

**PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005**

*(No. 3 of 2005)*

**IN EXERCISE** of the powers conferred by section 140 of the Public Procurement and Disposal Act, 2005, the Minister for Finance makes the following Regulations-

**THE PUBLIC PROCUREMENT AND DISPOSAL  
(PREFERENCE AND RESERVATIONS) REGULATIONS, 2011**

**PART I — PRELIMINARY**

1. These Regulations may be cited as the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. **Citation.**
2. In these Regulations, unless the context otherwise requires- **Interpretation.**

No. 10 of 2003. "Constituency Development Fund" shall have the meaning assigned to it under the Development Fund Act, 2003;

"disadvantaged group" means persons perceived to be denied, by mainstream society access to resources and tools which are useful for their survival in a way that disadvantages them, or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities, and includes enterprises owned by women, the youth and persons with disabilities;

No. 14 of 2003, "disability" shall have the meaning assigned to it under the Persons with Disabilities Act, 2003;

No. 8 of 1998. "Local Authorities Transfer Fund" shall have the meaning assigned to it under the Local Authorities 1998 Transfer Fund Act, 1998;

"local preference" means the right or opportunity to select a person from an identified target group that is considered more desirable than another in a constituency, local authority or county;

"micro enterprises" means a business undertaking with an initial-

- (a) staff establishment of not more than ten employees, and
- (b) annual turnover or investment not exceeding Kenya Shillings five hundred thousand;

"preference" means the right or opportunity to select a person from an identified target group which is considered more desirable than another;

"region" means a location designated by the Minister within which defined tenderers enjoy certain preferences and reservations;

"reservations" means exclusive preference to procure goods, works and services set aside to a defined target group within a specified threshold or region;

"small enterprises" means a business undertaking with an initial-

- (a) staff establishment of not less than eleven and not more than fifty employees, and
- (b) annual turnover or investment not exceeding five million Kenya Shillings;

"target group" means designated tenderers identified /by the Minister to benefit from the preference and reservations schemes;

"youth" means persons who have attained the age of eighteen years but have not attained the age of thirty-five years.

3. These Regulations shall apply to procurements by public entities when soliciting tenders from the following target groups-

- (a) small enterprises;
- (b) micro enterprises;
- (c) disadvantaged groups;
- (d) citizen contractors;
- (e) local contractors; or
- (f) citizen contractors in joint-venture or sub-contracting arrangements with foreign suppliers.

**Application.**

4. The purpose of these Regulations is to promote local, national and regional industry and support socio-economic development by defining-
- Purpose of the Regulations.**
- (a) the target group and eligibility requirements for benefitting from the preference and reservations schemes;
  - (b) the percentage margin of the preference, where applicable;
  - (c) the goods, works and services set aside or reserved for specified target groups;
  - (d) the regions within which to apply the scheme, and
  - (e) the means of measuring its effectiveness in achieving the objectives.

## **PART II—QUALIFICATION OF TARGET GROUPS**

5. (1) A person shall be qualified to benefit from the preference and reservations schemes if the person-
- Eligibility criteria.**
- (a) has the necessary qualifications, capability, experience, and, where appropriate, resources, equipment and facilities to provide the goods or services intended to be procured;
  - (b) has the legal capacity to enter into a contract for the procurement;
  - (c) is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
  - (d) is among the persons with whom the procuring entity may enter into a contract, not being precluded from doing so under section 33 of the Act;
  - (e) is not debarred from participating in procurement proceedings under Part IX of the Act; and
  - (f) is registered by the Ministry of Finance under regulation 6.
- (2) A person shall not be qualified to benefit from preference and reservation scheme -
- (a) as a contracting firm, unless that person is qualified as a local contractor or a citizen contractor; or
  - (b) as a, micro enterprise or an enterprise owner by a disadvantaged group unless the person is registered by the Ministry of finance as such upon application.

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| 6. | A small or micro enterprise or a disadvantaged group wishing to participate in public procurement shall apply for registration with the Ministry of Finance in the form set out in the First Schedule.   | <b>Registration of enterprises and groups.</b> |
| 7. | A firm shall be qualified as-<br>(a) a local contractor, if it is registered in Kenya, or<br>(b) a citizen contractor, if its owners and shareholders are Kenyan citizens.   | <b>Qualifications of contractors.</b>          |
| 8. | Notwithstanding the foregoing, a foreign contractor may apply benefit from the preference and reservation scheme where it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a local contractor, where the local contractor has a majority share. | <b>Application by foreign contractors.</b>     |

### **PART III—ADMINISTRATION OF PREFERENCE AND RESERVATION SCHEMES**

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| 9.  | For purposes of section 39(4)(c) of the Act the regions preference and reservations schemes is applied shall be-<br><br>(a) constituencies;<br>(b) counties; and<br>(c) local authorities.   | <b>Regions where schemes apply.</b> |
| 10. | Local preference and reservations shall be applicable in the constituencies, local authorities and counties where citizen contractors are based and operate.   | <b>Local preference.</b>            |
| 11. | Local contractors who are based and operate in the regions specified in Regulation 10 shall be given exclusive preference when participating in procurements using funds from the Constituency Development Fund and the Local Authority Transfer Fund, except where it is established that local capacity is not available.                | <b>Exclusive preference.</b>        |
| 12. | For purposes of section 39(4) (d) of the Act, public entities shall grant exclusive preference to local contractors offering-<br>(a) motor vehicles, plant and equipment which are assembled in Kenya;<br>(b) furniture, textile, foodstuffs and other goods made in Kenya;<br>(c) goods manufactured, mined, extracted or grown in Kenya. | <b>National Reservations.</b>       |

13. For the purposes of section 39(8) (a) of the Act, the threshold upto which exclusive preference shall be given to citizen contractors in all procurements using open tendering methods, shall be the sum of-
- (a) five hundred million shillings for procurements in respect of road works;
  - (a) two hundred million shillings for procurements in respect of other works; and
  - (b) fifty million shillings for procurements in respect of goods or services.
14. For the purposes of section 39(8) (b) (i) of the Act, a fifteen percent margin of preference in the evaluated price of the tender shall be given to candidates offering goods manufactured, mined, extracted or grown in Kenya.
15. For the purposes of section 39(8) (b) (ii) of the Act, the margin of preference shall be-
- (a) six percent of the evaluated price of the tender, where percentage of shareholding of the Kenyan citizens is less than twenty percent;
  - (b) eight percent of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty-one percent but above twenty percent; and
  - (c) ten percent of the evaluated price of the tender, where the percentage of shareholding of the Kenyan citizens is more than fifty percent.
16. Where citizen contractors have entered into contractual arrangements with foreign contractors pursuant to regulation 8, a ten percent margin of preference in the evaluated price of the tender shall be applied.

**Threshold for exclusive preference.**

**National preference.**

**Margin of preference.**

**Preference for joint-ventures with citizens contractors**

#### **PART IV—GENERAL PRINCIPLES**

17. A candidate shall be entitled to tender for one preference and reservation scheme at a time in a procurement proceeding.
18. Where a candidate is entitled to more than one preference scheme, the scheme with the highest advantage to the tenderer shall be applied.

**Single preferences.**

**More than one preference.**

19. For the purpose of ensuring maximum participation of disadvantaged groups, small and micro-enterprises in public procurement, procuring entities may unbundle goods, works and services in practicable quantities pursuant to Section 31(7) of the Act. **Unbundling of procurements.**
20. For greater certainty, unbundled procurement proceedings shall be restricted to disadvantaged groups, small and micro-enterprises. **Preference to disadvantaged groups.**
21. (1) No tender securities shall be required from small and micro enterprises or enterprises owned by disadvantaged groups participating in procurement proceedings. **Tender security.**
- (2) Notwithstanding paragraph (1), target groups shall be required to complete and sign the Tender Securing Declaration Form set out in the Second Schedule.
- (3) Any bidder from the target group who fails to adhere to the terms of the Tender Securing Declaration Form shall be liable to debarment pursuant to section 115 of the Act.
22. An enterprise registered by the Authority in a target group benefitting from the preference and reservation schemes shall be entitled to such benefits for a period of five years, which may be renewed once. **Term limit.**
23. An advertisement relating to open tender under these Regulations shall state that such tender is open to small and micro enterprises and to disadvantaged groups registered with the Ministry of Finance. **Open tender advertisement.**
24. Procurement of goods, works and services under these Regulations shall be conducted on competitive procedure among the qualified target groups pursuant to regulation 6. **Procurement to be competitive.**
25. Procuring entities shall make use of existing framework contracts with disadvantaged groups, small and micro enterprises wherever appropriate to provide an efficient, cost effective and flexible means to procure goods, works and services that are required repeatedly or continuously over a set period of time. **Framework contracts with target groups.**

## **PART V—MONITORING OF COMPLIANCE**

26. Application of the preference and reservations schemes by procuring entities shall be monitored by the Authority **Monitoring and evaluation.**
27. The Authority shall maintain and update a register of all small and micro enterprises and disadvantaged groups qualified to benefit from the scheme and post it in its website or dedicated portal. **Authority to maintain register**
28. Procuring entities shall integrate preference and reservations schemes in their procurement plans. **Integration of preference and reservations schemes.**
29. A procuring entity shall 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. **Procurement plan.**
30. All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported to the Authority on a quarterly basis. **Report to the Authority.**

**FIRST SCHEDULE**

**(r.6)**

**APPLICATION FORM FOR SMALL, MICRO ENTERPRISES AND  
DISADVANTAGED GROUP TO SUPPLY GOODS, WORKS AND SERVICES TO  
PROCURING ENTITIES**

The registration of suppliers is aimed at building a profile for each supplier regarding information on general particulars of the company. You are advised that it is a serious offence to give false information on this form.

**PART I: DETAILS OF THE APPLICANT**

- 1. Name of Applicant .....
- 2. Physical Address .....
- .....
- 3. Postal Address: .....
- .....
- .....
- 4. Postal Code: .....
- 5. E-mail: .....
- 6. Phone No .....
- 7. Fax No .....
- 8. Contact Person .....

**9. Overview of the Enterprise**

Type of ownership (please tick one)	[Sole Proprietor]      [Partnership] [Limited Company] [Others Specify]
Number of employees	[0-5] [6-25] [26-49] 50-59 [100-250]
Initial Investments (KES)	
Total Annual Sales (Turnover KES)	
Experience in the sector in years	

Type of Ownership Details

<b>Part 9 (a) — Sole Proprietor</b>	
Name in Full	Age
Identity/Passport No.	



<b>Part 9 (b) — Partnership Details</b>			
Name	Nationality	ID/Passport No.	% Shares

**Part 9 (c) — Registered Company**  
 State the nominal and issued capital of company  
 Nominal Kshs. .... Issued Kshs.....

<b>Directors' Details</b>			
Name	Nationality	ID/Passport No.	% Shares

10. Bank Account Name: .....

11. Branch of the Bank: .....

12. Bank Account Number: .....

13. VAT Registration Number: .....

14. Type of business: SECTOR

AGRIBUSINESS	TRADE	HOSPITALITY & ENTERTAINMENT
MANUFACTURING	SERVICES	ICT
CONSTRUCTION	OTHERS	SPECIFY

15. Prepared by (name in capital letter).....

Title: .....

Signature: .....Date .....

## **PART II: LIST OF ATTACHMENTS**

The following attachments are essential for appraisal and you are required to ensure that they are all attached, failure to which your application may be rejected:

1. Copy of certificate of incorporation/registration;
2. PIN Certificate;
3. VAT Registration Certificate;
4. Valid Tax Compliance/ Exemption Certificate;
5. Original Bank Statement/Bank reference of not more than three months from date of applying;
6. Copy of certificate of registration with relevant regulatory bodies;
7. Business/Company profile;
8. Evidence of having paid the non-refundable fee for the Application Form;
9. Copies of Annual Return Forms, filed by Limited Companies, the Business Names for business names (sole trader and partnerships), and a stamped receipt which bears the Accounts Stamp from the Registrar of Companies/Societies; and
10. Certificate of Registration in a target group issued by the Ministry of Finance.

**SECOND SCHEDULE**

Tender-Securing Declaration Form

(r.22)

[The Bidder shall complete in this Form in accordance with the instructions indicated]

Date: [insert date (as day, month and year) of Bid Submission] Tender No. [insert number of bidding process]

To: [insert complete name of Purchaser]

We, the undersigned, declare that:

- 1 We understand that, according to your conditions, bids must be supported by a Bid-Securing Declaration.
- 2 We accept that we will automatically be suspended from being eligible for bidding in any contract with the Purchaser for the period of time of [insert number of months or years] starting on [insert date], if we are in breach of our obligation(s) under the bid conditions, because we –
  - (a) have withdrawn our Bid during the period of bid validity specified by us in the Bidding Data Sheet; or
  - (b) having been notified of the acceptance of our Bid by the Purchaser during the period of bid validity,
    - (i) fail or refuse to execute the Contract, if required, or
    - (ii) fail or refuse to furnish the Performance Security, in accordance with the ITT.
- 3 We understand that this Bid Securing Declaration shall expire if we are not the successful Bidder, upon the earlier of
  - (i) our receipt of a copy of your notification of the name of the successful Bidder; or
  - (ii) twenty-eight days after the expiration of our Tender.
- 4 We understand that if we are a Joint Venture, the Bid Securing Declaration must be in the name of the Joint Venture that submits the bid, and the Joint Venture has not been legally constituted at the time of bidding, the Bid Securing Declaration shall be in the names of all future partners as named in the letter of intent.

Signed: [insert signature of person whose name and capacity are shown] in the capacity of [insert legal capacity of person signing the Bid Securing Declaration]

Name: [insert complete name of person signing the Bid Securing Declaration]

Duly authorized to sign the bid for and on behalf of: [insert complete name of Bidder]

Dated on ..... day of ....., ..... [insert date of signing]