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REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FIFTH SESSION – 2021

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING
.....

REPORT ON THE CONSIDERATION OF PUBLIC PROCUREMENT AND ASSET
DISPOSAL (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 20 OF 2020)

CLERKS CHAMBERS

DIRECTORATE OF DEPARTMENTAL COMMITTEES

PARLIAMENT BUILDINGS

NAIROBI

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CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bill No. 20 of 2020) which was published on 19th June, 2020 and read a First Time on 28th July, 2020. It was then committed to the Departmental Committee on Finance and National Planning pursuant to Standing Order 127.

Following the request for memoranda from members of the public through placement of adverts in the print media on 3rd August, 2020 requesting for stakeholder's Comments on the Bill pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received memoranda from sixteen (16) stakeholders.

The Committee held a stakeholder engagement meeting on the Bill on Tuesday, 27th and on Wednesday, 28th October, 2020. Most of the stakeholders were opposed to the setting of a contract price within a fifteen percent range of the Engineers Estimate where applicable noting that it can be abused by Government engineers. All the stakeholders' comments were put into consideration while preparing the proposed Committee's amendments and some of the proposals were adopted forming part of the proposed Committee's amendments.

The Bill has five clauses and seeks to amend the Public Procurement and Asset Disposal Act, 2015 in order to ensure that payment deadlines for local contractors and sub-contractors are observed by the national and county governments. This is unlike their foreign counterparts who have support from their mother countries and are paid in the form of credit. The principle object of the Bill is therefore to amend the Act to bring local contractors at par with their foreign counterparts. The Bill also allows a procuring entity to split a contract and award it to different companies. Additionally, the Bill provides that the contract price should be within a fifteen percent range of the Engineers Estimate where applicable. Further, it proposes that national and county governments shall settle their payments to successful tenderers by way of bank guarantees. Finally, the Bill increases the amount for exclusive preference for Kenyans from five hundred million shillings to one billion shillings, gives preference to a Kenya company which bids for one and a half times the amount bid by a foreign company and increases the amount that international tenders must source supplies from citizen contractors from forty percent to sixty percent.

The Committee rejected all the amendments proposed in the Bill because the proposal to split tenders into more than one procurements will contravene Section 54(1) of the Public Procurement and Asset Disposal Act, 2015 which provides that "*No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.*" In addition, the proposal that a successful tender shall be within the range of fifteen percent of the Engineers Estimate was rejected by the Committee because it was subject to abuse where public officers can collude with tenderers to manipulate pricing of tenders. Further, the proposal that exclusive preference is given to Kenyans for all tenders below one billion was rejected by the Committee because it is addressed by Regulation 163(a) of the Public Procurement and Asset Disposal Regulations, 2020. Additionally, the matter of reviewing the thresholds is better handled through Subsidiary Legislation as they are bound to change from time to time.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Public Procurement and Asset Disposal (Amendment) Bill (N.A. Bill No. 20 of 2020). The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The

Committee further wishes to thank all the stakeholders who sent memoranda on the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Public Procurement and Asset Disposal (Amendment) Bill (N.A. Bill No. 20 of 2020) and have the honour to report back to the National Assembly with the recommendation that the Bill should be **DELETED IN ITS ENTIRETY**.

Hon. Gladys Wanga, CBS, MP

Chairperson, Departmental Committee on Finance and National Planning

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:
 - i. To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
 - ii. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
 - iii. **To study and review all the legislation referred to it;**
 - iv. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - v. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - vi. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);
 - vii. To examine treaties, agreements and conventions;
 - viii. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - ix. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
 - x. To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following government Ministries and departments:
 - i. National Treasury and Planning
 - ii. State Department for Devolution
 - iii. Commission on Revenue Allocation
 - iv. Office of the Controller of Budget
 - v. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House in July, 2020 and comprises of the following Members:

Chairperson

Hon. Gladys Wanga, CBS, MP
MP for Homabay County

ODM Party

Vice-Chairperson

Hon. Isaac W. Ndirangu
MP for Roysambu Constituency

Jubilee Party

Members

Hon. Jimmy O. Angwenyi, MP
MP for Kitutu Chache North Constituency
Jubilee Party

Hon. Christopher Omulele, MP
MP for Luanda Constituency
ODM Party

Hon. Shakeel Shabbir Ahmed, MP
MP for Kisumu East Constituency
Independent Member

Hon. Daniel Nanok, MP
MP for Turkana West Constituency
Jubilee Party

Hon. (Dr.) Christine Ombaka, MP
MP for Siaya County
ODM Party

Hon. Andrew Okuome, MP
MP for Karachuonyo Constituency
ODM Party

Hon. David Mboni, MP
MP for Kitui Rural Constituency
CCU Party

Hon. Francis K. Kimani, MP
MP for Molo Constituency
Jubilee Party

Hon. Joseph Oyula, MP
MP for Butula Constituency

ODM Party

Hon. Joshua Kandie, MP
MP for Baringo Central Constituency
MCC Party

Hon. Stanley Muthama, MP
MP for Lamu West Constituency
Jubilee Party

Hon. Edith Nyenze, MP
MP for Kitui West Constituency
WDM-K

Hon. Catherine Waruguru, MP
MP for Laikipia County
Jubilee Party

Hon. James Mwangi, MP
MP for Tetu Constituency
Jubilee Party

Hon. (Prof.) Mohamud Muhamed, MP
MP for Wajir South Constituency
Jubilee Party

Hon. Peter Lochakapong, MP
MP for Sigor Constituency
Jubilee Party

Hon. Qalicha Gufu Wario, MP
MP for Moyale Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following Secretariat: -

Ms. Leah W. Mwaura
Senior Clerk Assistant/Team Leader

Ms. Jennifer Ndeto
Principal Legal Counsel 1

Ms. Laureen Wesonga
Clerk Assistant II

Mr. Josephat Motonu
Fiscal Analyst I

Mr. Chelang'a Maiyo
Research Officer II

Mr. John Njoro
Serjeant-At-Arms

Ms. Christine Maeri
Audio Officer

Mr. Vitalis Augo
Office Assistant

2 OVERVIEW OF THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL (N.A. BILL NO. 20 OF 2020)

2.1 INTRODUCTION

6. The payment deadlines for local contractors and sub-contractors are not always observed by the national and county governments. This has led to some of the contractors being declared bankrupt and their property being auctioned. This is unlike their foreign counterparts who have support from their mother countries and are paid in the form of a letter of credit. The local contractors are thus disadvantaged against the foreign contractors. The Bill therefore intends to bring the local contractors at par with their foreign counterparts.

2.2 ANALYSIS OF THE BILL

7. The principle object of the Bill is to amend the Public Procurement and Asset Disposal Act, 2015 to ensure that both the local and foreign contractors work under similar conditions. The Bill has five (5) clauses which propose the following amendments:
 8. **Clause 1:** Provides for the short title.
 9. **Clause 2:** Provides the framework for the amendment of section 54 of the Act to provide that in cases where a procuring entity is allowed to split a contract, then each part of the split contract should be awarded to a different company. This is to spread the risk among many companies and also allow to as many companies as possible to benefit from the tender.
 10. **Clause 3:** Provides for the amendment of section 86 of the Act to provide that in addition to the criteria to be awarded a contract, the contract price should be within a fifteen percent range of the Engineers Estimate where applicable. This is to avoid a company quoting an unrealistically low price just to get the tender and thereafter undertaking a below the par job or having to vary the contract price upwards. It would also avoid a company quoting an unrealistically high price for a contract whose actual cost is low.
 11. **Clause 4:** Provides that the national and county governments shall settle their payments to the successful tenderers by way of a bank guarantee. This is to avoid delay in payment of the contractors.
 12. **Clause 5:** Increases the amount of exclusive preference for Kenyans from five hundred million shillings to one billion shillings. It also gives preference to a Kenyan company which bids for one and a half times the amount bid by a foreign company. Lastly, it increases the amount that international tenders must source supplies from citizen contractors from forty percent to sixty percent.
13. The proposed Bill does not delegate legislative powers nor does it limit fundamental rights and freedoms.
14. The proposed Bill affects the functions of county governments and is therefore a Bill concerning counties for purposes of the Standing Orders.
15. The enactment of this Bill shall occasion additional expenditure of public funds.

3 PUBLIC PARTICIPATION/STAKEHOLDERS CONSULTATION

16. Following the call for memoranda from the public through the placement of adverts in the print media on Monday, 3rd August, 2020 requesting for their comments on the Bill, the Committee received memoranda from the following stakeholders:

- i. Eng. Henry Songole Amaje
- ii. Budget Talk, Pamoja Trust, Follow the Money and Slums Information Development and Resource Centres
- iii. Mr. Joel Nadebu Ouma
- iv. Anthopi Mechanical Engineering Services Limited
- v. Association of Insurance Brokers of Kenya
- vi. CPA Onesmus Muriithi Mugo
- vii. SCM Practitioner
- viii. The Federation of Kenya Registered Electrical Contractors
- ix. Mr. Joshua Wamithi Maina
- x. Transparency International Kenya
- xi. Eng. Weche Raphael Okubo, OGW
- xii. Mr. Daniel Moronge
- xiii. Vemart Engineering Consultants Limited
- xiv. Roads and Civil Engineering Contractors Association
- xv. Focus Group Limited
- xvi. The Institution of Engineers of Kenya

17. The stakeholders submitted as follows:

3.1 ENG. HENRY SONGOLE AMAJE

18. Eng. Amaje appeared before the Committee on 27th October 2020 and submitted that he was opposed to the amendment proposed to section 86 of Public Procurement and Asset Disposal Act, 2015 because it will be hard to secure the Engineers Estimate from leakage and it will create a loophole for corruption.

3.2 BUDGET TALK KENYA, PAMOJA TRUST, FOLLOW THE MONEY AND SLUMS INFORMATION DEVELOPMENT AND RESOURCE CENTRES

In their letter, they submitted that:

19. They were in support of the amendment proposed to section 54 of the Public Procurement and Asset Disposal Act, 2015 but were concerned whether there were measures in place to assess companies to ensure that same company owners who have won the contract do not collude with other company owners to win the other parts of the tender in exchange for kickbacks from the profits.

20. They supported the amendment proposed to section 86 but were concerned with the possibility of Government engineers colluding with contractors to raise the Engineers Estimate in exchange for kickbacks. They recommended that contractors give specifications of expected standards of goods and services to be delivered to the procuring entity.

3.3 MR. JOEL NADEBU OUMA

In his memorandum, Mr. Ouma submitted that:

21. The amount of exclusive preference to Kenyans should be revised from five hundred million to three billion and sourcing from local citizens and contractors should be increased from 40% to 60%. This is because there are Kenyan companies that have such capacities. Most current projects/contracts by the government are starting from two billion thus to bring most Kenyans on board, the preference should be more than two billion.

3.4 ANTHOPI MECHANICAL ENGINEERING SERVICES LIMITED

A representative of the Company appeared before the Committee on 27th October 2020 and submitted that:

22. They supported the amendment proposed in clause 2 of the Bill because it will make it possible for one tender to be awarded to more than one company. The amendment allows all qualified entities to tender for and be awarded a tender without giving one company undue advantage over others as has been the case.
23. They also supported the amendment proposed to clause 3 of the Bill because it will provide a balance between unrealistic low price quotations which end up delaying timely completion of projects and shortfalls being raised during pendency of the projects through the instructions. Further, it will address the unrealistic high prices which end up inflating the cost of the project and loss of public funds.
24. They supported the amendment proposed in clause 4 of the Bill because a bank guarantee will give the tenderer confidence in implementing the terms of the tender and financial institutions lending to the tenderer will be at peace on realization of the amount borrowed.

3.5 ASSOCIATION OF INSURANCE BROKERS

In their memorandum, they proposed the following amendments to the Bill:

25. Delete section 54(1A) of the Bill.
26. Amend section 55(1) of the principal Act by deleting sub-section (a) and replacing with the following new sub-section, '*the person has the legal capacity to enter into a contract for procurement or asset disposal and ordinarily offers the requested services or product in that particular industry or service sector*'.
27. Amend section 55 of the principle Act by inserting the following new subsection immediately after subsection (5), '*(6) No person shall be restricted from participating in a tendering process or considered as ineligible by any state organ or public entity for any other reason other than as provided in subsection (1) of this section*'.
28. Amend section 74(1)(h) of the principle Act by deleting and replacing it with the following paragraph, '*(h) A declaration that the tender is open to all persons who meet the eligibility requirements as set out under section 55 of the Act and ordinarily offer the desired product or service in that industry or service sector*'.

29. Amend section 38(2)(b) of the principle Act by deleting it and replacing it with the following paragraph, *‘Any other person who is acting in the interest of the public’*.
30. Amend section 167(1) of the principle Act by deleting and replacing it with the following paragraph, *‘(1) Subject to the provisions of this part, a candidate or a tenderer or any person acting in the public’s interest 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 within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process or disposal process as in such manner as may be prescribed’*.
31. The above proposed amendments will ensure inclusivity and broader financial inclusion and access. It will also eliminate and avoid future abuse of restrictive tendering processes by procuring entities. These objectives will strengthen policy, legal and regulatory environment for improved access, usage and affordability of products and services in Kenya by increasing the public’s pool of choices and making an informed decision on the best available option.

3.6 CPA ONESMUS MURIITHI MUGO

In his memorandum dated 10th August 2020, CPA Mugo submitted that:

Amendment to section 54 of the Act

32. The section prohibits splitting of tenders by a procuring entity to avoid a certain procurement method. The section was meant to curb the mischief where the procuring entity would split the tender whose value would require open tender that ensures competition among the bidders hence ensuring fairness, transparency and accountability in public procurement. The proposed amendment states that if such splits are allowed, each part of the split contract should be awarded to a different company. This is in line with section 154 of the regulations that provides for unbundling of procurements where a procurement entity may lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings.
33. However this proposed amendment only partly addresses the mischief that was to be cured by section 54 and therefore a further provision should be added to state that if splitting of a contract result to lots where the procuring entity results in using quotation method other than open tender restricted to the preference group, then the procuring entity shall invite all firms registered by that entity under preference group suppliers for that category of goods, services or works to participate in the quotation. This would cure the mischief where procurement officers in the procurement entity engage in cherry-picking of certain preferred or well-connected firms under preference category without any objective criteria and invite them to quote for the tender. This have led to a situation where only few firms are selected to bid and finally be awarded tender to supply the goods, services or works while others are locked out. This runs contrary to constitution provisions for fairness, transparency and accountability.

Amendment to section 86 of the principle Act

34. The proposed amendment states that in addition to the criteria to be awarded a contract, the contract price should be within a fifteen percent range of Engineers Estimate where applicable. The intention is to avoid situations where companies quote unrealistically low price just for the award of tender and there after undertaking substandard job or having to revise the contract price upwards. It would also deter companies from quoting an unrealistically high price for a contract whose actual cost is low.

35. The mischief that was being addressed by this section was to do away with use of Engineers estimates which was a secret figure that was being used by Engineers in the ministry of public works as a Rent- seeking tool. The secret figure could then be leaked to a specific firm in return for kickbacks. A firm quoting very competitive contract price could be knocked-out under the guise of having quoted below the engineer's estimate. The provision will bring back the mischief.
36. It is important to note the procurement act as it is currently addresses the issue of underpricing by specifically capping the duration within which the contractor can request for variation which is only after 12 months and the maximum percentage that the variation can be allowed under section 139 (4) (b) which is capped at 25% of the original contract price.
37. Secondly, the winning bidder is required to execute performance bond which is to be forfeited to the procuring entity in case of non-performance as provided under section 142. Any payment to the contractor is based on the architect certificate clearly certifying the part of work done satisfactorily as per the bills of quantity, hence the entity cannot lose any funds if there is proper contract monitoring and evaluations as per the requirement of the Act. A contractor who breaches the terms of the contract is liable for debarment under the current Act in addition to civil legal action for breach of the contract.
38. All these provisions in the current act are meant to ensure that there is no need of pegging contract award to engineers estimate. This should only be use internally to estimate the cost of the project but not as criteria for award of contract. Introducing engineer estimate as criteria in award of contract goes against various provisions in the current Act which requires goods, services and works to be procured competitively and ensure that the procurement entity gets value for money. Use of engineer estimates amounts to re-introducing the mischief of seeking kickbacks by some unethical public servants through the back door.

3.7 SCM PRACTITIONER

In his memorandum dated 10th August 2020, he submitted that he was not in support of the amendment proposed to section 54 of the Act because it can be misused by the people in authority and unscrupulous suppliers can collude with unethical professionals to defeat the purpose by invoking this provision. He was opposed to the amendment because:

39. It may open a floodgate for corruption where it is used against the intended purpose. Suppose goods worth KSh. 6 million are to be purchased and in the procurement plan it shows the method of procurement is open tender. The Accounting officer who intends to influence the outcome and favor some 'friendly' suppliers may invoke this amendment to split the tender into two or more procurements.
40. The proposed amendment may: ensure that the threshold is reduced from open to RFP; create quote cover by inviting prequalified suppliers who are friendly and can collude to make one of them win the perceived completion; encourage bid rigging and bid rotation where few suppliers end up getting many contracts at the expense of many.
41. The cardinal and paramount importance of procurement is value for money. This will be defeated by allowing amendment to this section. By splitting the tender to two or more procurements, the procuring entity will not get value for money because open tender method will be replaced by RFQ.

bid rigging, bid rotation and quote covering will result in compromising quality of goods and value for money under the hidden agenda and guise of benefiting many companies and also share the risk among them to cushion the procuring entity (buyer) against incompetent suppliers.

3.8 THE FEDERATION OF KENYA REGISTERED ELECTRICAL CONTRACTORS

Mr. Joseph Mburu represented the Institution before the Committee on 27th October 2020 and submitted that:

42. On the amendment of section 54 of the Act, they proposed that electrical works should be split from the main building Bill of Quantities. This is because electrical contractors have for many years suffered because one Bill of Quantities is used to tender where electrical works is put together with building works. This disadvantages the licensed electrical contractor who works at the mercy of the main building contractor. In the event that the main building contractors abandon site or fail to deliver the project the electrical contractor suffers mistakes of another party.
43. On the amendment of section 86 of the Act, they proposed that the contract price should be within the range of 20% of the Engineers Estimate.

3.9 MR. JOSHUA WAMITHI MAINA

In his memorandum, Mr. Maina submitted that:

44. He was opposed to the return of the 15% Engineers Estimate as an evaluation criteria on tenders because most of the Engineers Estimates are unrealistic and sometimes the bidders quote more realistic prices.
45. A bank guarantee requires some amount of funds balance in a client's account to be issued. If payments are hinged to bank guarantees, it shall risk funds meant for workers' salaries and other statutory remittances in those accounts if the National Treasury delays to dispatch the funds.
46. Raising the local supplies requirement by a foreign contractor from the current 40% under section 157(9) of the Act to 60% is too soon. Giving a margin of preference of 150% on price in favor of citizen contractors is quite unrealistic and not cost effective as required by Article 227(1) of the Constitution.

3.10 TRANSPARENCY INTERNATIONAL KENYA

Ms. Harriet Wachura represented the Institution in the stakeholder engagement retreat held on 27th October 2020 and submitted that:

47. They were not in support of the amendment proposed to section 86 of the Act because the current section 86 of the Act states that the successful tender shall be tender with the lowest evaluated price based on professional and technical score. This gives authenticity and credibility that the winning bidder will actually deliver as required by the terms of the contract.
48. The amendment proposed to section 141 will fit well under section 140 of the Act which already captures interest on overdue amounts and liquidated damages to the contractor in case of delayed payments. They however noted that it is a welcome proposal because the Act did not have period of payment to contractors.

3.11 ENG. WECHE RAPHAEL OKUBO, OGW

In his letter dated 8th August 2020, Eng. Okubo submitted that:

49. He wanted to know the basis of 15% range of Engineers Estimate and how secure the Engineers Estimate is once it is prepared and at what stage of the tender process it is prepared.
50. The proposed amendment to section 86 of the Act must be done alongside other provisions (sections 58(2), 67 and 70(6)(b)) in the Act otherwise it will not be possible to apply the amendment by itself.

3.12 MR. DANIEL MORONGE

In his memorandum, Mr. Moronge submitted that:

Section 86 (Engineer's Estimate)

51. Section 70(6)(b) states that a bidder shall not be disqualified on the basis that he/she quoted a price above or below a certain percentage of Engineers' Estimates. It is important to note that the amendment is also silent on what the percentage should be. Therefore, amending section 86 of the Act to provide the percentage at 15% in order to give section 70(6)(b) full meaning.
52. Regulation 71(3) of the Public Procurement and Asset Disposal Regulations (PPADR), 2020 provides that Engineer's Estimates shall be realistic and based on up to date information on economic and market conditions. Basing on this Regulation, it is perceived that a PE's Engineering Estimates are based on market surveys and prevailing inflation rates. Therefore, the act of bidders quoting lower prices just for the sake of winning a tender and should be punishable.

Preference in public procurement

53. The proposed amendments of the preferential scheme seems nationalistic as they contribute directly to the economic well-being of the people of Kenya. However, section 89 of the principle Act should be amended in order to compel procuring entities to buy goods, works or services locally.

3.13 VEMART ENGINEERING CONSULTANTS LIMITED

In their memorandum, Ref: VEMART/19/20 dated 6th August 2020, they submitted that:

54. The Bill is good for the construction industry but the Engineers Estimate is usually abused by civil servants who leak it to the contractors of their choice. Further, some engineers do not undertake a good market survey to understand the prevailing market prices for important items that are fluctuating due to new taxation protocols.

3.14 ROADS AND CIVIL ENGINEERING CONTRACTORS ASSOCIATION (RACECA)

In their memorandum, Ref: SH/0837/KSG/PM/AJA/2020/021 dated 10th August 2020, the Association submitted that:

55. They proposed that section 86(1)(a) of the Act should be deleted because the lowest evaluated price does not necessarily translate to the most responsive bid.
56. They proposed that section 157 of the Act should be amended so that the threshold is raised to KSh. 3 billion.

3.15 FOCUS GROUP LIMITED

In their memorandum dated 11th August 2020, the Company submitted the following proposals on the Bill:

57. Amend section 43(1) as follows, *'Where a procuring entity may structure procurement entity as two or more procurements, the procurement entity shall not award more than one tender to the same company'*. This is to provide opportunities to other suppliers or contractors and to eliminate corruption and cartels in the procurement process.
58. Amend section 163 of the Act as follows: in subsection (a) by deleting the words *'one billion'* and replacing with the words *'three billion'*; in subsection (b) by deleting the words *'five hundred'* and replacing with the words *'one billion'*; inserting the following new subsection *'a person who registers a company on behalf of a non-Kenyan with the intention of benefiting from procurement under this section commits an offence and is liable upon conviction to a fine not exceeding ten million'*; and inserting the following new subsection *'a foreigner who registers a company on behalf of a non-Kenyan with the intention of benefitting from procurement under this section commits an offence and shall be liable upon conviction to a fine not exceeding ten million'*.
59. Insert the following new subsection immediately after subsection 144(b) *'A committee should be established to review work permits application'*. This is to ensure that foreigners are not applying for work permits for menial jobs that can be done by Kenyan citizens.
60. Amend section 144(3)(f) of the Act by deleting *'40%'* and replacing with *'60%'*; and inserting the following paragraph immediately after the subsection *'that a fully registered joint venture agreement must be executed in accordance to the Registration of Documents Act'*. This is to protect local manufacturing industry and discourage unscrupulous products that have flooded the market killing local production.
61. Amend section 204(1) of the Act by deleting *'15% of the applicant's tender sum'* and amend section 222 by deleting the words *'3% of the applicant's tender sum'*. This is because the cost of filing an appeal at the Public Procurement and Regulatory Authority are already expensive as per the PPAD, 2015.

3.16 THE INSTITUTION OF ENGINEERS OF KENYA

In their memorandum, Ref: IEK/PRE/0166/2020 dated 11th August 2020, the Institution was in support of the Bill. They made the following general comments on the Bill:

62. Insert the following new section 1A immediately after section 54(1), *'In procuring services and works that involve general and specialized works, the procuring entity must tender the specialized works and services separately and award them to different qualified companies'*. This will reduce the risks and spread the reduced risks across many companies.
63. Amend section 141A(1) to read as follows, *'The national and county government shall make payments to the successful tenderer not later than ninety days after acceptance of the services, goods or works by the accounting officer of a procuring entity'*. This is to avoid delays of payment to suppliers and thus the focus should be on the maximum period when the payment should be made and not the form of payment (i.e. bank guarantee).

64. Amend section 157(a)(8) of the principle Act by deleting the words '*five hundred million*' appearing immediately after the word '*above*' in paragraph (a)(iii) and substituting therefor the words '*three billion*'. This is because most engineering projects/contracts are capital intensive and currently most procurement entities package projects which are worth KSh. 2 billion and above.
65. Amend clause 3 to read as follows, '*An engineer's estimate of the overall costs shall be prepared for all engineering works*'. This is because an engineer's estimate should be prepared for all engineering work.
66. Insert the following new clause 139(4) immediately after clause 3, '*Clause 3 above shall not apply for complex and specialized procurement contracts*'. The provision is restrictive and a hindrance to short term contracts which are complex and specialized.
67. Delete section 139(c) of the principle Act because the restriction of the quantity variation for works of 20% should be removed. The assessment of quantities should be left to the Technical User Department due to unforeseen site conditions. Any variation in quantities should be justifiable.
68. Amend the General section of the Principal Act as follows, '*(b) Managing, monitoring and reporting any departure from the terms and conditions of the contract to the accounting officer instead of the head of procurement function*' and '*(c) forwarding details of any required amendments or variations to contracts including extensions to the accounting officer for consideration and action*'. This will make the provisions of the Act to be in tandem with FIDIC conditions which are generally accepted all over the world to guide engineering contracts. The employer should constitute an ad hoc committee to evaluate such things and not the head of procurement.

4 COMMITTEE OBSERVATIONS

In considering the Bill, the Committee observed that:

69. It is easier to deal with one contractor for a project as opposed to dealing with several contractors where one project is split in segments depending on expertise. It will be hectic for the investor to supervise more than one contractor in a project.
70. The use of Engineers Estimate to determine the tender price may encourage corruption as Government engineers may collude with contractors and set higher construction prices thereby leading to loss of money. Additionally, the Bill assumes that construction firms cannot adopt technologies that can substantially reduce the cost of construction beyond the Engineers Estimates.
71. The National Assembly enacted the Public Finance Management (Amendment) (No. 2) Act, 2020 which if operationalized will put in place the Credit Guarantee Scheme which will provide funding for companies who get government contracts hence there will be no need for bank guarantees.
72. The issue proposed to be cured under Clause 5 has been adequately addressed by Regulation 163(a) of the Public Procurement and Asset Disposal Regulations, 2020 which provides exclusive preference of one billion shillings for procurement in respect of works, construction materials and other materials which are made in Kenya. It states that:

“Threshold for exclusive preference


For the purpose of section 157(8)(a)(ii) and (iii) of the Act, the threshold which exclusive preference shall be given to citizen contractors shall be—

- (a) one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and*
- (b) five hundred million shillings for procurements in respect of goods and services.”*

73. Regulation 163(b) has also addressed issues to do with exclusive preference of five hundred million shillings for procurement in respect of goods and service as shown above.

5 COMMITTEE RECOMMENDATION

74. From the above observations and from proposals made by stakeholders, the Committee recommends to the House that the Public Procurement and Asset Disposal (Amendment) Bill (N.A. Bill No. 20 of 2020) be **DELETED IN ITS ENTIRETY**.

SIGNED.......... DATE 5th May 2021.....
HON. GLADYS WANGA, CBS, MP
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

**ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE PUBLIC
PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL (NATIONAL
ASSEMBLY BILL NO. 20 OF 2020)**

The report on the consideration of the Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bill No. 20 of 2020) was adopted by the Committee on Tuesday, 4th April 2021 having been proposed and seconded by Hon. David Mboni, M.P. and Hon. Peter Lochakapong, M.P. respectively. The following Members acceded to the recommendation proposed in the report to be considered during the Committee Stage having been present in the meeting:

- | | | |
|---|---|-------------------------|
| 1. Hon. Gladys Wanga, CBS, M.P. | - | Chairperson |
| 2. Hon. Isaac Waihenya Ndirangu, M.P. | - | Vice-Chairperson |
| 3. Hon. Jimmy Angwenyi, MGH, M.P. | | |
| 4. Hon. Christopher Omulele, CBS, M.P. | | |
| 5. Hon. Shakeel Shabbir Ahmed, CBS, M.P. | | |
| 6. Hon. David Mboni, M.P. | | |
| 7. Hon. Joshua Kandie, M.P. | | |
| 8. Hon. Edith Nyenze, M.P. | | |
| 9. Hon. Catherine Waruguru, M.P. | | |
| 10. Hon. (Prof.) Mohamud Sheikh Mohamed, M.P. | | |
| 11. Hon. Peter Lochakapong, M.P. | | |

MINUTES OF THE 20TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD VIRTUALLY ON TUESDAY, 4TH MAY, 2021 AT 10:00 A.M.

PRESENT

- | | | |
|---|---|-------------------------|
| 1. Hon. Gladys Wanga, CBS, MP | - | Chairperson |
| 2. Hon. Isaac W. Ndirangu, MP | - | Vice Chairperson |
| 3. Hon. Jimmy O. Angwenyi, MGH, MP | | |
| 4. Hon. Christopher Omulele, CBS, MP | | |
| 5. Hon. Shakeel Shabbir Ahmed, CBS, MP | | |
| 6. Hon. David M. Mboni, MP | | |
| 7. Hon. Joshua C. Kandie, MP | | |
| 8. Hon. Edith Nyenze, MP | | |
| 9. Hon. Catherine Waruguru, MP | | |
| 10. Hon. (Prof.) Mohamud Sheikh Mohamed, MP | | |
| 11. Hon. Peter Lochakapong, MP | | |

ABSENT

1. Hon. (Dr.) Christine Ombaka, MP
2. Hon. Andrew A. Okuome, MP
3. Hon. Daniel E. Nanok, MP
4. Hon. Stanley M. Muthama, MP
5. Hon. James Gichuhi Mwangi, MP
6. Hon. Francis K. Kimani, MP
7. Hon. Joseph M. Oyula, MP
8. Hon. Qalicha Gufu Wario, MP

INATTENDANCE

SECRETARIAT

- | | | |
|---------------------------|---|--|
| 1. Ms. Leah Mwaura | - | Senior Clerk Assistant/Head of Secretariat |
| 2. Ms. Jennifer Ndeto | - | Principal Legal Counsel I |
| 3. Ms. Laureen Wesonga | - | Clerk Assistant II |
| 4. Mr. Chelang'a R. Maiyo | - | Research Officer II |
| 5. Ms. Christine Maeri | - | Audio Officer |
| 6. Ms. Jeruto Kosgey | - | Intern |

AGENDA

1. Prayers
2. Communication from the Chairperson
3. **Adoption of the reports on the consideration of the Public Finance Management (Amendment) Bill, 2019 by Hon. Alexander Kosgey, M.P. and the Public Procurement and Asset Disposal (Amendment) Bill, 2020 by Hon. Patrick Jungle Wainaina, M.P.**
4. Any Other Business
5. Adjournment/Date of Next Meeting

MIN.NO.NA/F&NP/2021/094:

COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 10:05 a.m. and a prayer was said. The Chairperson called for introduction of those virtually present before welcoming the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2021/095:

CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.NA/F&NP/2021/096:

**ADOPTION OF THE REPORTS ON THE
CONSIDERATION OF THE PUBLIC
FINANCE MANAGEMENT (AMENDMENT)
BILL (NATIONAL BILL NO. 48 OF 2019)
AND THE PUBLIC PROCUREMENT AND
ASSET DISPOSAL (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILL NO. 20 OF
2020**

The Chairperson invited the Secretariat to brief the Members on the Public Finance Management (Amendment) Bill, 2019 by Hon. Alexander Kosgey, M.P. and the Public Procurement and Asset Disposal (Amendment) Bill, 2020 by Hon. Patrick Jungle Wainaina, M.P. The Committee was informed as follows:

1. On the Public Finance Management (Amendment) Bill (N.A. Bill No. 48 of 2019) by Hon. Alexander Kosgey, M.P. the Committee had agreed that the Bill be deleted in its entirety because the main object of the Bill being to limit the amount of money that the Government may borrow to KSh. 6 trillion had been overtaken by events given that the debt ceiling was reviewed by Parliament through the Public Finance Management (National Government) (Amendment) Regulations, 2019 to KSh. 9 trillion.

Resolution: The Committee adopted the report with the recommendation to delete the Bill in its entirety having been proposed and seconded by Hon. Peter Lochakapong, M.P. and Hon. Edith Nyenze, M.P. respectively.

2. On the Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bill No. 20 of 2020) by Hon. Patrick Jungle Wainaina, M.P., the Committee had agreed that the Bill be deleted in its entirety because it was proposing in clause 2 to split tenders into more than one procurements where procuring entities are to be barred from awarding more than one tender to one tendering company. The Committee had observed that the amendment will contravene the provision of Section 54(1) of the Public Procurement and Asset Disposal Act, 2015 which provides that "*No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.*" In addition, Clause 3 was proposing to amend Section 86 of the said Act so as to provide an additional requirement for determination of a successful tender so that any successful tender shall be within the range of fifteen percent of the Engineers Estimate. The Committee was opposed to this amendment as it was subject to abuse where public officers can collude with tenderers to manipulate pricing of tenders. Regarding clause 4 of the Bill, the Committee observed that the Bill was seeking to address delays in making payments for completed works. The Committee agreed that the matter can be cured through a separate legislation. In

terms of clause 5, the Bill was proposing to amend Section 157 of the Act to ensure that exclusive preference is given to Kenyans for all tenders below one billion. The Committee had observed that the matter had been exhaustively addressed by Regulation 163(a) of the Public Procurement and Asset Disposal Regulations, 2020. Additionally, the matter of reviewing the thresholds are better handled through Subsidiary Regulations as they are bound to change from time to time.

Resolution: In view of the foregoing, the Committee agreed that the Bill be deleted in its entirety. The report on the Bill was therefore adopted having been proposed and seconded by Hon. David Mboni, M.P. and Hon. Peter Lochakapong, M.P. respectively.

MIN.NO.NA/F&NP/2021/097: **ADJOURNMENT/DATE OF NEXT
MEETING**

There being no other business to deliberate on, the meeting was adjourned at 11:32 a.m. The next meeting will be held on Friday 7th May, 2021 in Naivasha.

**HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)**

SIGNED.....



.....DATE.....

5th May 2021

