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THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) (NO. 2) BILL, 2021

A Bill for

AN ACT of Parliament to amend the Public Procurement and Asset Disposal Act, 2015

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment)(No. 2) Act, 2021. Short title.

2. Section 55 of the Public Procurement and Asset Disposal Act, 2015, in this Act referred to as the “principal Act”, is amended by deleting subsection (4) and substituting therefor the following new subsection— Amendment of s. 55 of No. 33 of 2015.

“(4) A State organ or public entity shall—

- (a) require a person to submit, together with any bid document, a declaration under oath stating whether the person has satisfied the criteria under subsection (1);
- (b) verify the declarations made under this subsection by a successful bidder prior to the award of a tender.”

3. Section 78(6) of the Public Procurement and Asset Disposal Act, 2015, in this Act referred to as the “principal Act”, is amended by deleting paragraph (b). Amendment of s. 78 of No. 33 of 2015.

4. Section 80(6) of the principal Act is amended by inserting the word “business” immediately after the word “thirty”. Amendment of s. 80 of No. 33 of 2015.

5. Section 82 of the principal Act is amended by inserting the words “or the opening of a financial proposal, where applicable” immediately after the words “tender opening”. Amendment of s. 82 of No. 33 of 2015.

6. Section 86(1) of the principal Act is amended by inserting the following new paragraph immediately after paragraph (a)— Amendment of s. 86 of No. 33 of 2015.

“(aa) 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 invitation to tender, the scores assigned to the technical and financial proposals where open tender method is used.”

7. Section 96 of the principal Act is amended by inserting the following new subsection immediately after subsection (5)—

Amendment of s.
96 of No. 33 of
2015.

“(6) The invitation to tender shall set out the following—

- (a) the title of the accounting officer and the address of the procuring entity;
- (b) the general and specific conditions to which the contract will be subject;
- (c) instructions for the preparation and submission of a technical proposal as prescribed;
- (d) a notice that only a person who submits a responsive technical proposal shall be invited to submit a financial proposal;
- (e) an explanation of where and when proposals shall be submitted;
- (f) the procedures and criteria to be used to evaluate and compare the proposals including—
 - (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
 - (ii) the procedures and criteria for evaluating the financial proposals;

- (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method; and
- (g) anything else required, under this Act or the Regulations to be set out in the invitation to tender.”

8. The principal Act is amended by inserting the following new section immediately after section 98—

Insertion of new s.98A into No. 33 of 2015.

Submission of financial proposals.

98A. (1) A procuring entity shall, within the thirty business days’ evaluation period, invite and evaluate financial proposals where at least three technical proposals submitted pursuant to the invitation under section 96 are responsive.

(2) The procuring entity shall, in the invitation under sub-section (1)—

- (a) specify that the financial proposals are to be submitted within a period not exceeding twenty-four hours; and
- (b) indicate the date, time and place of the opening and reading out of the proposals.

9. Section 175 of the principal Act is amended by deleting subsection (5).

Amendment of s.175 of No. 33 of 2015.

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons for the Bill

The principal object of this Bill is to amend the Public Procurement and Asset Disposal Act, 2015 to subject the open tender method of procurement to a two-envelope bid process. Under the proposals, persons shall be invited by a procuring entity to submit technical proposals for evaluation. Where at least three technical proposals are deemed responsive, the successful bidders are to be invited to submit financial proposals within a twenty-four-hour window for evaluation. The two-stage process is proposed to be concluded within the prescribed evaluation period.

The proposal further seeks to amend the maximum prescribed period for evaluation of open tenders from the current thirty days to thirty business days; and to waive the requirement on bidders to provide evidence of compliance with tender criteria to reduce the current reliance on technicalities to disqualify bidders during tender evaluation. Under the proposed amendments, bidders shall be required to submit a declaration under oath of their experience, qualifications and certifications held and the evaluation committee would only be required to verify the details of the declarations of successful bidders before awarding of a tender.

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 July, 2021.

GLADYS WANGA,
*Chairperson, Departmental
Committee on Finance and National Planning.*

Section 55 of No. 33 of 2015 which is proposed to be amended—

Eligibility to bid

55. (1) A person is eligible to bid for a contract in procurement or an asset being disposed, only if the person satisfies the following criteria—

- (a) the person has the legal capacity to enter into a contract for procurement or asset disposal;
- (b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;
- (c) the person, if a member of a regulated profession, has satisfied all the professional requirements;
- (d) the procuring entity is not precluded from entering into the contract with the person under section 38 of this Act;
- (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;
- (f) the person has fulfilled tax obligations;
- (g) the person has not been convicted of corrupt or fraudulent practices; and
- (h) is not guilty of any serious violation of fair employment laws and practices.

(2) A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1)(e), (f), (g) and (h).

(3) Despite the provisions of subsection (2), a person or other body having a substantial or controlling interest shall be eligible to bid where—

- (a) such person has declared any conflict of interest; and
- (b) performance and price competition for that good, work or service is not available or can only be sourced from that person or consortium.

(4) A State organ or public entity shall require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(5) State organ or public entity shall consider as ineligible a person for submitting false, inaccurate or incomplete information about his or her qualifications.

Section 78 of No. 33 of 2015 which is proposed to be amended—

Opening of tenders

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

(a) the committee shall have at least three members; and

(b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

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

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

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

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

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

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

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

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

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

(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

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

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

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

- (a) initial each page of the minutes;
- (b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.

Section 80 of No. 33 of 2015 which is proposed to be amended—

Evaluation of tenders

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 is proposed to be amended—

No correction of errors

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 of No. 33 of 2015 which is proposed to be amended—

Successful tender

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, 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 96 of No. 33 of 2015 which is proposed to be amended—

Advertisement

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

(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.

(3) In addition to subsection (2) a procuring entity shall—

- (a) use Kenya's dedicated tenders portal or any other electronic advertisements as prescribed; and
- (b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.

(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.

(5) Where the estimated value of the goods, works or services being procured is below the prescribed threshold for national advertising, the procuring entity shall advertise using the options available in subsection (3)(a) and (b).

Section 175 of No. 33 of 2015 which is proposed to be amended—

Right to judicial review to procurement

175. (1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty- five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

(6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

(7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.