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THE PUBLIC PROCUREMENT AND DISPOSAL ACT

No. 3 of 2005

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**THE PUBLIC PROCUREMENT AND DISPOSAL
ACT, 2005**

AN ACT of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters

ENACTED by the Parliament of Kenya as follows:-

PART I - PRELIMINARY

Short title and commencement

1. 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.

Purpose of the Act

2. The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives —

- (a) to maximise economy and efficiency,
- (b) to promote competition and ensure that competitors are treated fairly;
- (c) to promote the integrity and fairness of those procedures;
- (d) to increase transparency and accountability in those procedures; and
- (e) to increase public confidence in those procedures.

- (f) to facilitate the promotion of local industry and economic development.

3.(1) In this Act, unless the context otherwise requires —

Definitions

“accounting officer” means —

- (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 of the public entity; or
- (b) for a local authority, the town or county clerk of the local authority;

“Advisory Board” means the Public Procurement Oversight Advisory Board established under section 21;

“Authority” means the Public Procurement Oversight Authority established under section 8;

“candidate” means a person who has submitted a tender to a procuring entity;

“citizen contractor” means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya;

“contractor” means a person who enters into a procurement contract with a procuring entity;

“corruption” has the meaning assigned to it in the Anti Corruption and Economic Crimes, Act 2003 and includes the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process or in contract execution.

No 3 of 2001

“Director-General” means the Director-General of the Authority provided for under section 10;

“disposal” means the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified, other than those regulated by any other written law;

“fraudulent practice” includes a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity, and includes collusive practices amongst bidders prior to or after bid submission designed to establish bid prices at artificial non competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“goods” includes raw materials, things in liquid or gas form, electricity and services that are incidental to the supply of the goods;

Cap 486

“local contractor” means a contractor who is registered in Kenya under the Companies Act and whose operation is based in Kenya;

“Minister” means the Minister responsible for matters relating to finance;

“prescribed” means prescribed by regulation under this Act;

“procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination;

“procuring entity” means a public entity making a procurement to which this Act applies;

“public entity” means —

- (a) the Government or any department of the Government;
- (b) the courts;
- (c) the commissions established under the Constitution;
- (d) a local authority under the Local Government Act; Cap 265
- (e) a state corporation within the meaning of the State Corporations Act; Cap 446
- (f) the Central Bank of Kenya established under the Central Bank of Kenya Act; Cap 491
- (g) a co-operative society established under the Co-operative Societies Act; No 12 of 1997
- (h) a public school within the meaning of the Education Act; Cap 211
- (i) a public university within the meaning of the Universities Act; Cap 210B
- (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;

Cap 412

“public funds” has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid grants and credits, put at the disposal of procuring entities by foreign donors, and revenues of procuring entities;

“Review Board” means the Public Procurement Administrative Review Board established under section 25;

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

“the regulations” means regulations made under this Act;

“urgent need” means the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable;

“works” means the construction, repair, renovation or demolition of buildings, roads or other structures and includes —

- (a) the installation of equipment and materials;
- (b) site preparation; and
- (c) other incidental services.

- (d) capacity building levy of such amount of the contract price as may be prescribed.

19. The Authority shall be audited in accordance with the Public Audit Act, 2003.

20.(1) For each financial year, the Director-General shall cause four quarterly reports and one annual report to be prepared.

(2) The Director-General shall submit each report to the Advisory Board and to the Minister —

- (a) in the case of a quarterly report, within one month after the end of the quarter to which the report relates; or
- (b) in the case of an annual report, within four months after the end of the year to which the report relates.

(3) Each report shall contain, in respect of the period to which it relates —

- (a) a description of the activities of the Authority;
- (b) a report on the overall functioning of the public procurement system;
- (c) a list of each procurement for which a procurement procedure was specially permitted under section 92;
- (d) a report on the extent of positive bias to local participation.

(4) In addition to what is required under subsection (3), each annual report shall include the financial

Audit

No 12 of 2003

Quarterly and
annual reports

Public Procurement and Disposal
statements of the Authority for the year to which the report relates.

(5) The Minister shall, within thirty days after receiving a report, transmit it to the National Assembly.

B – Public Procurement Oversight Advisory Board

21. The Public Procurement Oversight Advisory Board is hereby established as an unincorporated body.

22.(1) The Public Procurement Oversight Advisory Board shall consist of—

- (a) nine members appointed by the Minister and approved by Parliament from persons nominated by the prescribed organisations; and
- (b) the Director-General.

(2) The First Schedule shall apply in respect of the members of the Advisory Board.

23. The functions of the Advisory Board are—

- (a) to advise the Authority generally on the exercise of its powers and the performance of its functions;
- (b) to approve the estimates of the revenue and expenditures of the Authority;
- (c) to recommend the appointment or termination of the Director-General in accordance with this Act;
- (d) to perform such other functions and duties as are provided for under this Act.

Establishment of
Advisory Board

Composition of
Advisory Board

Functions of
Advisory Board

24.(1) The business and affairs of the Advisory Board shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Advisory Board may regulate its own procedure.

(3) Five nominated members of the Advisory Board shall constitute a quorum for the transaction of any business of the Board

(4) The Advisory Board may invite any person to attend any of its meetings and to participate in its deliberations, but such an invitee shall not have a vote in any decision of the Board.

C – Public Procurement Administrative Review Board

25.(1) The Public Procurement Complaints, Review 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.

Review Board

I N 51/2001

(2) The composition and membership of the Review Board shall be in accordance with the regulations.

(3) The Authority shall provide administrative services to the Review Board.

PART III – INTERNAL ORGANISATION OF PUBLIC ENTITIES RELATING TO PROCUREMENT

26.(1) For the purpose of ensuring that its decisions are made in a systematic and structured way, a public entity shall establish procedures to provide for the making of decisions, on behalf of the public entity, relating to procurement.

Threshold matrix
and segregation
of
responsibilities

(2) The procedures required under subsection (1) shall be consistent with this Act and the regulations

(3) All procurement shall be –

- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;
- (b) undertaken by a procuring entity as per the threshold matrix as set out in the regulations.
- (c) handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services.

(4) A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations

(5) A tender committee or body established under subsection (4) shall be established in accordance with the regulations and shall -

- (a) consist of not less than five members,
- (b) have as its secretary, the procurement professional in charge of the procurement unit.

(6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.

(7) A procurement unit established under subsection (4) shall be staffed with procurement professionals whose qualifications have been recognised by the Authority

(8) For the purpose of this section, a "procurement professional" means a person who -

- (a) has professional qualifications in procurement and supply management from a recognised institution,
- (b) is engaged in a calling or occupation in which recourse to procurement is directly or indirectly involved and has experience in the practise of procurement; and
- (c) is a member of a recognised institute of purchasing and supply

(9) The level of qualification and experience required of procurement professionals under subsection (8) shall be as prescribed.

(10) The Authority shall facilitate the establishment of an examination body for procurement professionals and shall ensure support for their professional association.

27 (1) A public entity shall ensure that this Act, the regulations and any directions of the Authority are complied with respect to each of its procurements.

(2) The accounting officer of a public entity shall be primarily responsible for ensuring that the public entity fulfils its obligations under subsection (1).

Responsibility
for complying
with Act etc

(3) Each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member, that this Act, the regulations and any directions of the Authority are complied with.

(4) Contractors, suppliers and consultants shall comply with all the provisions of this Act and the regulations.

(5) The accounting officer may use the procurement unit and tender committee of another procuring entity which shall carry out the procurement in accordance with this Act and the regulations.

(6) The Authority shall have power to transfer the procuring responsibility of a procuring entity to another procuring entity or procuring agent in the event of delay or in such other instances as may be prescribed

Procuring agents

28.(1) A procuring entity may appoint a procurement agent, on competitive basis, to carry out such procurement proceedings on its behalf as may be prescribed.

(2) The Authority shall pre-qualify procuring agents to be engaged by a procuring entity pursuant to subsection (1).

(3) A procuring agent shall be registered with the Authority and where the procuring agent is undertaking procurement on behalf of a procurement entity, the procuring agent shall comply with the provisions of this Act and the regulations.

PART IV - GENERAL PROCUREMENT RULES

29.(1) For each procurement, the procuring entity shall use open tendering under Part V or an alternative procurement procedure under Part VI.

Choice of
procurement
procedure.

(2) A procuring entity may use an alternative procurement procedure only if that procedure is allowed under Part VI.

(3) A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity —

- (a) obtains the written approval of its tender committee; and
- (b) records in writing the reasons for using the alternative procurement procedure.

(4) A procuring entity shall use such standard tender documents as may be prescribed.

30.(1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure.

Procurement not
to be split or
inflated.

(2) Any person who contravenes the provisions of this section shall be guilty of an offence.

(3) Standard goods, services and works with known market prices shall be procured at the prevailing real market price.

(4) Public officials involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the regulations,

be required to pay the procuring entity for the loss resulting from their actions.

Qualifications to
be awarded
contract

31.(1) A person is qualified to be awarded a contract for a procurement only if the person satisfies the following criteria —

- (a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;
- (b) the person has the legal capacity to enter into a contract for the procurement;
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) the procuring entity is not precluded from entering into the contract with the person under section 33,
- (e) the person is not debarred from participating in procurement proceedings under Part IX.

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done

using the criteria and requirements set out in the documents or requests described in subsection (3).

(5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications.

(6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section and under section 39

(7) Procuring entities shall use creative approaches, such as design and build in order to enhance efficiency of the procurement process and project implementation

32. To identify qualified persons a procuring entity may use a pre-qualification procedure or may use the results of a pre-qualification procedure used by another public entity.

Pre-qualification
procedures

33.(1) Except as expressly allowed under the regulations, a procuring entity shall not enter into a contract for a procurement with —

Limitation on
contracts with
employees, etc

- (a) an employee of the procuring entity or a member of a board or committee of the procuring entity;
- (b) a Minister, public servant or a member of a board or committee of the Government or any department of the Government or a person appointed to any position by the President or a Minister; or
- (c) a person, including a corporation, who is related to a person described in paragraph (a) or (b).

(2) Whether a person is related to another person for

the purpose of subsection (1)(c) shall be determined in accordance with the regulations.

Specific
requirements

34.(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate —

- (a) relate to performance rather than to design or descriptive characteristics; and
- (b) be based on national or international standards.

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless —

- (a) there is no other sufficiently precise or intelligible way of describing the requirements; and
- (b) the requirements allow equivalents to what is referred to.

Verification that
not debarred

35. A tender, proposal or quotation submitted by a person shall include a statement verifying that the person is not debarred from participating in procurement

proceedings under Part IX and a declaration that the person will not engage in any corrupt practice.

36.(1) A procuring entity may, at any time, terminate procurement proceedings without entering into a contract.

Termination of
procurement
proceedings

(2) The procuring entity shall give prompt notice of a termination to each person who submitted a tender, proposal or quotation or, if direct procurement was being used, to each person with whom the procuring entity was negotiating.

(3) On the request of a person described in subsection (2), the procuring entity shall give its reasons for terminating the procurement proceedings within fourteen days of the request.

(4) If the procurement proceedings involved tenders and the proceedings are terminated before the tenders are opened, the procuring entity shall return the tenders unopened.

(5) The procuring entity shall not be liable to any person for a termination under this section.

(6) A termination under this section shall not be reviewed by the Review Board or a court.

(7) A public entity that terminates procurement proceedings shall give the Authority a written report on the termination.

(8) A report under subsection (7) shall include the reasons for the termination and shall be made in accordance with any directions of the Authority with respect to the contents of the report and when it is due.

Form of
communications

37.(1) If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing.

(2) If the procurement procedure used is direct procurement or a request for quotations, communications between the procuring entity and a person seeking a contract for the procurement shall either be —

- (a) in writing; or
- (b) referred to and confirmed in writing.

(3) To the extent allowed under written directions of the Authority, electronic communications may be used instead of written communications.

Inappropriate
influence on
evaluations, etc

38.(1) After the deadline for the submission of tenders, proposals or quotations —

- (a) no person who submitted a tender, proposal or quotation shall make any unsolicited communications to the procuring entity or any person involved in the procurement proceedings that might reasonably be construed as an attempt to influence the evaluation and comparison of tenders, proposals or quotations; and
- (b) no person who is not officially involved in the evaluation and comparison of tenders, proposals or quotations shall attempt, in any way, to influence that evaluation and comparison.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction —

- (a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding three years or to both; or
- (b) if the person is a corporation, to a fine not exceeding ten million shillings.

39.(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

Participation in
procurement

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall -

- (a) be non-discriminatory in respect of the targeted groups;
- (b) allow competition amongst the eligible;
- (c) be monitored and evaluated.

(4) The preferences and reservations shall apply to -

- (a) candidates such as disadvantaged groups, micro, small and medium enterprises;
- (b) works, services and goods, or any combination thereof;
- (c) identified regions; and

(d) such other categories as may be prescribed.

(5) A procuring entity shall, when processing procurement, comply with the provisions of this Act and the regulations in respect of preferences and reservations.

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility.

(7) The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.

(8) In applying the preferences and reservations under this section -

(a) exclusive preference shall be given to citizens of Kenya where -

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold.

(b) a prescribed margin of preference may be given -

(i) in the evaluation of bids to candidates offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

40.(1) No person, agent or employee shall be involved in any corrupt practice in any procurement proceeding.

Corrupt practice

(2) If a person or an employee or agent of a person contravenes subsection (1) the following shall apply —

- (a) the person shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person, employee or agent who contravenes subsection (1) shall be guilty of an offence.

41.(1) No person shall be involved in a fraudulent practice in any procurement proceeding.

Fraudulent
practice

(2) If a person contravenes subsection (1) the following shall apply —

- (a) the person shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

Collusion

42.(1) No person shall collude or attempt to collude with any other person —

- (a) to make any proposed price higher than would otherwise have been the case;
- (b) to have that other person refrain from submitting a tender, proposal or quotation or withdraw or change a tender, proposal or quotation; or
- (c) to submit a tender, proposal or quotation with a specified price or with any specified inclusions or exclusions.

(2) If a person contravenes subsection (1) the following shall apply —

- (a) both persons referred to in subsection (1) shall be disqualified from entering into a contract for the procurement; or
- (b) if a contract has already been entered into with either person referred to in subsection (1), the contract shall be voidable at the option of the procuring entity.

(3) The voiding of a contract by the procuring entity under subsection (2)(b) does not limit any other legal remedy the procuring entity may have.

(4) A person who contravenes subsection (1) shall be guilty of an offence.

Conflicts of interest

43.(1) An employee or agent of the procuring entity or a member of a board or committee of the procuring entity who has a conflict of interest with respect to a procurement —

- (a) shall not take part in the procurement proceedings; and
- (b) shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract.

(2) An employee, agent or member described in subsection (1) who refrains from doing anything prohibited under that subsection that, but for that subsection, would have been within his duties shall disclose the conflict of interest to the procuring entity.

(3) If a person contravenes subsection (1) with respect to a conflict of interest described in subsection (5)(a) and the contract is awarded to the person or his relative or to another person in whom one of them had a direct or indirect pecuniary interest, the contract shall be voidable at the option of the procuring entity.

(4) The voiding of a contract by the procuring entity under subsection (3) does not limit any other legal remedy the procuring entity may have.

(5) For the purpose of this section, a person has a conflict of interest with respect to a procurement if the person or a relative of the person —

- (a) seeks, or has a direct or indirect pecuniary interest in another person who seeks, a contract for the procurement; or
- (b) owns or has a right in any property or has a direct or indirect pecuniary interest that results in the private interest of the person conflicting with his duties with respect to the procurement.

(6) In this section, “relative” means —

- (a) a spouse, child, parent, brother or sister;
- (b) a child, parent, brother or sister of a spouse; or
- (c) any other prescribed relative.

(7) For the purpose of subsection (5), the following are persons seeking a contract for a procurement —

- (a) a person submitting a tender, proposal or quotation; or
- (b) if direct procurement is being used, a person with whom the procuring entity is negotiating.

(8) Any person who contravenes the provisions of this section shall be guilty of an offence.

Confidentiality

44.(1) During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following —

- (a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
- (b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition;
- (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or

(d) the contents of tenders, proposals or quotations.

(2) This section does not prevent the disclosure of information if any of the following apply —

- (a) the disclosure is to an employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;
- (b) the disclosure is for the purpose of law enforcement;
- (c) the disclosure is for the purpose of a review under Part VII or an investigation under Part VIII or as required under section 105;
- (d) the disclosure is pursuant to a court order; or
- (e) the disclosure is allowed under the regulations.

(3) Notwithstanding the provisions of subsection (2), the disclosure to an applicant seeking a review under Part VII shall constitute only the summary referred to in section 45(2)(e).

(4) Any person who contravenes the provisions of this section shall be guilty of an offence.

45.(1) A procuring entity shall keep records for each procurement for at least six years after the resulting contract was entered into or, if no contract resulted, after the procurement proceedings were terminated.

Procurement
records

(2) The records for a procurement must include —

- (a) a brief description of the goods, works or services being procured;

- (b) if a procedure other than open tendering was used, the reasons for doing so;
 - (c) if, as part of the procurement procedure, anything was advertised in a newspaper or other publication, a copy of that advertisement as it appeared in that newspaper or publication;
 - (d) for each tender, proposal or quotation that was submitted —
 - (i) the name and address of the person making the submission; and
 - (ii) the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation;
 - (e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used;
 - (f) if the procurement proceedings were terminated without resulting in a contract, an explanation of why they were terminated;
 - (g) a copy of every document that this Act requires the procuring entity to prepare; and
 - (h) such other information or documents as are prescribed.
- (3) After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a

tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.

(4) The procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available.

(5) No disclosure shall be made under subsection (3) that would be contrary to section 44(1), but a disclosure, under subsection (3), of anything described in paragraphs (a) to (f) of subsection (2) shall be deemed not to be contrary to paragraphs (b) to (d) of section 44(1).

(6) A procuring entity shall maintain a proper filing system with clear links between procurement and expenditure files.

46.(1) The Authority shall publish notices of the contracts awarded by procuring entities together with such other information as may be prescribed.

Publication of
procurement
contracts

(2) The Authority shall issue directions governing the publication of notices under this section, including directions specifying what must be included in a notice and how it must be published.

47. An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if —

Amendments to
contracts

- (a) the amendment has been approved in writing by the tender committee of the procuring entity; and
- (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services

Interest on
overdue amounts

48. The following shall apply with respect to overdue amounts owed by a procuring entity under a contract for a procurement —

- (a) unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts; and
- (b) the interest to be paid under paragraph (a) shall be in accordance with prevailing commercial bank rates.

Inspections and
audits relating to
contracts

49.(1) The following shall apply in relation to a contract for a procurement —

- (a) the Director-General, or anyone authorised by the Director-General, may inspect, at any reasonable time, the records and accounts of the procuring entity and contractor relating to the contract and the procuring entity and contractor shall co-operate with and assist whoever does such an inspection; and
- (b) the Controller and Auditor-General, or an auditor authorised by the Controller and Auditor-General, may audit the accounts of the procuring entity and contractor relating to the contract and the procuring entity and contractor shall co-operate with and assist whoever does such an audit.

(2) The costs of an audit under subsection (1)(b) shall be borne by the Authority if the audit was conducted at the request of the Director-General.

PART V - OPEN TENDERING

Part sets out
requirements

50. This Part sets out the requirements for open tendering.

51. The procuring entity shall prepare an invitation to tender that sets out the following —

Invitation to
tender

- (a) the name and address of the procuring entity;
- (b) the tender number assigned to the procurement proceedings by the procuring entity;
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;
- (d) an explanation of how to obtain the tender documents, including the amount of any fee;
- (e) an explanation of where and when tenders must be submitted and where and when the tenders will be opened; and
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders.

52.(1) The procuring entity shall prepare tender documents in accordance with this section and the regulations.

Tender
documents

(2) The tender documents shall contain enough information to allow fair competition among those who may wish to submit tenders.

(3) The tender documents shall set out the following —

- (a) the specific requirements prepared under section 34 relating to the goods, works or services

being procured and the time limit for delivery or completion,

- (b) if works are being procured, relevant drawings and bills of quantities;
- (c) the general and specific conditions to which the contract will be subject, including any requirement that performance security be provided before the contract is entered into,
- (d) the tender number assigned to the procurement proceedings by the procuring entity;
- (e) instructions for the preparation and submission of tenders including —
 - (i) the forms for tenders;
 - (ii) the number of copies to be submitted with the original tender;
 - (iii) any requirement that tender security be provided and the form and amount of any such security; and
 - (iv) any requirement that evidence be provided of the qualifications of the person submitting the tender;
- (f) an explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;
- (g) a statement that those submitting tenders or their representatives may attend the opening of tenders;

- (h) a statement of the period during which tenders must remain valid;
- (i) the procedures and criteria to be used to evaluate and compare the tenders;
- (j) a statement that the procuring entity may, at any time, terminate the procurement proceedings without entering into a contract; and
- (k) anything else required, under this Act or the regulations, to be set out in the tender documents.

53.(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum.

Modifications to
tender
documents

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry

(3) The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

54.(1) The procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.

Advertisement

(2) If the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for national advertising, the procuring entity shall advertise, at least twice in a

newspaper of general nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement, and on its website in instances where the procuring entity has a website, and the advertisement shall also be posted at any conspicuous place reserved for this purpose in the premises of the procuring entity as certified by the head of the procurement unit.

Time for
preparing
tenders

55.(1) The time allowed for the preparation of tenders must not be less than the minimum period of time prescribed for the purpose of this subsection.

(2) For the purpose of this section, the time allowed for the preparation of tenders is the period of time between whatever steps the procuring entity takes to bring the invitation to tender to the attention of those who may wish to submit tenders and the deadline for submitting tenders.

(3) If the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

Provision of
tender
documents

56.(1) The procuring entity shall provide copies of the tender documents expeditiously and in accordance with the invitation to tender.

(2) The procuring entity may charge such fees as may be prescribed for copies of the tender documents.

Tender security

57.(1) A procuring entity may require that tender security be provided with tenders.

(2) The procuring entity may determine the form and

amount of the tender security, subject to such requirements or limits as may be prescribed.

(3) Tender security shall be forfeited if the person submitting the tender —

- (a) withdraws the tender after the deadline for submitting tenders but before the expiry of the period during which tenders must remain valid;
- (b) rejects a correction of an arithmetic error under section 63; or
- (c) refuses to enter into a written contract as required under section 68 or fails to furnish any required performance security.

(4) The procuring entity shall immediately release any tender security if —

- (a) the procurement proceedings are terminated;
- (b) the procuring entity determines that none of the submitted tenders is responsive; or
- (c) a contract for the procurement is entered into.

58.(1) A tender must be in writing, it must be signed and it must be sealed in an envelope.

Submission and
receipt of
tenders

(2) A tender and the envelope it is sealed in must bear the tender number assigned to the procurement proceedings by the procuring entity.

(3) A tender must be submitted before the deadline for submitting tenders and any tender received after that deadline shall be returned unopened.

(4) The procuring entity shall ensure that the place where tenders must be submitted is open and accessible and shall provide, in that place, a tender box that complies with the prescribed requirements.

(5) Each tender that is delivered shall be placed unopened in the tender box —

- (a) if the tender is delivered by post, by the staff of the procuring entity immediately upon receipt; or
- (b) if the tender is delivered otherwise than by post, by the person delivering the tender.

(6) If a tender that is delivered by post is inadvertently opened, the fact of that opening shall be recorded on the envelope by the person who opened the tender and then the tender shall be placed in the tender box.

(7) If a tender or part of a tender is too large to be placed in the tender box it shall be received in the manner set out in the tender documents or the invitation to tender or, if no such manner is set out, in the manner determined by the procuring entity.

Changes to
tenders

59.(1) Before the deadline for submitting tenders, a person who submitted a tender may change or withdraw it in accordance with the following —

- (a) the change or withdrawal must be in writing; and
- (b) the change or withdrawal must be submitted before the deadline for submitting tenders and in accordance with the procedures for submitting tenders.

(2) After the deadline for submitting tenders, a person who submitted a tender shall not change, or offer to change, the substance of the tender.

(3) The procuring entity shall not attempt to have the substance of a tender changed.

60.(1) The accounting officer shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed —

Opening of
tenders

- (a) the committee shall have at least three members; and
- (b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(3) Those submitting tenders or their representatives may attend the opening of tenders.

(4) The tender opening committee shall assign an identification number to each tender.

(5) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register —

- (a) the name of the person submitting the tender;
- (b) the total price of the tender including any modifications or discounts received before the

deadline for submitting tenders except as may be prescribed; and

- (c) if applicable, what has been given as tender security.

(6) The procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(7) Each member of the tender opening committee shall —

- (a) sign each tender on one or more pages as determined by the tender opening committee; and
- (b) initial, in each tender, against the quotation of the price and any modifications or discounts.

(8) The tender opening committee shall prepare tender opening minutes which shall set out —

- (a) a record of the procedure followed in opening the tenders; and
- (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(9) Each member of the tender opening committee shall sign the tender opening minutes.

Extension of
tender validity
period

61.(1) Before the expiry of the period during which tenders must remain valid the procuring entity may extend that period.

(2) The procuring entity shall give notice of an

extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) is subject to such restrictions and requirements as may be prescribed.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn during an extension under subsection (1).

62.(1) The procuring entity may request a clarification of a tender to assist in the evaluation and comparison of tenders.

Clarifications

(2) A clarification may not change the substance of the tender.

63.(1) The procuring entity may correct an arithmetic error in a tender.

Corrections of arithmetic errors

(2) The procuring entity shall give prompt notice of the correction of an error to the person who submitted the tender.

(3) If the person who submitted the tender rejects the correction, the tender shall be rejected and the person's tender security shall be forfeited.

64.(1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.

Responsiveness of tenders

(2) The following do not affect whether a tender is responsive —

- (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall —

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

Notification if no responsive tenders

65. If the procuring entity determines that none of the submitted tenders is responsive, the procuring entity shall notify each person who submitted a tender.

Evaluation of tenders

66.(1) The procuring entity shall evaluate and compare the responsive tenders other than tenders rejected under section 63(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) —

(a) the criteria must, to the extent possible, be objective and quantifiable; and

(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.

(4) The successful tender shall be the tender with the lowest evaluated price.

(5) The procuring entity shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders.

(6) The evaluation shall be carried out within such period as may be prescribed.

67.(1) Before the expiry of the period during which tenders must remain valid, the procuring entity shall notify the person submitting the successful tender that his tender has been accepted.

Notification of
award of
contract

(2) At the same time as the person submitting the successful tender is notified, the procuring entity shall notify all other persons submitting tenders that their tenders were not successful.

(3) For greater certainty, a notification under subsection (2) does not reduce the validity period for a tender or tender security.

68.(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

Creation of
contract

(2) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

69.(1) If the person submitting the successful tender refuses to enter into a written contract as required under section 68, the procuring entity shall notify, under section

Refusal to sign
contract

67(1), the person who submitted the tender that, according to the evaluation under section 66, would have been successful had the successful tender not been submitted.

(2) Section 67(2), section 68 and this section apply, with necessary modifications, with respect to the tender of the person notified under subsection (1).

(3) This section does not apply if the period during which tenders must remain valid has already expired.

Changes to
contract
responsibilities

70. The procuring entity shall not request or require, as a condition of awarding a contract that a person who submitted a tender undertake responsibilities not set out in the tender documents.

International
tendering

71. If there will not be effective competition for a procurement unless foreign persons participate, the following shall apply —

- (a) the invitation to tender and the tender documents must be in English;
- (b) if the procuring entity is required to advertise the invitation to tender under section 54(2), the procuring entity shall also advertise the invitation to tender in one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;
- (c) the period of time between the advertisement under paragraph (b) and the deadline for submitting tenders must be not less than the minimum period of time prescribed for the purpose of this paragraph;
- (d) the technical requirements must, to the extent

compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;

- (e) a person submitting a tender may, in quoting prices or providing security, use a currency that is widely used in international trade and that the tender documents specifically allow to be used; and
- (f) any general and specific conditions to which the contract will be subject must be of a kind generally used in international tendering.

PART VI – ALTERNATIVE PROCUREMENT PROCEDURES

72. This Part sets out the requirements for the procurement procedures that are alternatives to open tendering.

Part sets out requirements

A – Restricted tendering

73.(1) A procuring entity may engage in procurement by means of restricted tendering in such manner as may be prescribed.

When restricted tendering may be used

(2) A procuring entity may use restricted tendering if the following conditions are satisfied -

- (a) competition for contract, because of the complex or specialised nature of the goods, works or services is limited to prequalified contractors:
- (b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; and
- (b) there is only a few known suppliers of the

goods, works or services as may be prescribed in the regulations.

B – Direct procurement

When direct procurement may be used

74.(1) A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

(2) A procuring entity may use direct procurement if the following are satisfied —

- (a) there is only one person who can supply the goods, works or services being procured; and
- (b) there is no reasonable alternative or substitute for the goods, works or services.

(3) A procuring entity may use direct procurement if the following are satisfied —

- (a) there is an urgent need for the goods, works or services being procured;
- (b) because of the urgency the other available methods of procurement are impractical; and
- (c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

Procedure

75. The following shall apply with respect to direct procurement —

- (a) the procuring entity may negotiate with a person for the supply of the goods, works or services being procured;

- (b) the procuring entity shall not use direct procurement in a discriminatory manner; and
- (c) the resulting contract must be in writing and signed by both parties.

C – Request for proposals

76.(1) A procuring entity may use a request for proposals for a procurement if —

When request for proposals may be used

- (a) the procurement is of services or a combination of goods and services; and
- (b) the services to be procured are advisory or otherwise of a predominately intellectual nature.

(2) Subject to any prescribed restrictions, a procuring entity may use a request for proposals for a procurement if the procuring entity would be allowed to use another alternative procurement procedure for that procurement under section 73, 74, 88 or 90.

77. Sections 78 to 86 set out the procedure for a procurement using a request for proposals.

Procedure

78.(1) The procuring entity shall prepare a notice inviting interested persons to submit expressions of interest.

Notice inviting expressions of interest

(2) The notice inviting expressions of interest shall set out the following —

- (a) the name and address of the procuring entity;
- (b) a brief description of the services being procured and, if applicable, the goods being procured;

- (c) the qualifications necessary to be invited to submit a proposal; and
- (d) an explanation of where and when expressions of interest must be submitted.

(3) The procuring entity shall advertise the notice inviting expressions of interest in at least two daily newspapers of nation-wide circulation.

Terms of
reference

79. The procuring entity shall prepare terms of reference that set out the following —

- (a) the specific requirements prepared under section 34 relating to the services and, if applicable, the goods being procured and the time limit for delivery or completion; and
- (b) anything else required under the regulations to be set out in the terms of reference.

Determination of
qualified
persons

80. After the deadline for submitting expressions of interest the procuring entity shall examine each expression of interest to determine if the person submitting it is qualified to be invited to submit a proposal in accordance with the notice inviting expressions of interest.

Request for
proposals to
qualified
persons

81.(1) The procuring entity shall give each person who it determines is qualified to be invited to submit a proposal a request for proposals and a copy of the terms of reference.

(2) The request for proposals shall set out the following —

- (a) the name and address of the procuring entity;
- (b) the general and specific conditions to which the contract will be subject,
- (c) instructions for the preparation and submission of proposals which shall require that a proposal include a technical proposal and a financial proposal;
- (d) an explanation of where and when proposals must be submitted;
- (e) the procedures and criteria to be used to evaluate and compare the proposals including —
 - (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
 - (ii) the procedures and criteria for evaluating the financial proposals; and
 - (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method;
- (f) a statement giving notice of the restriction, in section 87, on entering into other contracts; and
- (g) anything else required, under this Act or the regulations to be set out in the request for proposals.

Evaluation of
proposals

82.(1) The procuring entity shall examine the proposals received in accordance with the request for proposals.

(2) For each proposal, the procuring entity shall evaluate the technical proposal to determine if it is responsive and, if it is, the procuring entity shall assign a score to the technical proposal, in accordance with the procedures and criteria set out in the request for proposals.

(3) For each proposal that is determined, under subsection (2), to be responsive, the procuring entity shall evaluate and assign a score to the financial proposal, in accordance with the procedures and criteria set out in the request for proposals.

(4) If the request for proposals provides for additional methods of evaluation, the procuring entity shall conduct such methods in accordance with the procedures and criteria set out in the request for proposals

(5) The successful proposal shall be the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).

Notification of
successful
proposal

83.(1) The procuring entity shall notify the person who submitted the successful proposal that his proposal was successful.

(2) At the same time as the person who submitted the successful proposal is notified, the procuring entity

shall notify all other persons who submitted proposals that their proposals were not successful.

84.(1) The procuring entity may negotiate with the person who submitted the successful proposal and may request and permit changes, subject to section 85(2).

Negotiations
with submitter of
successful
proposal

(2) If the negotiations with the person who submitted the successful proposal do not result in a contract the procuring entity may negotiate with the person who submitted the proposal that would have been successful had the successful proposal not been submitted and subsection (1) and this subsection apply, with necessary modifications, with respect to those negotiations.

85.(1) This section shall apply with respect to the contract resulting from a procurement by a request for proposals.

Contract
requirements

(2) The contract may not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal except in accordance with the following —

- (a) the contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract; and
- (b) the variations must be such that if the proposal, with those variations, was evaluated again under section 83, the proposal would still be the successful proposal.

(3) The contract must be in writing.

(4) The contract must set out either —

- (a) the maximum amount of money that can be paid under the contract; or
- (b) the maximum amount of time that can be paid for under the contract.

**International
competition**

86. If there will not be effective competition unless foreign persons participate, the following shall apply —

- (a) the notice inviting expressions of interest and the request for proposals must be in English;
- (b) in addition to the advertisement required under section 54(2), the procuring entity shall also advertise the notice inviting expressions of interest in one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;
- (c) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;
- (d) a person submitting a proposal may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for proposals specifically allows to be used; and
- (e) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

87. A person who enters into a contract resulting from a procurement by a request for proposals shall not enter into any other contract for the procurement of goods or works that follows from or is related to that original contract.

Restriction on entering into certain related contracts

D - Request for quotations

88. A procuring entity may use a request for quotations for a procurement if —

When may be used

- (a) the procurement is for goods that are readily available and for which there is an established market, and
- (b) the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

89.(1) This section sets out the procedure for a procurement using a request for quotations

Procedure

(2) The procuring entity shall prepare a request for quotations that sets out the following —

- (a) the name and address of the procuring entity;
- (b) the specific requirements prepared under section 34 relating to the goods being procured,
- (c) an explanation of where and when quotations must be submitted; and
- (d) anything else required under this Act or the regulations to be set out in the request for quotations.

(3) The procuring entity shall deal with the request

for quotations in accordance with the following —

- (a) the procuring entity shall give the request to such persons as the procuring entity determines.
- (b) the request must be given to as many persons as necessary to ensure effective competition and must be given to at least three persons, unless that is not possible; and
- (c) the procuring entity shall give the request to each person early enough so that the person has adequate time to prepare a quotation.

(4) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

(5) The following shall apply with respect to the contract resulting from a procurement by a request for quotations —

- (a) the procuring entity shall place a purchase order with the person submitting the successful quotation; and
- (b) the person submitting the successful quotation shall confirm the purchase order in writing.

(6) If there will not be effective competition unless foreign persons participate, the following shall apply —

- (a) the request for quotations must be in English;
- (b) the technical requirements must, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade;

- (c) a person submitting a quotation may, in quoting prices or providing security, use a currency that is widely used in international trade and that the request for quotations specifically allows to be used; and
- (d) any general and specific conditions to which the contract will be subject must be of a kind generally used in international trade.

E - Procedure for low-value procurements

90.(1) A procuring entity may use a low-value procurement procedure if —

When may be used

- (a) the estimated value of the goods, works or services being procured are less than or equal to the prescribed maximum value for that low-value procurement procedure; and
- (b) any other prescribed conditions for the use of the low-value procurement procedure are satisfied.

(2) A regulation prescribing a maximum value for a low-value procurement procedure or prescribing conditions for the use of such a procedure may prescribe different values or conditions for different classes of public entities or different classes of goods, works or services being procured.

91.(1) The procedure for a low-value procurement shall be as prescribed.

Procedure

(2) A regulation prescribing a low-value procurement procedure may —

- (a) prescribe different procedures for different

classes of public entities or different classes of goods, works or services being procured; or

- (b) exempt the procedure from the application of a provision of Part IV or vary the application of such a provision to the procedure.

F - Specially permitted procurement procedure

Authority may
permit

92.(1) A procuring entity may use a procurement procedure specially permitted by the Authority which may include concessioning and design competition.

(2) For the purpose of this section-

(a) "concessioning" means a procurement that encourages the mobilization of private sector resources for the purpose of public financing, construction, operation and maintenance of development projects and may include build-own and operate, build-own-operate and transfer, build-operate and transfer or similar types of procurement procedures;

(b) "design competition" means a procurement procedure for obtaining competitive bids for services which are creative in nature and which require that part of the services be carried as part of the bid to facilitate evaluation of the bids and such services include architecture, landscaping, engineering, urban design projects, urban and regional planning and fine arts.

(3) The procedure for specially permitted procurement shall be as prescribed

(4) In specially permitting a procedure under

subsection (1), the Authority may exempt the procedure from the application of a provision of Part IV or vary the application of such a provision.

PART VII - ADMINISTRATIVE REVIEW OF PROCUREMENT PROCEEDINGS

93.(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.

Request for a review

(2) The following matters shall not be subject to the review under subsection (1)-

- (a) the choice of a procurement procedure pursuant to Part IV;
- (b) a decision by the procuring entity under section 36 to reject all tenders, proposals or quotations;
- (c) where a contract is signed in accordance to section 68; and
- (d) where an appeal is frivolous.

94 Upon receiving a request for a review under section 93, the secretary to the Review Board shall notify the procuring entity of the pending review and the suspension of the procurement proceedings in such manner as may be prescribed.

Suspension of proceedings, etc

95. The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.

Dismissal of frivolous requests, etc

Parties to review

96. The parties to a review shall be —

- (a) the person who requested the review,
- (b) the procuring entity;
- (c) if the procuring entity has notified a person that the person's tender, proposal or quotation was successful, that person; and
- (d) such other persons as the Review Board may determine.

Completion of review

97.(1) The Review Board shall complete its review within thirty days after receiving the request for the review.

(2) In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in the Act or the regulations.

Powers of Review Board

98. Upon completing a review the Review Board may do any one or more of the following —

- (a) annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety;
- (b) give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings;
- (c) substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and
- (d) order the payment of costs as between parties to the review.

2005

Public Procurement and Disposal

accounting officer shall give the committee a written notice as to whether the accounting officer accepts or rejects the recommendations of the committee.

(5) If the accounting officer accepts the recommendations of the disposal committee, the stores and equipment shall be disposed of in accordance with those recommendations.

(6) If the accounting officer rejects the recommendations of the disposal committee he shall, within the time period referred to in subsection (4), —

- (a) include, with the notice given to the committee under subsection (4), written reasons for rejecting the recommendations of the committee;
- (b) give the Authority a copy of the notice under subsection (4) and the written reasons under paragraph (a); and
- (c) refer the matter back to the committee for further consideration.

130. The Authority may issue written directions to public entities with respect to the disposal of unserviceable, obsolete or surplus stores and equipment.

Directions

131. A public entity shall not dispose of unserviceable, obsolete or surplus stores and equipment to an employee of the public entity or a member of a board or committee of the public entity except as expressly allowed under the regulations.

Restriction on disposal to employees, etc

132. Part VIII applies, with necessary modifications, with respect to disposals of unserviceable, obsolete or surplus stores and equipment in the same manner as that Part applies with respect to procurements.

Application of Part VIII to disposals

PART XI – MISCELLANEOUS

Certain
procurements
and disposals by
armed forces,
police, etc

133.(1) For the avoidance of doubt, defence and national security organs shall comply with this Act subject to sub-section (2) and (3).

(2) The defence and national security organs shall manage their procurement and disposal on the basis of a dual list, covering items subject to open and restricted procurement and disposal methods respectively.

(3) The defence and national security organs shall agree annually with the Authority on the category of restricted items to be included in the restricted list and on restricted procurement or disposal methods to be applied to each category of items on the restricted list.

(4) The restricted list of items shall be subjected to classified audit by the Controller and Auditor-General or his appointee.

(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;
- (e) the Administration Police;
- (f) the Kenya Wildlife Service; and
- (g) such other institution as may be prescribed.

134.(1) The Director-General shall convene meetings at least annually for the purpose of consulting with persons in the public and private sectors who have an interest in the proper functioning of the public procurement system.

Consultation
meetings

(2) The Permanent Secretary of the ministry responsible for finance, or a member of the staff of the ministry selected by the Permanent Secretary, shall chair each meeting convened under this section.

(3) The Director-General, or a member of the staff of the Authority selected by the Director-General, shall act as the secretary to each meeting convened under this section.

(4) The procedure for conducting a consultative meeting referred to in subsection (1) shall be as prescribed .

135.(1) No person shall —

- (a) obstruct or hinder a person carrying out a duty or function under this Act or exercising a power under this Act;
- (b) knowingly lie to or mislead a person carrying out a duty or function under this Act or exercising a power under this Act;
- (c) delay without justifiable cause the opening or evaluation of bids or the awarding of contract beyond the prescribed period;
- (d) unduly influence or exert pressure on any member of a tender committee or on any employee or agent of a procuring entity to take

Offence -
obstruction, etc

a particular action which favours or tends to favour a particular bidder; or

- (e) open any sealed bid, including such bids as may be submitted through the electronic system and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the bid or documents.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

Offence
contravention of
orders

136. A person who contravenes an order of the Review Board under Part VII or an order of the Director-General or the Review Board under Part VIII is guilty of an offence.

General Penalty

137.(1) A person convicted of a offence under this Act for which no penalty is provided shall be liable -

- (a) if the person is an individual, to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years or to both;
- (b) if the person is a body corporate, to a fine not exceeding ten million shillings.

(2) In addition to the penalty under sub section (1), the public officer involved shall suffer disqualification from public office while the private individual shall be debarred.

Protection from
personal liability

138. No person shall, in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act.

139. All procurement and disposal shall be carried out in accordance with the codes of ethics that may from time to time be specified by the Authority.

Ethics
applicable

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 –

Regulations

- (a) governing how decisions relating to procurement are to be made on behalf of public entities, including requiring the creation of specified committees and the assignment of responsibilities and functions within a public entity;
- (b) governing pre-qualification procedures,
- (c) providing for and governing the use of electronic communications and documents in relation to procurement;
- (d) governing the procedures to be followed in reviews by the Review Board, including the panels of the Review Board to conduct reviews;
- (e) governing how decisions relating to disposals of stores and equipment that are unserviceable, obsolete or surplus are to be made on behalf of public entities, including requiring the creation of specified committees and the assignment of responsibilities and functions within a public entity;
- (f) prescribing anything that this Act requires or allows to be prescribed.

141. The Authority shall ensure that this Act, the

Availability of
Act, etc

regulations and any directions issued under this Act are accessible to the public.

Transitional provisions

142. The provisions of the Third Schedule shall apply.

Amendment of Cap 412

143. The Exchequer and Audit Act is amended by deleting section 5A.

Other consequential amendments

144. The Acts identified in the Fourth Schedule are amended in the manner set out in that Schedule.

FIRST SCHEDULE

s 22

PROVISIONS RELATING TO MEMBERS OF THE ADVISORY BOARD

Appointment of nominated members

1. The nomination and appointment of the members of the Advisory Board under section 22(1)(a) shall be in accordance with the prescribed procedures and requirements.

Term of members

2.(1) The term of office of each nominated member of the Advisory Board shall be three years.

(2) A person may not serve more than two terms as a nominated member of the Advisory Board.

Resignation

3.(1) A nominated member of the Advisory Board may resign by a written resignation addressed to the Minister.

(2) A resignation is effective upon being received by the Minister or by a person authorized by the Minister to receive it.

Termination of appointment

4. The Minister, on the recommendation of the Advisory Board, may terminate a person's appointment as a member of the Advisory Board only if the person —

(a) is unable to perform the functions of his office by reason of a mental or physical infirmity;

- (b) is adjudged bankrupt;
- (c) is convicted of an offence under the Penal Code or this Act or an offence involving dishonesty; or
- (d) is absent from three consecutive meetings of the Advisory Board without reasonable excuse

Cap 63

5.(1) A member of the Advisory Board who has a direct or indirect personal interest in a matter being considered or to be considered by the Advisory Board shall, as soon as reasonably practicable after the relevant facts concerning the matter have come to his knowledge, disclose the nature of his interest to the Advisory Board.

Disclosure of personal interest

(2) A disclosure of interest in a matter shall be recorded in the minutes of the meeting of the Advisory Board and the member shall not be present while that matter is being dealt with by the Advisory Board and shall not take part in any deliberations or vote relating to the matter.

6. The Authority shall pay the members of the Advisory Board such allowances and expenses as are determined by the Minister for finance.

Allowances

SECOND SCHEDULE s 24
**PROVISIONS RELATING TO THE CONDUCT OF BUSINESS
 AND AFFAIRS OF THE ADVISORY BOARD**

1.(1) The Advisory Board shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

Meetings

(2) Meetings shall be convened by the Chairman, or in his absence by the Vice-chairman.

(3) Unless three quarters of the members otherwise agree, at least fourteen days' notice of a meeting shall be given to every member.

(4) A meeting shall be presided over by the Chairman, or in his absence by the Vice-chairman or in both their absences, by a person elected by the Advisory Board at the meeting for that purpose.

Voting

2. A decision of the Advisory Board shall be by a majority of the members present and voting and, in the case of an equality of votes, the person presiding at the meeting shall have a second or casting vote.

Chairman and
Vice-chairman

3. (1) The Advisory Board shall elect one of its nominated members to be the Chairman of the Advisory Board and another of its nominated members to be its Vice-chairman

(2) Subject to an earlier resignation or termination, the Chairman and Vice-chairman shall each hold office until his current term as a member of the Advisory Board expires.

Secretary

4. The Director-General shall be the secretary of the Advisory Board.

Minutes

5. Minutes of all meetings shall be kept and entered in books kept for that purpose.

THIRD SCHEDULE TRANSITIONAL PROVISIONS

s 142

Interim Director-
General

1.(1) The person who, immediately before this Act comes into operation, was the Director of the Public Procurement Directorate shall become the interim Director-General of the Authority upon the establishment of the Authority.

(2) The interim Director-General shall cease to be the interim Director-General upon the appointment of a Director-General under section 10.

(3) For greater certainty, the interim Director-General shall have and may exercise and perform all the powers and functions of the Director-General until the Director-General is appointed, including being a member of the Advisory Board.

(4) For greater certainty, service as the interim Director-General shall not constitute service for a term for the purpose of section 11(2).

2. (1) Before members of the Advisory Board are nominated and appointed under section 22(1)(a), the Minister shall appoint nine interim members.

Interim members
of Advisory
Board

(2) The Minister shall designate one of the interim members as the Chairman.

(3) The interim members shall cease to hold office upon sufficient members of the Advisory Board being appointed, under section 22(1)(a), to constitute a quorum

(4) While the interim members hold office the Advisory Board shall not recommend the appointment of the Director-General under section 23(c).

(5) For greater certainty, service as an interim member shall not constitute service for a term for the purpose of paragraph 2(2) of the First Schedule

3. (1) Procurement proceedings commenced before this Act comes into operation shall be continued in accordance with the law applicable before this Act comes into operation.

Existing
procurement
proceedings
continued under
old law

(2) A procurement proceeding commences for the purpose of subparagraph (1) when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding

4. If, before this Act comes into operation, the Minister made a decision under Regulation 3(2) of the Exchequer and Audit (Public Procurement) Regulations, 2001 with respect to the use of a different procedure for a procurement, that procurement shall be exempt from this Act.

Existing
exemptions
continued.

5. Section 44 shall apply with respect to procurement

Confidentiality in

relation to past proceedings

proceedings completed before this Act comes into operation

Records of past procurements

6.(1) Section 45 shall apply with respect to —

- (a) a procurement that took place before this Act comes into operation; or
- (b) a procurement, the procurement proceeding for which was terminated before this Act comes into operation.

(2) Section 45(2), as it applies under subparagraph (1), does not require the record of a procurement to include anything that was not required before this Act comes into operation.

Publication of existing contracts

7. Section 46 shall not apply with respect to a contract formed before this Act comes into operation.

Amendments to existing contracts

8. Section 47 shall apply with respect to a contract formed before this Act comes into operation but not to an amendment to such a contract made before this Act comes into operation.

Interest on overdue amounts under existing contracts

9. Section 48 shall apply to contracts formed before this Act comes into operation and to amounts under such contracts that became overdue before this Act comes into operation.

Inspections and audits relating to prior contracts

10. Section 49 shall apply to contracts formed before this Act comes into operation including contracts that are no longer in force when this Act comes into operation.

Administrative review, etc for existing proceedings

11. Parts VII and VIII apply, with necessary modifications, with respect to procurement proceedings commenced before this Act comes into operation.

Continuation of existing administrative review proceedings

12. Proceedings before the Public Procurement Review, Complaints and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 shall be continued before the Review Board under Part VII and the provisions of that Part shall apply, with necessary modifications.

13. An investigation of procurement proceedings by the Public Procurement Directorate shall be continued under Part VIII and the provisions of that Part shall apply, with necessary modifications.

Continuation of existing investigations

14. The grounds for debarring a person from participating in procurement proceedings under section 115 extend to anything done before this Act comes into operation that would constitute a ground under that section.

Grounds for debarment include previous actions

15.(1) Upon the establishment of the Authority each member of the staff of the Public Procurement Directorate, including the Director, shall remain a member of the public service but shall be seconded to the Authority for a one year period

Transfer of staff

(2) If, within the first year after the Authority is established, a person seconded to the Authority under subparagraph (1) enters into a written contract of service with the Authority the person shall cease to be a member of the public service without right to severance pay but without prejudice to any right to other remuneration or benefits payable on termination or in respect of their public service.

(3) A person seconded to the Authority under subparagraph (1) shall cease to be so seconded and shall be re-deployed as a member of the public service if—

- (a) the one year period of secondment under subparagraph (1) expires without the person having entered into a written contract under subparagraph (2); or
- (b) the person opts, within the one year period of secondment under subparagraph (1), to end his secondment.

(4) This paragraph does not apply with respect to staff whose duties are, in the opinion of the Director of the Public

Procurement Directorate, primarily concerned with procurement operations rather than with the oversight of public procurement.

Transfer of
authorized
expenditures for
2005/2006

16. Expenditures that were authorized for the 2005/2006 financial year to be used in relation to the Public Procurement Directorate and that, upon the commencement of this Act, have not been expended, shall be deemed to be authorized for that financial year to be used in relation to the Authority.

Financing of
Authority

17. The Minister shall facilitate an adequate budget for the Authority upon the commencement of this Act

Transfer of
assets

18. The assets of the Directorate of Public Procurement existing before the commencement of this Act shall be transferred to the Authority upon commencement of this Act

FOURTH SCHEDULE

s 145

CONSEQUENTIAL AMENDMENTS

Kenya Roads Board Act, 1999

1999/No 7

1.(1) This paragraph amends the Kenya Roads Board Act, 1999.

(2) Section 6(2)(f) of the Act is deleted.

(3) Section 37(b) of the Act is deleted.

Local Government Act

Cap 265

2. Subsections (4), (5), (6) and (7) of section 143 of the Local Government Act are deleted.

Parliamentary Service Act, 2000

2000/No 10

3. Section 22 of the Parliamentary Service Act, 2000 is deleted.

*Public Procurement and Disposal
State Corporations Act*

4. Section 13 of the State Corporations Act is amended by adding the following new subsection at the end — Cap 446

(4) This section does not apply with respect to procurements or disposals to which the Public Procurement and Disposal Act, 2005 applies.

Government Contract Act.

5. Section 8 of the Government Contract Act is deleted Cap 25.