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THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL, 2020

A Bill for

AN ACT of Parliament to amend the Public Procurement and Asset Disposal Act.

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment) Act, 2020.

Short title.

2. Section 54 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the principal Act) is amended by inserting the following new subsection immediately after subsection (1) –

Amendment of section 54 of No. 33 of 2011.

"(1A) Where a procuring entity may structure procurement as two or more procurements, the procurement entity shall not award more than one tender to the same company".

3. Section 86 of the principal Act is amended by inserting the following new subsection immediately after subsection (1) –

Amendment of section 86 of No. 33 of 2011.

"(1A) Notwithstanding the provisions of subsection (1), the successful tender price shall be within a range of fifteen per cent of the Engineers Estimate where applicable".

4. The principal Act is amended by inserting the following new section immediately after section 141 –

Insertion of new section in No. 33 of 2015.

141A. (1) The national and county governments shall make payments to the successful tenderer by way of a bank guarantee.

Payment for contracts

(2) The bank guarantee referred to under subsection (1) shall have effect after ninety days.

5. Section 157 of the principal Act is amended –

Amendment of section 157 of No. 33 of 2015.

(a) in sub section (8) –

(i) by deleting the words "five hundred million" appearing immediately after

the word "above" in paragraph (a) (iii) and substituting therefor the words "one billion";

(ii) in paragraph (b) by inserting the following new subparagraph immediately after subparagraph (ii)–

"(iii) to a Kenyan who bids for up to one and a half times the amount submitted by a foreigner";

(b) in sub section (9) by deleting the word "forty" and substituting therefor the word "sixty".

MEMORANDUM OF OBJECTS AND REASONS

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 these 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 principal object of this Bill is therefore to amend the Public Procurement and Asset Disposal Act, 2015 to bring the local contractors at par with their foreign counterparts.

Clause 1 of the Bill provides for the short title.

Clause 2 of the Bill provides 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.

Clause 3 of the Bill 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 per cent 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.

Clause 4 of the Bill 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 payments of the contractors.

Clause 5 of the Bill increases the amount for 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 per cent to sixty per cent.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not limit any fundamental rights and freedoms as provided under the Constitution.

Statement that the Bill concerns county governments

The Bill affects the functions of the county governments and is therefore a Bill concerning counties for purposes of the Standing Orders.

Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall occasion additional expenditure of public funds.

Dated the 18th June, 2020.

PATRICK WAINAINA,
Member of Parliament.

Section 54 of the Act which it is proposed to amend—

Procurement pricing and requirement not to split of contracts

(1) 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.

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

(3) The Authority shall issue a quarterly market price index as reference guide to assist accounting officers make informed price decisions.

(4) Public officers 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 made thereunder, be required to pay the procuring entity for the loss resulting from their actions.

Section 86 of the Act which it is proposed to amend—

Successful tender

(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) 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 where Request for Proposals method is used;

(c) the tender with the lowest evaluated total cost of ownership; or

(d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.

(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

Section 157 of the Act which it is proposed to amend—

Participation of candidates in preference and reservations

(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 Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset 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 persons; and

(c) be monitored and evaluated by the Authority.

(4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—

(a) candidates such as disadvantaged groups;

(b) micro, small and medium enterprises;

(c) works, services and goods, or any combination thereof;

(d) identified regions; and

(e) such other categories as may be prescribed

(5) An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and 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 as prescribed.

(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 preferences shall be given to citizens of Kenya where—

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or 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.

(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

(10) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.

(11) Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.

(12) The procuring entities at the national and county level shall make a report after every six months to the Authority.

(13) A report under subsection (12) shall—

(a) certify compliance with the provisions of this section; and

(b) provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.

(14) The Authority shall make a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.

(15) The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (10) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.

(16) The preferences referred to in subsection (15) shall—

(a) be prescribed within ninety days after commencement of this Act;

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

(17) The National Treasury shall operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for—

(a) registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;

(b) training and capacity building of the above target groups;

(c) providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and

(d) monitoring and evaluating the implementation of the preferences and reservations under this Act.

(18) The National Treasury shall provide adequate staff and resources for the operations of the secretariat.