protection of any right or fundamental freedom.	situations where information contained in the tender documents is required by one of the unsuccessful bidders.
Article 46	Article46 provides that consumers have a right to goods and services of reasonable quality. Since this right has now been elevated to a constitutional right, all other legislations, including PPD Act should give meaning to it.	PPD Act should contain a provision which prohibits the procurement of goods and services which are not of reasonable quality. The parameters of reasonable quality should be clearly spelt out in the Act.
Article 47(1)	Article47 provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Public, procurement involves the making of various administrative decisions which from now on must meet these basic constitutional standards.	PPD Act should be reviewed to institutionalize expedition, efficiency, lawfulness, reasonableness and fairness as the basic touch stones of all administrative decisions involving public procurement, by all the agencies involved in public procurement.

Article 47(2)	Article47 (2) provides that if a right or fundamental freedom of a person has been adversely affected by administrative action, the person has a right to be given written reasons for the decision. This implies that every procurement decision should be accompanied by written reasons containing details of the grounds in support of that decision.	PPD Act should be amended to provide that all procurement decisions affecting rights of person to be accompanied by written reasons containing the grounds in support of the decision. All decisions made by the various agencies involved in procurement from the evaluation stage to the award stage must be accompanied by written reasons in support of the same.
Article 48	Article48 entrenches the right of every individual to access justice, and provides explicitly that fees shall be reasonable and shall not be used to impede access to justice.	PPD Act and Rules made thereunder should be amended to enhance access to justice before the Public Procurement Appeals and Review Board and the fees chargeable should be reduced if possible to enhance access to justice. PPD Act should be reviewed to explicitly define the parameters of reasonableness with regards to fees chargeable in correction with applications challenging the making of any procurement decision.

Article 50	Article 50(1) provides that every person has a right to have any dispute resolved in a fair manner and in public. Article 50(2) provides the ingredients of a fair trial. All proceedings before the Public Procurement Appeals and Review Board must from now on comply with these ingredients of a fair trial.	PPD Act should be reviewed to institutionalize these basic touchstones of a fair trial. The Rules of the Public Procurement Appeals and Review Board should be reviewed to align them with the essential requirements of a fair trial as outlined in Article 50(1) of the constitution.
Article71	Article71 provides that certain transactions involving the exploitation of natural resources shall be subject to ratification by parliament and provide that parliament shall pass a legislation providing for the categories of transactions that shall be subject to ratification by parliament.	PPD Act should be reviewed to harmonise the roles of PPOA and Public Procurement Appeals and Review Board as well as parliament with regards to such classes of transactions, because in relation to such transactions parliament has been added as an additional procurement agency with a final veto power.
Article 159	Article159 gives details of principles of justice that should be followed by all courts and tribunals. These principles should be followed by the Public Procurement Appeals and Review	PPD Act and Rules should be Amended to incorporate these principles. The amended rules should explicitly state that all proceedings before the Public Procurement Appeals and Review

	Board just like any other courts and tribunals.	Board must comply with the principles set out in Article 159 of the Constitution.
Article 160	Article 160 entrenches the principle of judicial independence and provides explicitly that the exercise of judicial authority shall not be subject to the control or direction of any other person.	The provisions of PPD Act should be reviewed to establish Public Procurement Appeals and Review Board as an independent tribunal completely delinked from the PPOA. The fact that the review board is currently appendaged to PPOA compromises its autonomy and independence.
Article 174	Article 174(h) provides that one of the objectives of the devolution of government are to facilitate decentralization of state organs, their functions and services to the counties. This means that the services of PPOA should similarly be decentralized to the counties.	The PPD Act should be amended to provide that PPOA should have branches in the counties. The amended PPD Act should provide a delicate balance as regards the exercise of procurement regulatory authority as between the current PPOA as well as its branches in the counties.

Article 175	Article 175 of the new constitution provides that county governments shall be established on the principles of separation of powers. This implies that the county branches of PPOA should be independent in the discharge of their functions. This Article should be read together with Article 6 of the new constitution.	The PPD Act should be reviewed to harmonise the power relations as between PPOA and its county branches.
Article 201	Article 201 outlines the principles of public finance which include openness, accountability and public participation. Since public procurement issues involve public finance, there is need to entrench these principles in the legal regime governing public procurement in Kenya.	PPD Act should be amended to incorporate the constitutional principles of public finance.
Article 227(1)	Article 227(1) of the constitution outlines new constitutional principles for public procurement. These include fairness,	Article 2 of the PPD Act should be amended to incorporate these

	<p>equity transparency, competition and cost-consciousness. These principles should be entrenched in the current legal framework for public procurement.</p>	<p>new constitutional principles for public procurement.</p>
<p>Article 227(2)</p>	<p>Article 227(2) provide that an Act of Parliament shall provide a framework within which policies relating to procurement and asset disposal shall be implemented especially with regards to the following issues:</p> <ul style="list-style-type: none"> - Categories of preferences in allocation of contracts - Protection or advancement of categories of persons or groups disadvantaged by unfair competition of discrimination - Sanctions against contractors who breach professionally regulated procedures, contractual agreements and legislations. 	<p>The PPD Act should be amended to specifically include provisions that govern the matters mentioned in Article227(2)</p>

	These matters need to be incorporated into the current legal regime governing procurement in Kenya.	
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ANNEX 2: SUMMARY OF THE PROPOSED AMENDMENTS TO THE ACT

No.	STATUS IN CURRENT ACT	SUGGESTED AMENDMENT/REVISION
1.	<p>2. The purpose of this Act is to establish procedures for procurement and disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following:</p> <ul style="list-style-type: none"> (a) to maximise economy and efficiency; (b) to promote competition and ensure that competitors are fairly treated; (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 	<p>(1) The overriding objective object of this Act is to provide a comprehensive, harmonized, efficient and effective legal and regulatory framework for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives:.</p> <ul style="list-style-type: none"> 6.2. To promote effective and efficient procurement practices and systems to enable national and the county governments to timeously deliver the quantity and quality of services demanded by Kenyans. 6.3. To achieve continuing improvement in value for money based on whole life cost and quality. 6.4. To enhance the competitiveness of suppliers through the development of world class procurement systems and practices. 6.5. To ensure that control and accountability is maintained through comprehensive auditing. 6.6. To achieve a uniform procurement system with standardised

	<p>economic development.</p>	<p>tendering procedures, policies and contract documentation for implementation at all levels.</p> <p>6.7. To ensure that public sector procurement complies with the provisions of the constitution.</p> <p>6.8. To ensure consensus within the national government on the reform of the public procurement process, and to encourage the adoption of the reformed process by all public sector procurement agencies.</p> <p>6.9. To seek value for money on behalf of all taxpayers.</p> <p>6.10. To eliminate corruption in the procurement process.</p> <p>6.11. To make the public procurement process accessible to all by simplifying the process, and by encouraging fairness and transparency.</p> <p>6.12. To encourage greater competition in the public procurement process through the creation of an enabling environment for small, medium and micro enterprises while retaining quality and standards.</p> <p>(2) The national government, the county governments, the Constitutional Commissions , Independent offices, state corporations, public agencies, public servants and other bodies charged with procurement and disposal of unserviceable, obsolete or surplus stores and equipment shall at all times have due regard to, and observe, the overriding objective of this Act</p>
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		<p>as set out in subsection (1).</p> <p>(3) Whenever there is any conflict between this Act and any other law, having a bearing on the overriding objective of this Act, the provisions of this Act shall prevail.’</p> <p>(4) The national and the county governments shall co-operate in the development of policies that affect public procurement and disposal at the county level.</p>
2.	<p>‘Accounting officer’ means :</p> <p>(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 officer of the public entity; or</p> <p>(b) for a local authority, the town or county clerk of the local authority</p>	<p>‘Accounting officer’ means :</p> <p>(a) for a public entity other than a local authority, the person appointed by the <u>Principal Secretary</u> to the Treasury as the accounting officer or, if there is no such person, the chief executive officer of the public entity; or</p> <p>(b) For a local authority, the town or county clerk of the local authority.</p>
3.	<p>‘Minister’ means the ‘Minister’ responsible for finance</p>	<p>‘Cabinet Secretary’ means the ‘Cabinet Secretary’ responsible for finance</p>

<p>4.</p>	<p>‘Public entity’ means :</p> <ul style="list-style-type: none"> (a) the Government or any department of the Government; (b) the courts; (c) the commissions courts, ; (d) commissions established under the Constitution, (e) a local authority under the Local Government Act; (f) a state corporation within the meaning of the State Corporations Act, (g) the Central Bank of Kenya established under the Central Bank of Kenya Act, (h) a co-operative society established under the Co-operative Societies Act, (i) a public school within the meaning of the Education Act, (j) a public university within the meaning of the Universities Act; (k) A college or other educational institution maintained or assisted out of public funds; or 	<p>‘Public entity’ means:</p> <ul style="list-style-type: none"> (a) the national government, or any organ or department of the national government; (b) the county government and any organ or department of the county government (c) the courts; (d) Commissions and Independent Offices established under the Constitution, (e) a local authority under the Local Government Act; (f) a state corporation within the meaning of the State Corporations Act, (g) the Central Bank of Kenya established under the Constitution (h) a co-operative society established under the Co-operative Societies Act, (i) a public school within the meaning of the Education Act, (j) a public university within the meaning of the Universities Act; (k) a college or other educational institution maintained or assisted out of public funds; or (l) An entity prescribed as a public entity by the Authority.
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	(l) An entity prescribed as a public entity.	
5.	-No equivalent section-	<p>Insert subsections 4 and 5 in Section 8 as follows:</p> <p>(4) The headquarters of the Authority shall be in Nairobi.</p> <p>(5)The Authority shall, for purposes of ensuring access to its services in all parts of the country, establish such offices in the counties, and may establish such offices in such other locations as it may deem necessary.</p>
6.	Section 9 (b) -‘to monitor the public procurement system and report on the overall function of it in accordance with section 20 (3) (b) and present to the Minister such other reports and recommendations as the Director-General considers advisable.’	Section 9 (b) - ‘to monitor the public procurement system and report on the overall function of it in accordance with section 20 (3) (b) and present to the Cabinet Secretary such other reports and recommendations as the Director-General considers advisable.’
7.	Section 10 (2)-The Director General shall be appointed by the Advisory Board with the approval of Parliament	Section 10 (2)-The Director General shall be appointed by the Advisory Board with the approval of the National Assembly

8.	Section 18 (5) (a) the funds of the Authority shall consist of funds approved by Parliament	Section 18 (5) (a) the funds of the Authority shall consist of funds approved by the National Assembly
9.	Section 20(2)- the Director-General shall submit each report to the Advisory Board and the Minister-	Section 20(2)- the Director-General shall submit each report to the Advisory Board and the Cabinet Secretary
11.	Section 20 (5)-the Minister, shall within 30 days after receiving report, transmit it to the National Assembly	Section 20 (5)-the Cabinet Secretary, shall within 30 days after receiving report, transmit it to the National Assembly
12.	Section 22 (1) (a) – nine members appointed by the Minister and approved by parliament from persons nominated by the prescribed organizations.	Section 22 (1) (a) – nine members appointed by the Cabinet Secretary and approved by the National Assembly from persons nominated by the prescribed organizations.
13.	Section 25 (1)- the Public Procurement Complaints, Review	New Section 25

and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 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 may provide administrative services to the Review Board.

(1) For the purpose of hearing and determining reviews and exercising other powers conferred on it by this Act, there is established a Tribunal to be known as the Public Procurement Administrative Review Tribunal hereinafter referred to as the Tribunal;

(2) The Tribunal shall comprise seven persons including the Chairperson and Vice-Chairperson.

(3) A person shall be qualified to be appointed under this section if such person-

6.13. Has considerable knowledge, competence and at least ten years' experience in a managerial capacity in insurance, law, accounting, finance, actuarial science , architecture, public procurement, pharmacy, engineering, and arbitration;

6.14. Has not at any time been convicted of any offence involving fraud, theft, dishonesty, breach of trust or moral turpitude; and

6.15. Is not disqualified under any other written law from holding public office.

(4) The Chairperson and Vice chairperson shall be appointed by

the Cabinet Secretary upon recommendation by the Judicial Service Commission from among persons qualified to be judges of the High Court.

(5) The members of the Tribunal shall hold office for a term of four years from the date on appointment and shall be eligible for reappointment for one further term.

(6) A member shall not hold office after attainment of the age of sixty-five years:

(7) Notwithstanding anything contained in sub-section (6), a member may relinquish his office by giving in writing to the appointing Authority notice of not less than three months.

(8) The Cabinet Secretary may remove from office any member who-

6.15.4. Has been, adjudged as an insolvent; or

6.15.5. Has become physically or mentally incapable of acting as a member; or

6.15.6. Has been convicted of any offence which, in the opinion of the Cabinet Secretary, involves moral turpitude; or

		<p>7. Has so abused his position as to render his continuation in office detrimental to the public interest.</p> <p>(9) A member shall not be removed under clause (d) or clause (e) of sub-section (1), unless he has been given a reasonable opportunity of being heard in the matter.</p> <p>(10) The provisions set out in the First Schedule shall have effect in relation to the membership and conduct of business and affairs of the Tribunal.</p> <p>(11) The Authority may provide administrative services to the Tribunal.</p>
14.	Section 33 (1) (b)- a Minister, a public servant or a member of a board or committee of the Government or any department of the Government or a person appointed by the President or a Minister; or	Section 33 (1) (b)- a Cabinet Secretary, a public servant or a member of a board or committee of the National Government or County Government or any department or organ of the National Government or County Government or a person appointed by the President or a Cabinet Secretary; or
15.	Section 39 (2) - Subject to subsection 8, the Minister shall in	Section 39 (2) - Subject to subsection 8, the Cabinet Secretary shall in

	consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal	consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal
16.	Section 39 (8) (a) (i)-the funding is 100 % from the Government of Kenya or a Kenyan body; and	Section 39 (8) (a) (i)-the funding is 100 % from the national Government or a county government or a Kenyan body; and
17.	Section 105 (1) (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	Section 105 (1) (d) - prepare and submit a summary of the investigator's findings and recommendations to the procuring entity and to the Ethics and Anti-Corruption Commission established under the <u>Anti-Corruption and Economic Crimes Act 2003</u>
18.	Section 133 (5)- the defence and national security organs to which this section applies are the following: (a) the Armed Forces; (b) the Kenya Police Force; (c) the National Security intelligence service; (d) the Kenya Prisons Service;	Section 133 (5) - the defence and national security organs to which this section applies are the following: (a) the Kenya Defence Forces; (b) the Kenya Police Service; (c) the National Intelligence Service; (d) the Kenya Prisons Service;

	<p>(e) the Administration Police;</p> <p>(f) the Kenya Wildlife Service; and</p> <p>(g) such other institutions as may be prescribed</p>	<p>(e) the Kenya Wildlife Service; and</p> <p>(f) such other institutions as may be prescribed</p>
19.	<p>Section 134 (2)- the Permanent Secretary of the ministry responsible for finance, or member of the staff of the ministry selected by the permanent secretary, shall chair each meeting convened under this section</p>	<p>Section 134 (2) – the Principal Secretary of the ministry responsible for finance, or member of the staff of the ministry selected by the Principal Secretary, shall chair each meeting convened under this section</p>
20.	<p>Section 140-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-</p>	<p>Section 140-the Cabinet Secretary 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-</p>

ANNEX 3:-SECOND SCHEDULE

{s. 8 (9)}

**PROVISIONS AS TO THE CONDUCT OF BUSINESS AND AFFAIRS OF THE PUBLIC
PROCUREMENT ADMINISTRATIVE REVIEW TRIBUNAL**

1. Oath of office

A person who is appointed a member of the Tribunal shall, before assuming the duties of his office take and subscribe to the oath of allegiance to the office.

2. Disclosure of interest

Where a member of the Tribunal, as constituted for the purposes of a proceeding, has any interest, pecuniary or otherwise, that could conflict with the proper performance of the member's functions, he shall disclose the interest to the parties to the proceeding and shall not be present during any deliberations on the matter by the Tribunal to take part in decision of the Tribunal on the matter.

3. Termination of appointment

- (1) A member of the Tribunal may resign his office by notice in writing addressed to the Cabinet Secretary as the case may be.
- (2) The Cabinet Secretary may remove from office, a member of the Tribunal who:-
 - (a) Is unable to perform the functions of his office by virtue of mental or physical infirmity of body or mind;
 - (b) Is absent from three consecutive meetings of the Tribunal without reasonable cause to the satisfaction of the Tribunal ;
 - (c) Is declared or becomes bankrupt;
 - (d) Fails to disclose to the Tribunal any interest in any contract or other matter before the Tribunal; or
 - (e) Is convicted of a criminal offence involving dishonesty, fraud or moral turpitude and sentenced for a term exceeding six months.

4. Secretary

The Secretary to the Tribunal shall be hired by the Review Board on a competitive recruitment process.

5. Official seal

- (1) The Tribunal shall have an official seal;
- (2) The official seal of the Tribunal shall be affixed by the chairperson to such documents as the Tribunal may direct;
- (3) In the absence of the chairperson the Tribunal may nominate one member to authenticate the seal of the Tribunal on behalf of the chairperson.
- (4) The Courts shall take judicial notice of documents where the seal is properly affixed.

6. Arrangement of business

- (1) The chairperson shall be responsible for ensuring the orderly and the expeditious discharge of the business of the Tribunal.
- (2) Without limiting the operation of subsection 91), the chairperson shall give directions relating to:-
 - (a) The arrangement of the business of Tribunal;
 - (b) The places at which the Tribunal may sit generally; and
 - (c) The procedure of the Tribunal at a particular place
- (3) The times and places of the hearings of the Tribunal shall be determined by the chairperson with a view to securing a reasonable opportunity for applicants to appear before the Tribunal with as little inconvenience and expense as is practicable.

7. Quorum of the Tribunal

- (1) The chairperson shall preside at all sittings of the Tribunal at which he is present and in the absence of the chairperson, the vice chairperson shall preside.
- (2) The quorum of the Tribunal shall be three members including the chairperson.