

THE PUBLIC PROCUREMENT AND DISPOSAL (AMENDMENT) BILL, 2011

A Bill for

AN ACT of Parliament to amend the Public Procurement and Disposal Act, 2005 and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

Short title and commencement.

1. This Act may be cited as the Public Procurement and Disposal (Amendment) Act, 2011 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint which date shall not be later than ninety days from the date of publication.

Amendment of section 3 of No 2 of 2005.

2. Section 3 of the Public Procurement and Disposal Act, 2005, in this Act referred to as “the principal Act”, is amended in subsection (1) by inserting the following new definition in its proper alphabetical sequence—

“youth” means a person who has attained the age of eighteen years and has not attained the age of thirty-five years and includes a company, association or body of persons, corporate or unincorporated in which all its directors or proprietors are persons who have attained the age of eighteen years and have not attained the age of thirty-five years.

Amendment of section 39 of No 2 of 2005.

3. Section 39 of the principal Act is amended by inserting the following new subsection immediately after subsection (8)—

(9) Despite the provisions of subsection (2) or any other provisions of this Act, the Minister shall, pursuant to articles 55 and 227(2) of the Constitution, prescribe preferences requiring every procuring entity to ensure that at least twenty five per cent of its procurement in every financial year is allocated to the youth in accordance with this section and in such manner and subject to such conditions as the Minister may prescribe.

MEMORANDUM OF OBJECTS AND REASONS.

The principal object of this Bill is to amend the Public Procurement and Disposal Act, 2005 so as to ensure that at least twenty five per cent of the annual procurement by public entities is allocated to the youth in accordance with such conditions as the Minister may prescribe. It is proposed to delegate to the Minister powers to prescribe the conditions upon which the procurement shall be allocated to the youth so as to safeguard this provision against possible abuse.

This proposed amendment will go a long way in empowering the youth and will help reduce the high level of unemployment in this country.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 14th June, 2011.

EUGENE WAMALWA,
Member of Parliament.

Section 3 of No. 3 of 2005 which is proposed to amend—

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

“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;

(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, 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.

“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;

“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;

(e) a state corporation within the meaning of the State Corporations Act;

(f) the Central Bank of Kenya established under the Central Bank of Kenya Act;

(g) a co-operative society established under the Co-operative Societies Act;

(h) a public school within the meaning of the Education Act;

(i) a public university within the meaning of the Universities Act;

(j) a college or other educational institution maintained or assisted out of public funds; or

(k) an entity prescribed as a public entity for the purpose of this paragraph;

“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.

Section 39 of No 3 of 2005) which is proposed to amend—

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

(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;
- (b) identified regions; and
- (c) such other categories as may be prescribed.

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

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

(7) The Authority shall maintain an up-to register of contractors in works, goods and service any combination thereof, in order to be cognizant 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 candidate offering goods manufactured, mi extracted and grown in Kenya; or

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