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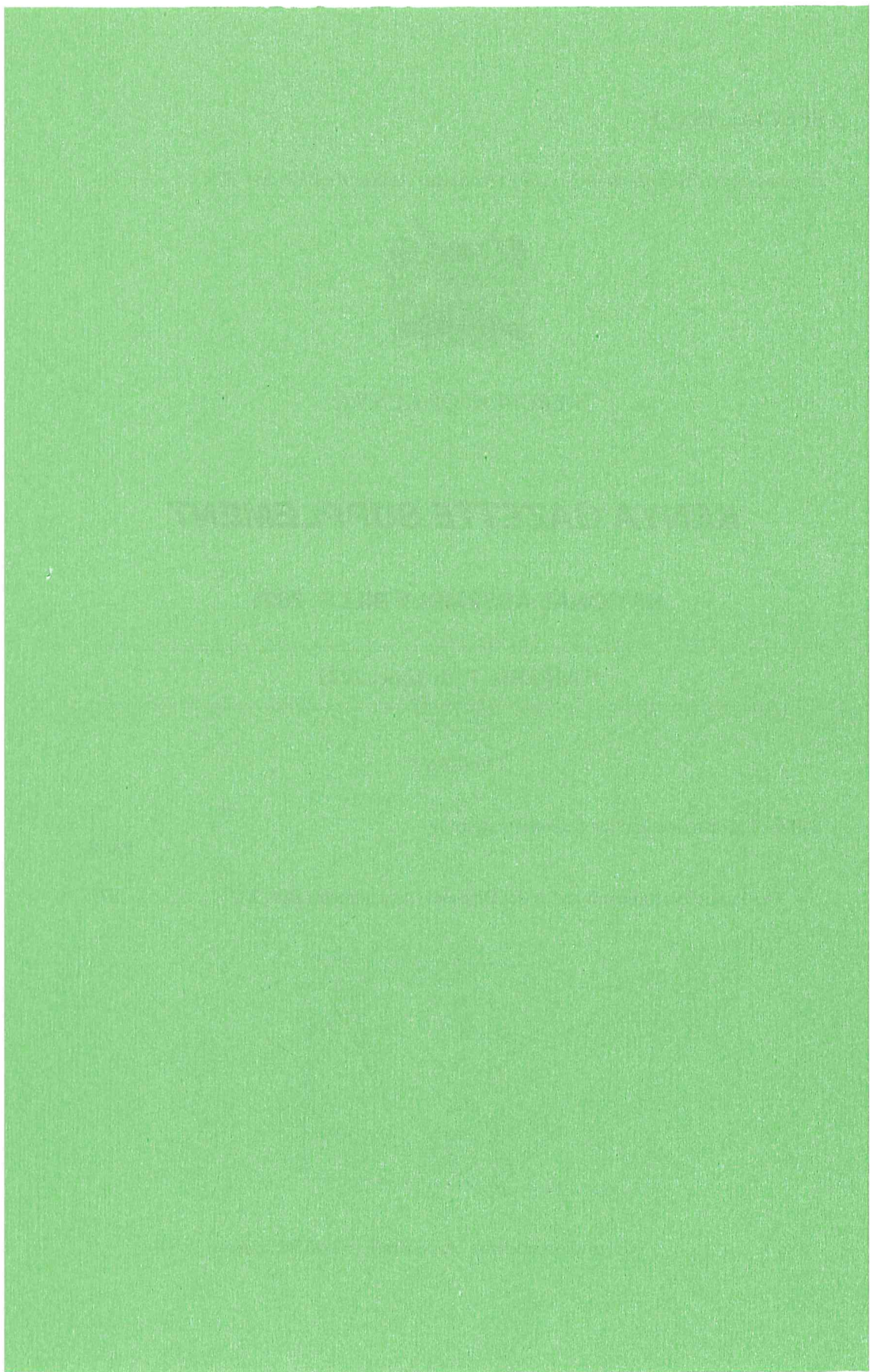
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THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL, 2021

A Bill for

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

ENACTED by Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment) Act, 2021. Short title.

2. Section 2 of the Public Procurement and Asset Disposal Act, in this Act referred to as the “principal Act”, is amended— Amendment of section 2 of No. 33 of 2015.

(a) in the definition of “procurement profession”, by deleting the words “established under the Supplies Practitioners Management Act, 2007” appearing immediately after the word “Management” and substituting therefor the words “or any other supply chain professional body”;

(b) by inserting the following new definition in its proper alphabetical sequence—

“local contractor” means a person or a firm registered in Kenya under the Companies Act, 2015 or any other written law and whose operation is based in Kenya; No. 17 of 2015.

3. Section 7 of the principal Act is amended in subsection (2) by inserting the following new paragraphs immediately after paragraph (k) — Amendment of section 7 of No. 33 of 2015.

(ka) develop, promote and support the training and capacity development for procurement and supply chain management services cadre at the national and county level;

(kb) develop and manage the state portal on procurement and asset disposal and ensure that it is available and easily accessible;

4. Section 9 of the principal Act is amended in subsection (1) — Amendment of section 9 of No. 33 of 2015.

- (a) by deleting paragraph (k); and
- (b) by inserting the following new paragraph immediately after paragraph (r) —

“(ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal;”

5. Section 26 of the principal Act is amended in subsection (6) by deleting the word “draft” appearing immediately after the words “publicize the” and substituting therefor the word “annual”.

Amendment of
section 26
of No. 33 of 2015.

6. Section 39 of the principal Act is amended by deleting the word “Board” appearing immediately after the words “order of the” and substituting therefor the words “Director-General”.

Amendment of
section 39
of No. 33 of 2015.

7. Section 40 of the principal Act is amended in subsection (2) by deleting the word “Board” appearing immediately after the words “attention of the” and substituting therefor the words “Director-General”.

Amendment of
section 40
of No. 33 of 2015.

8. Section 41 of the principal Act is amended in subsection (1) by inserting the following new paragraph immediately after paragraph (i)—

Amendment of
section 41
of No. 33 of 2015.

“(j) is determined by the Review Board to have filed a request that is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceeding or a performance of a contract”.

9. The principal Act is amended by inserting the following new section immediately after section 43—

Insertion of a new
section 43A.

Authority to enter
premises.

43A. (1) When conducting investigations, inspections, assessments and reviews relating to contracts, procurement and asset disposal proceedings, anyone authorized by the Authority may enter any premises of a procuring entity, at a reasonable time

and inspect the premises to make any inquiries that may be necessary for the collection of information.

(2) Where an authorized person is refused entry or is prevented from entering premises, a magistrate may, on application by the Authority, issue a warrant authorizing the Police to enter the premises, using such force as may be reasonably necessary and to conduct the search and obtain the required information.

10. Section 44 of the principal Act is amended by inserting the following new subsection immediately after subsection (4)—

Amendment of section 44 of No. 33 of 2015.

“(5) Where a public entity lacks capacity to comply with this Act, an accounting officer shall seek assistance from the National Treasury”.

11. Section 46 of the principal Act is amended—

Amendment of section 46 of No. 33 of 2015.

(a) in subsection (4), by deleting paragraph (c) and substituting therefor the following paragraph—

“(c) have as its secretary, the person in charge of the procurement function or an officer from the procurement function appointed, in writing, by the head of procurement function”.

(b) by deleting subsection (6).

12. Section 48 of the principal Act is amended in subsection (2) by deleting the words “procuring unit” appearing immediately after the words “recommendation of the” and substituting therefor the words “head of procurement function”.

Amendment of section 48 of No. 33 of 2015.

13. Section 51 of the principal Act is amended in subsection (2) (b) by deleting the words “procurement and

Amendment of section 51 of No. 33 of 2015.

disposal unit” appearing immediately after the words “establish a” and substituting therefor the words “procurement function”.

14. Section 53 of the principal Act is amended by inserting the following new subsections immediately after subsection (11)—

Amendment of
section 53 of No.
33 of 2015.

(12) Upon submission of the procurement plans to the National Treasury pursuant to section 44(2)(c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.

(13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.

15. Section 54 of the principal Act is amended by inserting the following new subsection immediately after subsection (2)—

Amendment of
section 54 of No.
33 of 2015.

“(2A) The head of procurement function shall carry out market surveys to inform the placing of orders or decision making on a procurement by the relevant awarding authority”.

16. Section 67 of the principal Act is amended in subsection (4), by deleting the expression “section 67(2)(d)(iii)” appearing immediately after the words “referred to in” and substituting therefor the expression “section 68(2)(d)(iii)”.

Amendment of
section 67 of No.
33 of 2015.

17. Section 69 of the principal Act is amended by inserting the words “and delegation of responsibility” immediately after the words “procurement approvals” appearing in the marginal note.

Amendment of
section 69 of No.
33 of 2015.

18. Section 71 of the principal Act is amended in subsection (3) by deleting the word “tenderer” appearing immediately after the word “A” and substituting therefor the words “procuring entity”.

Amendment of
section 71 of No.
33 of 2015.

19. Section 80 of the principal Act is amended—

Amendment of
section 80 of No.
33 of 2015.

(a) in subsection (1), by deleting the expression

“under section 82(3)” appearing immediately after the word “rejected”;

(b) in subsection (6), by deleting the words “thirty days” appearing immediately after the words “period of” and substituting therefor the words “seven days”; and

(c) by inserting the following new subsection immediately after subsection (7) —

“(8) Where a tender is complex or has attracted high number of tenderers, the accounting officer may extend the tender evaluation period once for a further period not exceeding seven days”.

20. The principal Act is amended by repealing section 82 of the Act and substituting therefor the following new section—

Repeal and replacement of section 82 of No. 33 of 2015.

Correction, revision, adjustment or amendment of tender.

82. (1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person or entity.

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

21. The principal Act is amended in section 86(1) by inserting the following proviso immediately after paragraph (d)—

Amendment of section 86 of No. 33 of 2015.

“Provided that the provisions of this subsection shall not apply to section 141 of this Act.”

22. Section 89 of the principal Act is amended in paragraph (b), by deleting the expression “118(2)” appearing immediately after the expression “sections 96(2) and” and substituting therefor the expression “118(1)”.

Amendment of section 89 of No. 33 of 2015.

23. Section 92 of the principal Act is amended by—

Amendment of
section 92 of No.
33 of 2015.

- (a) re-numbering the existing provision as subsection (1); and
- (b) inserting the following new subsection immediately after subsection (1)—

“(2) The procedure for competitive negotiations set out in sections 131, 132 and 133 of this Act shall apply, with necessary modifications, to procurement of goods, works and non-consultancy services”.

24. Section 94 of the principal Act is amended in subsection (4) by deleting the words “fourteen days” appearing immediately after the words “at least” and substituting therefor the words “seven days”.

Amendment of
section 94 of No.
33 of 2015.

25. Section 96 of the principal Act is amended—

Amendment of
section 96 of No.
33 of 2015.

- (a) in subsection (2), by inserting the following words immediately after the words “nationwide circulation”—

“or a notice in at least two free to air television stations and two radio stations of national reach”.

- (b) in subsection (4), by inserting the following words immediately after the words “county-wide circulation”—

“or a notice in at least two free to air television stations and two radio stations of national reach”.

26. Section 98 of the principal Act is amended in subsection (1) by deleting the word “and” appearing immediately after the word “documents”.

Amendment of
section 98 of No.
33 of 2015.

27. Section 114 of the principal Act is amended in subsection (6) by deleting the words “procurement management unit” appearing immediately after the word “A” and substituting therefor the words “procurement function”.

Amendment of
section 114 of No.
33 of 2015.

28. Section 117 of the principal Act is amended—

Amendment of
section 117 of No.
33 of 2015.

- (a) in paragraph (a), by deleting the expression “section 74” appearing immediately after the words “subject to” and substituting therefor the expression “section 73”; and

- (b) by deleting the marginal note and substituting therefor the words “initiation of procurement”.

29. Section 119 of the principal Act is amended in subsection (1) by deleting the word “may” appearing immediately after the words “procuring entity” and substituting therefor the word “shall”.

Amendment of
section 119 of No.
33 of 2015.

30. Section 121 of the principal Act is amended—

Amendment of
section 121 of No.
33 of 2015.

- (a) in subsection (1), by deleting the words “accounting officer of a procuring entity” appearing immediately after the word “The” and substituting therefor the words “evaluation committee”;

- (b) by inserting the following new subsection immediately after subsection (4)—

“(5) Notwithstanding provisions of subsection (3), where a repeat process fails to yield the requisite numbers of qualified candidates, the procuring entity shall proceed with the subject procurement and make a report to the Authority”.

31. Section 124 of the principal Act is amended—

Amendment of
section 124 of No.
33 of 2015.

- (a) by deleting subsection (14);

- (b) in subsection (15), by deleting the words “for approval” appearing immediately after the words “the Authority” and substituting therefor the words “within fourteen days”; and

- (c) by inserting the following new subsection immediately after subsection (15)—

“(16) The Authority shall issue written directions and guidelines governing the reporting requirements for use of alternative selection methods by the accounting officers of procuring entities”.

32. Section 126 of the principal Act is amended—

Amendment of
section 126 of No.
33 of 2015.

- (a) in subsection (3), by deleting the words “twenty-one days” appearing immediately after the words “maximum of” and substituting therefor the words “seven days”.

- (b) by inserting the following new subsection immediately after subsection (3) —

“(3A) Where subject procurement is complex or has attracted a high number of tenderers, the accounting officer may extend the tender evaluation period once for a further period not exceeding seven days”.

33. Section 135 of the principal Act is amended—

Amendment of
section 135 of No.
33 of 2015.

- (a) in subsection (3), by deleting the words “fourteen days” appearing immediately after the words “not before” and substituting therefor the words “seven days”; and

- (b) by deleting subsection (4).

34. Section 138 of the principal Act is amended by deleting subsection (5) and substituting therefor the following subsection—

Amendment of
section 138
of No. 33 of 2015.

“(5) This section shall not apply to procurement contracts awarded by national security organs through classified procurement methods and procedures provided for under Part VIII”.

35. Section 139 of the principal Act is amended in subsection (4) by deleting the words “after twelve months from the date of signing the contract and shall only be considered” appearing immediately after the words “contract shall only be considered” in the opening statement.

Amendment of
section 139
of No. 33 of 2015.

36. The principal Act is amended by repealing section 141 and substituting therefor the following new section—

Repeal and
replacement of
section 141 of No.
33 of 2015.

Framework
contracting and
multiple awards.

141. (1) Subject to any prescribed restrictions an accounting officer of a procuring entity may apply framework contracting arrangements by making awards of indefinite-delivery contracts and multiple awards of indefinite or definite quantity contracts for procurements under this Act.

(2) For the purposes of subsection (1), “multiple award” means award of separate (partial) contracts to two or more bidders of the same item.

37. Section 167 of the principal Act is amended—

Amendment of
section 167 of No.
33 of 2015.

(a) in subsection (1), by deleting the words “fourteen days” appearing immediately after the words “review within” and substituting therefor the words “seven days”;

(b) by inserting the following proviso immediately after subsection (2) —

“Provided that this shall not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups”.

(c) in subsection (4) (b), by deleting the expression “section 62” appearing immediately after the words “in accordance with” and substituting therefor the expression “section 63”.

38. Section 169 of the principal Act is amended by—

Amendment of
section 169 of No.
33 of 2015.

(a) re-numbering the existing provisions as subsection (1); and

(b) inserting the following new subsection immediately after subsection (1)—

“(2) Notwithstanding the provisions of subsection (1), filing fees for review by candidates under reserved procurements for women, youth, persons with disabilities and other disadvantaged groups may be waived by the secretary or where required fees shall be as prescribed”.

39. Section 172 of the principal Act is amended by inserting the words “and be debarred by the Authority” immediately after the words “deposit paid”.

Amendment of
section 172 of No.
33 of 2015.

40. Section 173 of the principal Act is amended by deleting paragraph (c).

Amendment of
section 173
of No. 33 of 2015.

41. Section 176 of the principal Act is amended—

Amendment of
section 176 of No.
33 of 2015.

- (a) in subsection (1)(e), by deleting the expression “section 78” appearing immediately after the words “opened under” and substituting therefor the expression “section 77(6)”;
- (b) in subsection (1)(f), by deleting the expression “section 66” appearing immediately after the word “under” and substituting therefor the expression “section 67”; and
- (c) in subsection (1)(h), by deleting the expression “section 60” appearing immediately after the words “contrary to” and substituting therefor the expression “section 54”.

42. The First Schedule is amended by deleting paragraph 3.

Amendment of the
First Schedule of
No. 33 of 2015.

43. The Second Schedule is amended by deleting paragraph 3.

Amendment of the
Second Schedule of
No. 33 of 2015.

44. The Third Schedule is amended—

Amendment of the
Third Schedule of
No. 33 of 2015.

- (a) in paragraph 2, by deleting the expression “section 66” and substituting therefor the expression “section 67”;
- (b) in paragraph 3(1), by deleting the expression “section 67” and substituting therefor the expression “section 68(2)”;
- (c) in paragraph 3(2), by deleting the expression “section 51(2)” and substituting therefor the expression “section 68(2)”; and
- (d) in paragraph 4, by deleting the expression “section 67” and substituting therefor the expression “section 138”.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons for the Bill

The purpose of the Bill is to amend the Public Procurement and Asset Disposal Act to address the challenges faced by procuring entities in implementing the Act including the multiple awards of contracts in the wake of sections 82 and 86 of the Act.

Clause 1 of the Bill sets out the short title of the proposed Act.

Clause 2 of the Bill proposes to amend section 2 of the Act by amending the definition of "procurement profession" to recognize other institutions who offer membership and professional qualification in procurement and supply chain management. Further to this, the Bill proposes to introduce the definition of "local contractor" into the Act to pave way for the inclusion of sole proprietorships, partnerships, cooperative societies, individual consultants, associations, and groups that are registered in Kenya.

Clause 3 of the Bill proposes to amend section 7 of the Act to address the training and capacity development for professionals involved the supply chain management services cadre at national level.

Clause 4 of the Bill contains proposals to amend section 9 of the Act, among others, to address the training lacuna for non-procurement professionals involved in procurement, such as user departments, disposal and contract implementation teams, suppliers, etc.

Clause 5 of the Bill proposes to amend section 26 of the Act to clarify that it is the final report and not draft report to be published and publicized.

Clause 6 of the Bill proposes to amend section 39 of the Act by deleting the word the "Board" and substituting therefor the words "Director-General" to align with section 38(2) which relates to the making of the order, in case of a breach of the provisions of the Act, by the Director-General and not the Board.

Clause 7 of the Bill contains proposals to amend section 40 of the Act to assign the Director-General the responsibility to institute investigations pursuant to section 35 of the Act.

Clause 8 of the Bill contains proposals to amend section 41 of the Act by adding a new paragraph to provide for the provisions to reduce chances of delayed contracts by tenderers.

Clause 9 of the Bill proposes to amend the Act by introducing a new section 43A to give the Authority the power, when conducting investigations, inspections, assessments and reviews relating to contracts,

procurement and asset disposal proceedings, to enter premises of a procuring entity to make any inquiries that may be necessary for the collection of information.

Clause 10 of the Bill contains proposals to amend section 44 of the Act by adding a new subsection to enable the accounting officer of a procuring entity to seek assistance from the National Treasury where that procuring entity lacks capacity to comply with the Act.

Clause 11 of the Bill proposes to amend section 46 of the Act to allow the head of procurement to delegate the secretarial function. The proposed amendment intends enhance efficiency in delivery of public services and reduce procurement lead time as procuring entities will be able to run multiple procurements/tenders concurrently.

Clause 12 of the Bill proposes to amend section 48 of the Act by deleting the words "procuring unit" and substituting therefor the words "head of procurement function". This is meant to ensure consistency with the definition and role of the procurement function.

Clause 13 of the Bill contains provisions to amend section 51 of the Act to further ensure consistency with the definition of the procurement function.

Clause 14 of the Bill seeks to amend section 53 of the Act by adding new subsections to enhance transparency in procurement and also to provide potential bidders with information necessary to plan and organize to respond to procurement opportunities. Further to this, publication of procurement plans is one of the sub-indicators (under transparency and access to public information) that is checked during PEFA and UNCAC Assessments which Kenya ascribe to.

Clause 15 of the Bill seeks to amend section 53 of the Act by empowering the head of procurement function to carry out market survey(s) to inform the placing of orders or decision making on a procurement by the relevant awarding authority. The object of this provision is to guard against purchasing standards items at inflated prices.

Clause 16 of the Bill proposes to amend section 67 of the Act for proper cross-referencing.

Clause 17 of the Bill proposes to amend the marginal note to section 69 to align with the text.

Clause 18 of the Bill seeks to amend section 71 of the Act to correct the notion that a tenderer may seek clarification from the candidate, which is not feasible as it is the procuring entity that is evaluating the candidates to determine their eligibility.

Clause 19 of the Bill seeks to amend section 80 to ensure proper cross-referencing and to reduce the tender evaluation period from thirty days to seven days to hasten the procurement process. The proposal also introduces a new subsection (8) giving powers to the accounting officer to extend the tender evaluation period once for a further period not exceeding seven days where a tender is complex or has attracted high number of tenderers.

Clause 20 of the Bill proposes to amend section 82 for clarification.

Clause 21 of the Bill seeks to exempt section 141 from the application of the provisions of section 86(1).

Clause 22 of the Bill seeks to amend section 89 of the Act for right cross-referencing.

Clause 23 of the Bill proposes to amend section 92 of the Act by placing Competitive Negotiations solely under Part X of the Act.

Clause 24 of the Bill seeks to amend section 94 of the Act to reduce the timeframe allowed for the candidates to prepare and submit their applications for pre-qualifications.

Clause 25 of the Bill seeks to amend section 96(2) and (4) of the Act to enable those Kenyans who have no access to newspapers and who would wish to participate in tendering process.

Clause 26 of the Bill seeks to amend section 98 of the Act for clarity.

Clause 27 of the Bill seeks to amend section 114 of the Act to ensure consistency with the definition of procurement function.

Clause 28 of the Bill proposes to amend section 117 of the Act to address an incorrect cross-referencing and to harmonize the marginal note with the text.

Clause 29 of the Bill proposes to amend section 119 of the Act to provide for the preparation of a notice inviting expressions of interest mandatory.

Clause 30 of the Bill provides proposals to amend section 121 of the Act to clarify that it is the role of the evaluation committee to carry out evaluation; and to align the provision to section 121(4). Further to this, the proposed new subsection (5) is intended to unlock procurement process that might stall due to failure to elicit requisite number of qualified candidates/ proposals.

Clause 31 of the Bill proposes to amend section 124 of the Act by deleting subsection (14), which contradicts the conditions of single sourcing provided under subsection (12). Further to this, the Bill seeks to amend subsection (15) to enhance efficiency by eliminating the approval

requirement before initiating a procurement process. The Bill also seeks to amend the section by adding a new subsection (16) to uphold the principle of independence where the regulator, the Authority, should not involve itself in procuring entities' operational matters.

Clause 32 of the Bill seeks to amend section 126 of the Act to reduce the number of days for evaluation of proposals from 21 days to 7 days. The Bill also introduces a new subsection (3A) to provide for the extension of the tender evaluation period by the accounting officer where subject procurement is complex or has attracted a high number of tenderers.

Clause 33 of the Bill seeks to amend section 135 of the Act to reduce the duration of the procurement process from 14 days to 7 days. The Bill also proposes to delete subsection (4), which contradicts the provisions of subsection (1).

Clause 34 of the Bill proposes to amend section 138 of the Act by deleting subsection (5) and substituting therefor a new subsection (5). This will ensure that the security organs report contracts processed through the open list maintained under section 90(4) for accountability while protecting national security interest.

Clause 35 of the Bill seeks to amend section 139 of the Act to allow variations in terms of quantity which might be occasioned due to unforeseen circumstances within a period less than twelve months provided the subject variations are within outlined limits/thresholds.

Clause 36 of the Bill seeks to amend section 141 of the Act to facilitate multiple award of contracts.

Clause 37 of the Bill seeks to amend section 167 of the Act to reduce the duration for procurement process from 14 days to 7 days. It also proposes to amend subsection (2) by inserting a proviso to exempt the disadvantaged groups from the application of subsection (2).

Clause 38 of the Bill proposes to amend section 169 of the Act adding a new subsection (2) to waiver filing fees for reviews for disadvantaged groups.

Clause 39 of the Bill contains the proposal to amend section 172 of the Act to introduce further grounds for debarment.

Clause 40 of the Bill contains the proposal to amend section 173 of the Act by deleting paragraph (c) to cure the anomaly of procurement decision making being a function of a procuring entity.

Clause 41 of the Bill seeks to amend section 176 of the Act for proper referencing.

Clause 42 of the Bill seeks to amend the First Schedule by deleting paragraph 3 which contradicts provisions of section 10(1)(a) of the Act providing that the chairperson of the Board is nominated by the Cabinet Secretary and appointed by the President.

Clause 43 of the Bill seeks to amend the Second Schedule by deleting paragraph 3 which contradicts provisions of section 29 of the Act.

Clause 44 of the Bill seeks to amend the Third Schedule for proper cross-referencing.

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

This Bill does not delegate legislative power or limit any fundamental rights or freedoms.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

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

Dated the 7th June, 2021.

AMOS KIMUNYA,
Leader of the Majority Party.

Section 2 of No. 33 of 2015, which it is proposed to amend—

“Procurement professional” means a person who has professional qualifications in procurement or supply chain management from a recognised institution and is a member of the Kenya Institute of Supplies Management established under the Supplies Practitioners Management Act, 2007 (No. 20 of 2007);

Section 9(1)(k) of No. 33 of 2015, which it is proposed to amend—

9. (1) The functions of the Authority shall be to—

- (a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
- (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) enforce any standards developed under this Act;
- (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- (e) monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) provide advice and technical support upon request;
- (h) to investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
- (i) research on the public procurement and asset disposal system and any developments arising from the same;
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;

- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- (m) create a central repository or database that includes—
 - (i) complaints made on procuring entities;
 - (ii) a record of those prohibited from participating in tenders or those debarred;
 - (iii) market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that are non-compliant with procurement laws;
 - (vi) statistics related to public procurement and asset disposal;
 - (vii) price comparisons for goods, services and works; and
 - (viii) any information related to procurement that may be necessary for the public;
- (n) inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of non-compliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;
- (o) generally report to Parliament and the relevant county assembly;
- (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
- (q) in undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
- (r) ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
- (s) perform such other functions and duties as are provided for under this Act and any other relevant law.

Section 26(6) of No. 33 of 2015, which it is proposed to amend—

26. (6) The Board shall publish and publicize the draft report within two weeks after the expiry of seven (7) days upon submission to the Cabinet Secretary.

Section 39 of No. 33 of 2015, which it is proposed to amend—

39. The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38(2) may request for Judicial Review against an order of the Board to the High Court within fourteen days after the order is made.

Section 40(2) of No. 33 of 2015, which it is proposed to amend—

40. (2) Subsection (1) ceases to apply if, after the Review Board has completed its review, information comes to the attention of the Board that was not brought before the Review Board in the course of its review.

Section 41(1) of No. 33 of 2015, which it is proposed to amend—

41. (1) The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person—

- (a) has committed an offence under this Act;
- (b) has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;
- (c) has breached a contract for a procurement by a public entity including poor performance;
- (d) has, in procurement or asset disposal proceedings, given false information about his or her qualifications;
- (e) has refused to enter into a written contract as required under section 135 of this Act;
- (f) has breached a code of ethics issued by the Authority pursuant to section 181 of this Act or the code of ethics of the relevant profession regulated by an Act of Parliament;
- (g) has defaulted on his or her tax obligations;
- (h) is guilty of corrupt or fraudulent practices; or
- (i) is guilty of a serious violation of fair employment laws and practices.

Section 44 of No. 33 of 2015, which it is proposed to amend—

44. (1) An accounting officer of a public entity shall be primarily responsible for ensuring that the public entity complies with the Act.

(2) In the performance of the responsibility under subsection (1), an accounting officer shall—

- (a) ensure that procurements of goods, works and services of the public entity are within approved budget of that entity;
- (b) constitute all procurement and asset disposal committees within a procuring entity in accordance with the Act;
- (c) ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and, subject to subsection (3), submit them to the National Treasury;
- (d) ensure proper documentation of procurement proceedings and safe custody of all procurement records in accordance with the Act;
- (e) ensure compliance with sections 68, 147, 148 and 149 of the Public Finance Management Act, 2012 (No. 18 of 2012);
- (f) approve and sign all contracts of the procuring entity;
- (g) ensure the procurement and asset disposal process of the public entity shall comply with this Act;
- (h) ensure that the procurement processes are handled by different professional offices in respect of procurements, initiation, processing and receipt of goods, works and services;
- (i) submit to the Authority the part in its procurement plan demonstrating application of preference and reservations schemes in relation to the procurement budget within sixty days after commencement of the financial year; and
- (j) ensure compliance with any other responsibilities assigned by this Act or any other Act of Parliament or as may be prescribed in Regulations.

(3) The procurement plans prepared by the national security organs shall be exempted from submission to the National Treasury.

(4) An accounting officer involved in a procurement transaction on exploitation of natural resources shall comply with provisions of Article 71 of the Constitution and any other written law.

Section 46 of No. 33 of 2015, which it is proposed to delete—

46. (4) An evaluation committee established under subsection (1), shall—

- (c) have as its secretary, the person in charge of the procurement function;

(6) Where a public entity lacks capacity to comply with this Act an accounting officer shall seek assistance from the National Treasury.

Section 48(2) of No. 33 of 2015, which it is proposed to amend—

48. (2) The inspection and acceptance committee shall be composed of a chairman and at least two other members appointed by the accounting officer or the head of the procuring entity on the recommendation of the procuring unit.

Section 51(2)(b) of No. 33 of 2015, which it is proposed to amend—

51. (2) A procuring entity may not appoint a procuring or asset disposal agent unless that procuring entity —

- (b) provides evidence of inability to establish a procurement and disposal unit; or

Section 53 of No. 33 of 2015, which it is proposed to amend—

53. (1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process.

(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act.

(4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.

(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).

(11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.

Section 54 of No. 33 of 2015, which it is proposed to amend—

54. (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 67 of No. 33 of 2015, which it is proposed to amend—

67. (4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67 (2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

Section 71 (3) of No. 33 of 2015, which it is proposed to amend—

71. (3) A tenderer may seek clarification from the candidate or relevant government agency on eligibility but not on capability.

Section 80 of No. 33 of 2015, which it is proposed to amend—

80. (1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected under section 82(3).

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

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

- (a) the criteria shall, to the extent possible, be objective and quantifiable;
- (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations

(6) The evaluation shall be carried out within a maximum period of thirty days.

(7) The evaluation report shall be signed by each member of evaluation committee.

Section 82 of No. 33 of 2015, which it is proposed to amend—

82. The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

Section 86(1) of No. 33 of 2015, which it is proposed to amend—

86. (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,
- (c) the scores assigned to the technical and financial proposals where Request for Proposals method is used;
- (d) the tender with the lowest evaluated total cost of ownership; or
- (e) 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.

Section 89 of No. 33 of 2015, which it is proposed to amend—

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

(b) if the procuring entity is required to advertise the invitation to tender under sections 96(2) and 118(2), the procuring entity shall also advertise the invitation to tender in Kenya's dedicated tenders portal or one or more English-language newspapers or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement;

Section 94 (4) of No. 33 of 2015, which it is proposed to amend—

94. (4) The accounting officer of a procuring entity shall allow the candidates at least fourteen days to prepare and submit their applications to be pre-qualified.

Section 96 (2) and (4) of No. 33 of 2015, which it is proposed to amend—

96. (2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation.

(4) In regard to county-specific procurements pursuant to section 33, the procuring entity shall advertise the notice inviting expressions of

interest in the dedicated Government tenders portal; in its own website, or in at least one daily newspaper of county-wide circulation.

Section 98 (1) of No. 33 of 2015, which it is proposed to amend—

98. (1) Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website.

Section 114 (6) of No. 33 of 2015, which it is proposed to amend—

114. (6) A procurement management unit shall prepare and submit to the accounting officer with a copy to the internal auditor quarterly reports detailing an analysis of items procured through framework agreements and these reports shall include, an analysis of pattern of usage, procurement costs in relation to the prevailing market rates and any recommendations.

Section 117 of No. 33 of 2015, which it is proposed to amend—

117. Initiation of the procurement shall—

(a) be subject to section 74 of the Act.

Section 119 (1) of No. 33 of 2015, which it is proposed to amend—

119. (1) An accounting officer of a procuring entity may prepare a notice inviting interested persons to submit expressions of interest as prescribed.

Section 121 of No. 33 of 2015, which it is proposed to amend—

121. (1) The accounting officer of a procuring entity shall, in writing, record the results of its evaluation of applications for expression of interest using the evaluation criteria in the expression of interest notice and documents and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the expression of interest documents and shall, in the case of expression of interest for professional services, have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) Subject to total proposals received, a minimum of six proposals shall be shortlisted, but where less than six proposals have been received, a minimum of three proposals shall be shortlisted.

(4) The record of results prepared under subsection (1) shall be submitted to the accounting officer for review and approval.

Section 124 of No. 33 of 2015, which it is proposed to amend—

124. (14) Single Source Selection shall require a placement of advertisement of the intention to single source and invite anyone who wishes to bid and, in the event, that there is a response to the advert then all interested suppliers shall be invited to submit proposals.

(15) Where alternative methods are selected a report shall be prepared and submitted to the Authority for approval.

Section 126 (3) of No. 33 of 2015, which it is proposed to delete—

126. (3) The evaluation shall be carried out within a maximum of twenty-one days, but shorter periods may be prescribed in the Regulations for particular types of procurement.

Section 135 of No. 33 of 2015, which it is proposed to amended—

135. (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

Section 138(5) of No. 33 of 2015, which it is proposed to delete—

138. (5) This section shall not apply to procurement contracts awarded by the national security organs.

Section 139(4) of No. 33 of 2015, which it is proposed to amend—

139. (4) For the purposes of this section, any variation of a contract shall only be considered after twelve months from the date of signing the contract and shall only be considered if the following are satisfied—

- (a) the price variation is based on the prevailing consumer price index obtained from Kenya National Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;
- (b) the quantity variation for goods and services does not exceed fifteen per cent of the original contract quantity;
- (c) the quantity variation of works does not exceed twenty per cent of the original contract quantity;
- (d) the price or quantity variation is to be executed within the period of the contract; and

- (e) the cumulative value of all contract variations do not result in an increment of the total contract price by more than twenty five per cent of the original contract price.

Section 141 of No. 33 of 2015, which it is proposed to amend—

141. Subject to any prescribed restrictions an accounting officer of a procuring entity may apply framework contracting arrangements by making awards of indefinite-delivery contracts and multiple awards of indefinite-quantity contracts for procurements under this Act.

Section 167 of No. 33 of 2015, which it is proposed to amend—

167. (1) Subject to the provisions of this Part, a candidate or a tenderer, 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.

(2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.

(3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

- (a) the choice of a procurement method;
- (b) a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act; and
- (c) where a contract is signed in accordance with section 135 of this Act.

Section 169 of No. 33 of 2015, which it is proposed to amend—

169. The Review Board Secretariat shall reject a request for a review where no appeal fees were paid within the prescribed time.

Section 172 of No. 33 of 2015, which it is proposed to amend—

172. Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

Section 173 of No. 33 of 2015, which it is proposed to amend—

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

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

Section 176 (1) of No. 33 of 2015, which it is proposed to amend—

176. (1) A person shall not—

- (a) obstruct or hinder a person carrying out a duty or function or exercising a power under this Act;
- (b) knowingly lie to or mislead a person carrying out a duty or function or exercising a power under this Act;
- (c) delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations;
- (d) unduly influence or exert pressure on any member of an opening committee evaluation committee and disposal committee or on any employee or agent of a procuring entity or the accounting officer to take a particular action which favours or tends to favour a particular tenderer;
- (e) open any sealed tender, including such tenders electronically submitted and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the tender or documents except for tenders inadvertently opened under section 78;
- (f) divulge confidential information under section 66;

- (g) inappropriately influence tender evaluations;
- (h) split procurements contrary to section 60 of the Act;
- (i) commit a fraudulent act;
- (j) knowingly withholds the notification of award to a successful tenderer;
- (k) knowingly withholds notification to unsuccessful tenderer;
- (l) sign a contract contrary to the requirements of this Act or Regulations made thereunder; or
- (m) contravene a lawful order of the Authority given under Part IV or the Review Board under Part XV.

The First Schedule, paragraph 3 of No. 33 of 2015, which it is proposed to delete—

3. Chairperson and Vice Chairperson

(1) The Board shall elect one of its nominated members to be the Chairperson of the Board and another of its nominated members to be its Vice-chairperson.

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

The Second Schedule, paragraph 3 of No. 33 of 2015, which it is proposed to delete—

3. (1) The Review Board shall elect one of its nominated members to be the Chairperson of the Review Board and another of its nominated members to be its Vice-chairperson.

(2) Subject to an earlier resignation or termination, the Chairperson and Vice- chairperson shall each hold office until their current term as a member of the Review Board expires

The Third Schedule of No.33 of 2015, which it is proposed to amend—

2. Confidentiality in relation to past proceedings

Section 66 of this Act shall apply with respect to procurement proceedings completed before the commencement date of this Act.

3. Records of past procurements

(1) Section 67 of this Act shall apply with respect to—

(2) Section 51(2) of the Act, as it applies under subparagraph (1), does not require the record of a procurement to include anything that was not required before the commencement date of this Act.

4. Publication of existing contracts

Section 67 of this Act shall apply with respect to a contract formed before the commencement date of this Act comes.

