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NT/PPD.1/3/24/A(23)

1st July 2019

Michael Sialai, CBS
Clerk of the National Assembly
Parliament Building
Nairobi

Jeremiah M. Nyegenye
Clerk of the Senate
Parliament Building
Nairobi

Dear Mr. Sialai

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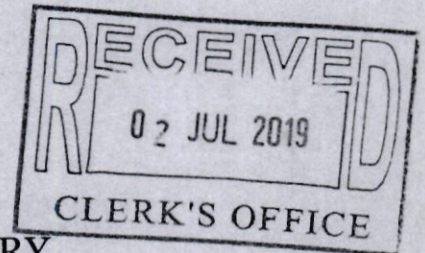
**DRAFT PUBLIC PROCUREMENT AND ASSET DISPOSAL
(REGULATIONS), 2019**

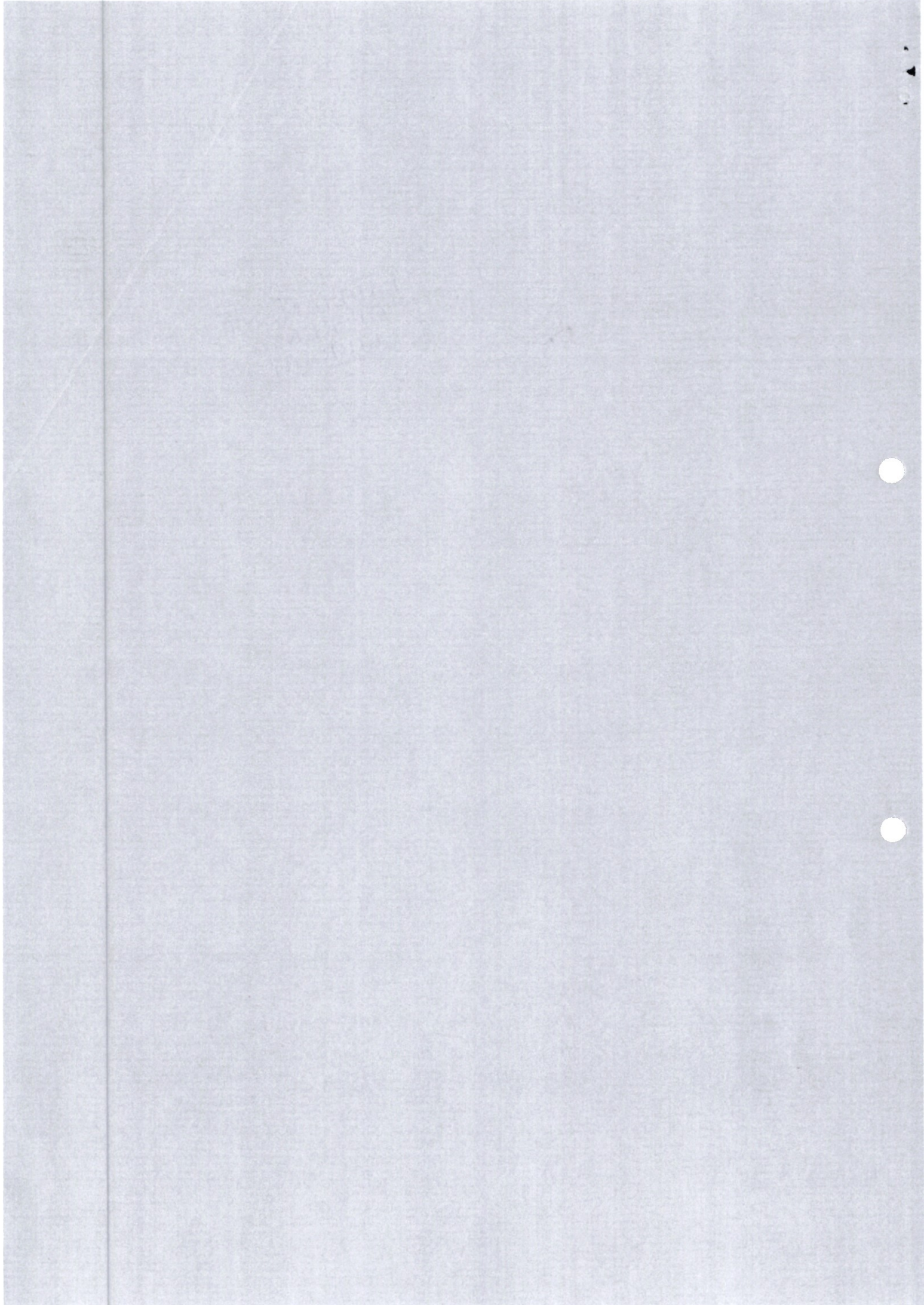
Further to our letter Ref. No. NT/PPD.1/3/24/A(37) of 24th June, 2019, we forward herewith explanatory notes in respect to the earlier submitted Draft Public Procurement and Asset Disposal (Regulations), 2019.

Yours

Sincerely

Dr. Kamau Thugge, CBS
PRINCIPAL SECRETARY/NATIONAL TREASURY





**DRAFT PUBLIC PROCUREMENT AND ASSET DISPOSAL
REGULATIONS, 2019**

EXPLANATORY NOTES

Background

1. The Public Procurement and Asset Disposal, 2015 was enacted on 8th December, 2015 and date of commencement was 7th January, 2016.
2. Section 180 of the Public Procurement and Asset Disposal Act, 2015 provides that: - *“The Cabinet Secretary shall make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may make Regulations to facilitate the implementation of this Act, and such regulations shall not take effect unless approved by Parliament pursuant to the Statutory Instruments Act, 2013”*.
3. In line with section 24 of the Interpretation and General Provisions Act, Cap2 of the Laws of Kenya, Procuring Entities have been using the existing Public Procurement and Disposal Regulations including Standard Tender Documents, Manuals and directives issued under the repealed Public Procurement and Disposal Act, 2005. Section 24 states

“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder”.

The National Treasury in consultation with stakeholders embarked on developing the Public Procurement and Asset Disposal Regulations in April, 2016 and this involved:-

- Constitution of multi-sectorial taskforce comprising of nominees from MDAs, COG, KEPSA and professional bodies.
- Review of various relevant pieces of legislations.
- Desktop research
- Workshops and county forums to receive inputs
- Receipt of memorandum from professional bodies
- Public validation forum in December, 2016

Key Stakeholders in the development of the Public Procurement and Asset Disposal Regulations, 2019

- The National Treasury
- Public Procurement Regulatory Authority
- Public Procurement Administrative Review Board
- Kenya Institute of Supplies Management
- Accounting officers of MDAs
- Council of Governors
- County Executive Committee members of Finance
- Civil society
- The General public
- Kenya Private Sector Alliance
- Development Partners

Objects and purpose of these Regulations

1. Provide means of administering the powers vested in the Cabinet Secretary for the National Treasury under the Constitution, the Act and any other related legislation;
2. Harmonize and standardize application of government service in controlling and managing the procurement function in government;
3. Set out a standardized public procurement and asset disposal management system for use in Government service; and
4. Ensure accountability, efficiency, transparency and effective application and utilization of public resources.
5. To fully operationalize the various provisions as contained in the Act;
6. To prescribe processes, procedures and bring clarity to the provisions of the Act;

The development of the Public Procurement and Asset Disposal Regulations, 2019 was underpinned by:-

- a) The need to ensure the Public Procurement and Asset Disposal Regulations, 2019 are in tandem with international best practices;
- b) To ensure that the Regulations are applicable to both National and County Government and their entities

The key highlights of the Public Procurement and Asset Disposal Regulations, 2019 provisions in the regulations are outlined below:-

Part I: Preliminary - Regulations 1- 5

1. Provides a short title of the Bill
2. Provides definition of new terms to be introduced in the Regulations
3. Provides a statement on the application of the Regulations
4. Outlines the purpose for the Regulations
5. Outlines on bilateral and multilateral agreements

Part II - Regulations 6-29

Responsibilities of bodies involved in public procurement and related provisions

The part provides for the relationship of the National Treasury and the regulators of the public procurement system applying the principles of corporate governance. It sets forth the establishment of the Public Procurement Services Agency and its roles. Also the functions of the Authority and those of the Public procurement Administrative Review Board Secretary, employees and funding arrangements.

Part III - Regulations 30-31

County Government responsibilities with respect to Public Procurement and Asset Disposal

1. The part provides for the responsibilities of County Treasury concerning the procurement function; In addition, the Part allows counties to establish county specific procurement and asset disposal services agencies.

Part IV - Regulations 32-33

Powers to ensure compliance and debarment procedures

The part provides for the powers of investigations of the Authority and the procedure for request for debarment proceedings

Part V - Regulations 34-50

Internal Organizations of procuring entities

1. This part provides for responsibilities of accounting officers,

2. minimum requirements for a procuring entity to perform procurement mandate;
3. The part also provides for appointment of procurement committees (opening and evaluation) its composition and conduct of evaluation committee;
4. The part provides for establishment and role of procurement function, user department, inspection and acceptance committee, sector-specific procuring and disposal agencies and consortium buying;
5. The part further provides for the registration of procuring or asset disposal agents as well as the transfer of procuring responsibility to another public entity.

Part VI - Regulations 51-78

General Procurement and Asset Disposal Principles

1. This part provides for general principles relating to procurement planning, procurement pricing and requirement not to split contracts, registration of suppliers, tender security, tender securing declaration, self-declaration and confidentially forms;
2. This part also provides for termination or cancellation of procurement and asset disposal proceedings;
3. The part further provides for forms of communication, electronic procurement and asset disposal relating to procurement planning, e-tendering and publication of notices, submission of tenders, digital signature, tender wards, invoicing and evaluation of tenders;
4. In addition, the part provides for procurement records form and dissemination of laws, regulations directives and circulars;

Part VII - Regulations 79-94

Basic Procurement Rules

1. The part provides for Standards Tender documents and formats to be used in the procurement proceeding, initiation of procurement, invitation to tender opening and evaluation of tenders;

2. The part also provides for evaluation report and professional opinion and approval of the Accounting Officer;
3. The part further provides for post, qualification and notification of intention to enter into a contract and international tendering and competition and provide time frame for advertisement to minimum of 7 days;

Part VIII - Regulation 95

Classified procurement method and procedures

The part further provides for the justification for use of classified, the description and quantity items and the proposed procurement and asset disposal methods for each item and the justification for use of the method.

The part also provides for establishment and appointment of the special committee for procuring entities who deal with classified items.

Part IX - Regulations 96-123

Methods of procurement of goods, works and services

1. This part provides for time for preparation of open tenders to be a minimum period of 7 days' notice for National/County specific tenders;
2. The part further provides for community participation as a new method of procurement and sets forth procedures for applying all procurement methods as listed below:-
 - a) Open Tender
 - b) Two- Stage Tendering
 - c) Design Competition Procedure
 - d) Conditions Of Restricted Tendering
 - e) Direct Procurement Method
 - f) Request For Quotations
 - g) Low Value
 - h) Force Account
 - i) Competitive Negotiations
 - j) Electronic Reverse Auction Method
 - k) Framework Agreement
 - l) Specially Permitted Procurement Procedure And
 - m) Community Participation.

Part X - Regulations 124-141

Procurement of consultancy services

1. The part provides for the time for preparation of expression of interest and request for proposal to be a minimum period of 7 days.
2. The part also provides for the opening and evaluation of expression of interest request for proposal and terms of reference;
3. In addition the part provides for procedures for selection methods for request for proposal including: -
 - a. quality and cost based selection;
 - b. quality-based selection;
 - c. fixed budget method;
 - d. least cost selection;
 - e. qualification selection method;
 - f. individual consultant selection; and
 - g. single source selection method.

Part XI - Regulations 142-153

Procurement contracts

1. The part provides for the publication of procurement contracts, Amendments or variations of contracts, interest on overdue amounts and liquidated damages, performance security, Advance payment and letters of credit;
2. The part also provides for the complex and specialized contracts, contract review reports, payment to a contractor, contract monitoring, contract termination and handover and acceptance of goods works or services

Part XII - Regulation 154 – 176

Preference and Reservations in procurement

1. The part provides for requirement for preferential treatment to be given to the local citizen contractors;
2. The part provides for accounting officers to ensure PE's tender documents contains mandatory - requirement as preliminary evaluation criteria that the successful bidder shall:-
 - a) transfer of technology, skills and knowledge through training, mentoring to Kenya citizens;

- b) reserve at least 40% employment;
 - c) local content in terms of employment and materials grown or mined in Kenya;
3. The part also provides for registration of disadvantaged groups (youth, women and persons with disabilities) with the National Treasury;
 4. The part Further provides for definition and qualification of a local and citizen contractor to be one who is registered in Kenya and has a shareholding of above 50% shall be qualified for preferential treatment.
 5. In addition the part provides for how local companies may benefit from preferential treatment through joint ventures with foreign companies or through sub-contracting;
 6. The part also provides from prompt payment to the disadvantaged groups. Payments to be within 60 days from the date of receipt of invoice;
 7. The part provides for unbundling of procurement to make it easy for those in the disadvantaged groups to benefit;
 8. The PE's to allocate at least 30% of their budgets to the disadvantaged groups;
 9. Provides exclusive preference to the citizen contractors, 1 billion for procurement in respect works, 500 million for goods/services;
 10. The part further provides margin of preference for international tendering and competition;
 - a) 20% margin of preference given to candidates offering manufactured goods in Kenya and where % of shareholding of Kenyan citizen is above 50%;
 - b) 15% margin of preference given to candidates offering manufactured goods in Kenya;
 - c) 10% margin of preference given where shareholding is of Kenya citizens in more than 50%;

- d) 8% margin of preference given where shareholding of Kenyan citizens is less than 50% but above 20%;
- e) 6% margin of preference is given where shareholding of Kenya citizens is above 5% and less than 20%;

Part XIII - Regulations 177-186

Inventory Control, Asset and Stores Management and Distribution

1. This part provides for the responsibility of Inventory control and asset and stores management to be vested with Accounting officers;
2. The part also provides for accounting officers responsibilities upon transfer of assets to another accounting officer;
3. In addition, the part provides that Accounting Officers be responsible for maintaining a register of assets under control or possession;
4. Further the part provides for the procurement and procedure for maintenance of motor vehicles, plant, equipment and related spare parts;
5. Finally the part provides for requirement to procure and maintain ICT equipment and related accessories, which are environment – friendly;

Part XIV - Regulations 187-213

Disposal of Assets

1. The part provides for the assets disposal planning, establishment of disposal committee and procedure for disposal;
2. The part further provides for procedure of identification unserviceable, surplus obsolete, obsolescence stores/assets and equipment, valuation, and evaluation.
3. The part also provides for the procedure of disposal methods as listed below:
 - a) transfer to another public entity
 - b) sale by public tender
 - c) sale by public auction
 - d) use of waste disposal management
 - e) trade in

Part XV- Regulations 214-233

Administrative Review of Procurement and Asset Disposal Proceeding

This part provides for Administrative Review Procedures by the Administrative Review Board in conducting procurement and asset disposal dispute proceedings. The procedure includes:-

- a) request for a review state the reasons for the compliant
- b) deposits (a refundable security valued at 20% tender sum)
- c) notification of the review
- d) notice of hearing
- e) hearing panels and quorum
- f) procedures at the hearing
- g) withdrawal of the requests
- h) powers of the Review Board
- i) security fee

Part XVI -Regulations 234

Offences and Sanctions

This part provides for the further prohibitions and sanctions for public officers who contravenes the provisions of the Act and the Regulations while handling the Public Procurement and Asset Disposal matters;

SCHEDULES

These Regulations have 17 schedules which include:-

- a) Conduct of The Business and Affairs of the Agency
- b) Form Filing for a Request For Debarment
- c) Threshold Matrix
- d) Annual Procurement Plan
- e) Tender Securing Declaration Form
- f) Self-Declaration Forms
- g) Confidentially Declaration Form
- h) Summary of Procurement Proceedings
- i) Standard Tender Documents and Formats

- j) Professional Opinion Template
- k) List of Classified Procurement Disposals
- l) Registration of Small and Micro Enterprises
- m) Inventory of Assets
- n) Annual Asset Disposal Plan
- o) Forms of Review
- p) Fees for Review
- q) Hearing Notice

CONCLUSION

The development of Public Procurement and Asset Regulations has been done in line with Article 10 of the Constitution on National values and Principles of Governance and especially receiving sufficient public participation from all stakeholders in all the counties of Kenya.