

## PART I - PRELIMINARY

Short title and commencement.

**1.** This Act may be cited as the Public Procurement and Disposal Act, 2005 and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Purpose of the Act.

**2.** The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives —

- (a) to maximise economy and efficiency;
- (b) to promote competition and ensure that competitors are treated fairly;
- (c) to promote the integrity and fairness of those procedures;
- (d) to increase transparency and accountability in those procedures; and
- (e) to increase public confidence in those procedures.
- (f) to facilitate the promotion of local industry and economic development.

Definitions.

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

“accounting officer” means —

- (a) for a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity; or
- (b) for a local authority, the town or county clerk of the local authority;

“Advisory Board” means the Public Procurement Oversight Advisory Board established under section 21;

“Authority” means the Public Procurement Oversight Authority established under section 8;

"candidate" means a person who has submitted a tender to a procuring entity;

“citizen contractor” means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya;

"contractor" means a person who enters into a procurement contract with a procuring entity;

No.3 of 2001. "corruption" has the meaning assigned to it in the Anti Corruption and Economic Crimes, Act 2003 and includes the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process or in contract execution.

“Director-General” means the Director-General of the Authority provided for under section 10;

"disposal" means the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified, other than those regulated by any other written law;

"fraudulent practice" includes a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity, and includes collusive practices amongst bidders prior to or after bid submission designed to establish bid prices at artificial non competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“goods” includes raw materials, things in liquid or gas form, electricity and services that are incidental to the supply of the goods;

Cap.486. “local contractor” means a contractor who is registered in Kenya under the Companies Act and whose operation is based in Kenya;

“Minister” means the Minister responsible for matters relating to finance;

“prescribed” means prescribed by regulation under this Act;

“procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination;

“procuring entity” means a public entity making a procurement to which this Act applies;

“public entity” means —

- (a) the Government or any department of the Government;
- (b) the courts;
- (c) the commissions established under the Constitution;
- Cap. 265. (d) a local authority under the Local Government Act;
- Cap. 446. (e) a state corporation within the meaning of the State Corporations Act;
- Cap. 491. (f) the Central Bank of Kenya established under the Central Bank of Kenya Act;
- No. 12 of 1997 (g) a co-operative society established under the Co-operative Societies Act;
- Cap. 211. (h) a public school within the meaning of the Education Act;
- Cap. 210B. (i) a public university within the meaning of the Universities Act;
- (j) a college or other educational institution

maintained or assisted out of public funds; or

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

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“public funds” has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid grants and credits, put at the disposal of procuring entities by foreign donors, and revenues of procuring entities;

“Review Board” means the Public Procurement Administrative Review Board established under section 25;

“services” means any objects of procurement or disposal other than works and goods and includes professional, non professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services;

“the regulations” means regulations made under this Act;

“urgent need” means the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable;

“works” means the construction, repair, renovation or demolition of buildings, roads or other structures and includes —

- (a) the installation of equipment and materials;
- (b) site preparation; and
- (c) other incidental services.

- (2) A regulation prescribing a public entity for the

purpose of paragraph (k) of the definition of “public entity” in subsection (1) may prescribe a class of public entities or may specify particular public entities.

Application of Act.

4.(1) This Act applies with respect to —

- (a) procurement by a public entity;
- (b) contract management;
- (c) supply chain management, including inventory and distribution; and
- (d) disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.

(2) For greater certainty, the following are not procurements with respect to which this Act applies —

- (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he were an employee;
- (b) the acquiring of stores or equipment if the stores or equipment are being disposed of by a public entity in accordance with the procedure described in section 129(3)(a);
- (c) the acquiring of services provided by the Government or a department of the Government.

(3) For greater certainty, the following are procurements with respect to which this Act applies —

- (a) the renting of premises, except as described under subsection (2)(c);
- (b) the appointing, other than under the authority of an Act, of an individual to a committee, task force or other body if the individual will be paid an amount other than for expenses;

(c) the acquiring of real property.

Conflicts with other Acts.

**5.**(1) If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.

(2) For greater certainty, a provision of an Act that provides for a person or body to approve any work or expenditure shall not be construed as giving that person or body any power with respect to procurement proceedings.

Conflict with international agreements.

**6.**(1) Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans.

(2) Where a treaty or agreement referred to in subsection (1) contains provisions favourable to citizens and local contractors, full advantage shall be taken of these in the interest of promoting domestic capacity development.

(3) Where the Republic of Kenya is required under the terms of any treaty or agreement to which she is a party, to contribute from her resources, in any form, to any procurement activities within Kenya, either

in part or wholly, jointly or separately, procurement through such contributions shall be –

(a) in discrete activities where possible; and

(b) subject to the applicable provisions of this Act.

(4) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) and (2) apply shall be subject to the provisions of this Act.

(5) Where a procurement to which subsection (1)

applies favours an external beneficiary -

- (a) the procurement through contributions made by Kenya, shall be undertaken in Kenya through contractors registered in Kenya; and
- (b) all relevant insurances shall be placed with companies registered in Kenya and goods shall be transported in carriages registered in Kenya.

Conflict with conditions on donated funds.

**7.(1)** If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.

(2) This section does not apply if the donor of funds is a public entity.