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Public Procurement & Government Contracts

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EMSI & ASSOCIATES is a boutique, women-owned law firm based in Nairobi, Kenya, providing legal and business advice and representation in the practice areas of project finance, corporate and commercial transactions and policy and legislative advisory, with a special focus on the energy, infrastructure and real estate sectors. EMSI advise both public and private entities on compliance with the legal and regulatory framework governing public procurement processes as well as drafting and negotiating agreements to commercial close. The firm has advised on procurement procedures under the Public Procurement and Asset Disposal Act, 2015 as well as the Public Private Partnerships

Act, 2013. The firm's lawyers have also supported public entities in the drafting of standardised tender documentation in compliance with governing public procurement and public financial management legislation, as well as participating in audits of public procurement processes for the purposes of establishing compliance with applicable legislation. EMSI has advised various multi-national companies on compliance with international bidding processes in which multi-lateral and bilateral institutions and development banks are involved in the project or transaction funding including projects funded by the World Bank and AfDB.

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1. General

1.1 Legislation Regulating Procurement of Government Contracts

The Public Procurement and Asset Disposal Act, No 33 of 2015 (PPAD Act) is the main legislative instrument governing public procurement in Kenya. It became effective in January 2016 and was promulgated to give effect to Article 227 of the Constitution of Kenya which requires that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.

Other relevant legislation includes the Public Private Partnership Act, No 15 of 2013 (PPP Act) and the Public Private Partnerships Regulations, 2014 (PPP Regulations) promulgated thereunder; the Public Finance Management Act, No 18 of 2012 (PFM Act); the County Governments Act, No 17 of 2012; the Public Audit Act, No 34 of 2015 and the Anti-Corruption and Economic Crimes Act No 3 of 2003 (ACEC Act).

The PPP Act and the PPP regulations provide a framework for procurement and implementation of public private partnerships in Kenya.

The PFM Act regulates the effective management of public finances by the national and county governments and outlines the oversight responsibility of Parliament and county assemblies and the different responsibilities of government entities with regards to management of public finances. In particular, sections 30 and 121 of the PFM Act require that all procurement of goods and services and disposal of assets by the National Government and the County Government be carried out in a system that is fair, equitable, transparent, competitive and cost-effective and in accordance with the Constitution and relevant legislation on procurement and disposal of assets.

Section 91 of the County Governments Act obliges county governments to establish structures for citizen participation in the county procurement process while Section 38 of the Public Audit Act mandates the Auditor-General to examine the public procurement and asset disposal processes of a state organ or a public entity with a view to confirm whether procurements were done lawfully and in an effective way.

Finally, Section 45 of the ACEC Act provides that an officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property shall be guilty of an offence if the person:

- fraudulently makes payment or excessive payment from public revenues for –
 - (a) sub-standard or defective goods,

- (b) goods not supplied or not supplied in full, or
 - (c) services not rendered or not adequately rendered;
- wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
- engages in a project without prior planning.

1.2 Entities Subject to Procurement Regulation

The PPAD applies to all public entities. These are defined in Section 2 of the Act to include:

- the national government or any organ or department of the national government;
- a county government or any organ or department of a county government;
- the judiciary and the courts;
- any commissions established under the Constitution;
- all independent offices established under the Constitution;
- all state corporations;
- the Central Bank of Kenya;
- public schools and universities;
- a city or urban area;
- companies owned by a public entity;
- a constituency established under the Constitution;
- a Kenyan diplomatic mission;
- a pension fund for a public entity;
- a body that uses public assets in any form of contractual undertaking, including a PPP;
- a body in which the national or county government has controlling interest;
- a college or other educational institution maintained or assisted out of public funds; and
- any other entity that uses public money for purposes of procurement or is declared as a national or county government entity under the Public Finance Management Act.

1.3 Type of Contracts Subject to Procurement Regulation

Types of Contracts to which the PPAD Act Applies

All contracts with state organs and public entities are deemed to be public procurements and are subject to the PPAD Act, unless expressly exempted under Section 4 (2) of the Act.

Under Section 4 (2), contracts that are exempt from the application of the Act include those relating to the provision of services where an individual works as if he or she were an employee of the public entity. The PPAD Act does not apply to the transfer of assets being disposed off between public entities for no financial consideration or the acquisition of services provided by the government or government department.

The PPAD Act is also not applicable where there is an acquisition or sale of shares or securities by a public entity from another public entity, co-operative or state corporation. All procurements and disposal of assets governed under the PPP Act are also exempt from the PPAD Act.

Finally, all procurements and disposal of assets effected under a bilateral or multilateral agreement between the Government of Kenya and other foreign governments or agencies, including multilateral agencies, are exempt from the application of the PPAD Act under Section 4 (2)(f).

Minimum Value Thresholds for Public Procurement

While there are no regulations promulgated under the PPAD Act, the regulations under the previous Public Procurement and Disposal Act (No 3 of 2005) – which was repealed by the PPAD Act – provide a matrix of thresholds for procuring entities.

Procuring entities were classified into three key classes with state corporations and ministries being class A and the other public entities being categorised as either class B or class C entities. The thresholds per procurement method are therefore subject to the classification of the public entity.

Where the procurement method is an international open tender, there is no maximum or minimum level of expenditure for procurement of goods, works and services for all the classes except as may otherwise be provided. The same applies where the procurement method is the request for proposals or direct procurement provided all set conditions are met.

Where the procurement utilises the national open tender method, the maximum level of expenditure shall be determined by the funds allocated in the budget for the procurement of goods, works and services for all the classes of entities.

For restricted tenders, the maximum level of expenditure is determined by the funds allocated in the budget for the particular procurement of goods, works and services for class A and B entities. However, for class C entities, there is no minimum or maximum expenditure under this procurement method provided the conditions are met.

Where the procurement method is a request for quotation, the maximum thresholds are KES2 million (USD20,000) for procurement of goods and services and KES4 million (USD40,000) for procurement of works for class A entities; KES1.5 million (USD15,000) for procurement of goods and services and KES3 million (USD30,000) for procurement of works for class B entities and KES500,000 (USD5,000) for procurement of goods, works and services for class C entities.

Finally, where the procurement method is low-value procurement, the maximum level of expenditure is KES30,000 (USD300) for procurement of goods and services per item and KES50,000 (USD500) for procurement of works for class A entities; KES10,000 (USD1,000) for procurement of goods, works and services per item for class B entities and KES5,000 (USD500) for procurement of goods, works and service per item for class C entities.

A further discussion on these different types of procurement methods is available in **2.3 Tender Procedure for Award of Contract**, below.

1.4 Openness of Regulated Contract Award Procedure

In general, a regulated contract award procedure is open to any interested parties; however, there are certain limitations to this.

The first limitation is found in Section 59 of the PPAD Act which prohibits a state organ or public entity from entering into a contract for a procurement with a public officer, state officer, member of a committee or board or other officer of that public entity or state organ.

State or public officers are also prohibited under Section 59 (2) from awarding or influencing the award of a contract to themselves, their spouses or children, their business associates or agents or to any corporation – including a private company, partnership or other body - in which that officer has a substantial or controlling interest.

The second notable limitation is found in Part XII of the PPAD Act which addresses preferential treatment and reservations in procurement by public entities for the purpose of protecting and ensuring the advancement of previously disadvantaged persons or groups including micro, small- and medium-sized enterprises. These groups are categorised as women, youths and persons living with disabilities as specified in the Access to Government Procurement Opportunities (AGPO) programme; such groups are entitled, under Section 157(5) of the PPAD Act, to a minimum of 30% of all Government procurement opportunities.

The third limitation is found in Section 157 (8) of the PPAD Act which requires that exclusive preference shall be given to citizens of Kenya where the funding is 100% from the national government or county government or a Kenyan body, and the target procurement value is less than KES500 million (USD5 million). There are ongoing proposals to increase this threshold from the current USD5 million to KES1 billion (USD100 million).

Fourthly, Section 157 (9) of the PPAD Act mandates a procuring entity to have in its tender documents a mandatory requirement as a preliminary evaluation criterion for all

foreign tenderers participating in international tenders to source at least 40% of their supplies from citizen contractors prior to submitting a tender.

Finally, it is worth noting that Section 86 of the PPAD Act seeks to promote local industry and citizen contractors by entitling them to 20% of their total score in evaluation provided they have attained the minimum technical score.

1.5 Key Obligations

Overall responsibility for ensuring compliance with the PPAD Act lies with the accounting officer of the public entity. An accounting officer is defined under Section 2 of the Public Finance Management Act as any officer designated by the Cabinet Secretary or by the county executive committee member in charge of finance to manage the finances of the national or county government entities. In the case of the judiciary and the Parliamentary Service Commission, the accounting officer is the Chief Registrar and Clerk of the Senate respectively. Presently, the chief executive officers of state corporations and county government entities, principal secretaries of state departments and chief officers of county governments are usually designated as the accounting officers of these public entities.

Key responsibilities of the accounting officer under Section 44 of the PPAD Act, include ensuring that all procurements are within the approved budget of that entity, constituting all procurement and asset disposal committees within the entity as well as ensuring procurement plans are prepared in conformity with the medium-term fiscal framework and fiscal policy objectives and submitting them to the National Treasury.

The accounting officer is also obliged to ensure the proper documentation of procurement proceedings and safe custody of all procurement records in accordance with the PPAD Act as well as approving and signing all contracts of the procuring entity. They are also required to ensure that the procurement processes are handled by different professional offices in respect of procurements, initiation, processing and receipt of goods, works and services. The accounting officer is also mandated with the submission of its entity's procurement plan to the Public Procurement Regulatory Authority demonstrating application of preference and reservations schemes in relation to the procurement budget.

Finally, the accounting officer is required to ensure compliance with the Public Finance Management Act. In particular, they are accountable to the National Assembly for ensuring that the resources of the public entity are used in a way that is lawful and authorised as well as effective, efficient, economical and transparent.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

Section 96 of the PPAD Act requires the accounting officer of a procuring entity to take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders. There are exceptions to this requirement to advertise where the procurement method is the restricted tender, direct procurement, request for quotations, low-value procurement and force accounts. A further discussion on the different procurement methods is found in **2.3 Tender Procedure for Award of Contract**, below.

Publication

The above section requires a procuring entity to advertise in the dedicated government tenders' portals at www.tenders.go.ke, on its own website, and via a notice in at least two daily newspapers of nationwide circulation.

The procuring entity should also post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.

The above requirement is similarly anchored in Section 37 (1) of the PPP Act.

Type of Information to be Disclosed

Under Section 74 of the PPAD Act, the accounting officer of a procuring entity should ensure that the invitation of tender sets out information relating to, amongst other things, the contact details and address of the entity, the tender number assigned to the procurement proceedings, a brief description of the goods, works or services being procured (including the time limit for delivery or completion) as well as an explanation of how to obtain the tender documents (including the amount of any fee).

Advertisements should also include an explanation of where, and when, tenders shall be submitted and opened together with a statement that those submitting tenders, or their representatives may attend the opening of tenders. Where the procurement involves preferences and reservations for specific categories of bidders, then the advertisement should include this information.

Other information required in the advertisement includes a declaration that the tender is only open to those who meet the requirements for eligibility and that each bid submitted should have all pages serialised. The latter requirement, while seemingly unimportant, has resulted in bidders' submissions being rejected by the procuring entity for the simple reason that they failed to number all pages of the bid submission. In some instances, the public entity will also stipulate that the bid submission should also be initialled on each page by

the person authorised to sign the bid submission on behalf of the bidder.

2.2 Preliminary Market Consultations by Awarding Authority

During the two-stage tendering procedure, Section 99 (7) of the PPAD Act allows the procuring entity to engage experts when developing the specifications for the proposed procurement. The procuring entity is permitted, in the second stage and before finalising the tender documents, to amend the final specifications that had been initially set in the original tender documents. These amendments are usually informed by feedback from the bidders and experts based on the first round of the tendering process.

The PPP Act has also made a provision under Section 20 that, prior to entering into a public private partnership (PPP) arrangement the public entity should undertake a sector diagnostic study and assessment covering: technical issues; legal, regulatory and technical frameworks; institutional and capacity status; commercial, financial and economic issues; and any other issues that the Cabinet Secretary in charge of finance may stipulate. A feasibility study is also mandatory under Section 33 of the PPP Act for purposes of enabling the public entity to determine the viability of undertaking the proposed project as a PPP. In conducting the feasibility study and sector diagnostic study, the public entity is required to engage with key stakeholders as part of the public participation.

Under Section 41 of the PPP Act, during this procedure the public entity is permitted to hold preliminary meetings with shortlisted bidders in order to deliberate on issues related to the project specifications and initial preliminary conditions. These sessions are also usually used as a forum to respond to any enquiries made by bidders in relation to the proposed project. The public entity is entitled thereafter to alter the specifications of the project and amend the bidding documents for the second stage of the procurement process, based on the deliberations of the preliminary meeting held with the shortlisted bidders.

Finally, under Section 45 of the PPP Act, the public entity is permitted, once it has received the bids from shortlisted bidders, to engage in confidential competitive dialogue with each bidder to define the technical or financial aspects of the project and on conclusion of these stage, alter the project specifications, risk matrix or structure further. The public entity may also opt to re-open the pre-qualification for the project while keeping the initial pre-qualified parties qualified.

2.3 Tender Procedure for Award of Contract

Section 91 (1) of the PPAD Act states that open tendering should be the preferred procurement method for procurement of goods, works and services and that the public entity

may use an alternative procurement procedure only if that procedure is allowed and satisfies the required conditions for use of that method.

Section 92 of the PPAD lists 12 procurement methods that may be utilised by a public entity, while Section 114 (1) lists a further five methods that may be used as specially permitted procurement procedures.

The PPP Act has two procurement procedures: (i) solicited proposals through a two-stage tendering process under Section 37, and (ii) privately initiated investment proposals under Section 61.

Tender Procedures

Open tender

This procurement method is governed by sections 96-98 of the PPAD Act. Under this procedure, the accounting officer of the procuring entity is required to bring the invitation to tender to the attention of those who may wish to submit tenders. This shall be done through advertisement of the tender as discussed above. Tenders can either be on a national competitive bidding process or international competitive bidding process.

Two-stage tendering

This procurement method is governed by Section 99 of the PPAD Act. Under this method, a procuring entity shall prepare tendering documents calling upon tenderers to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. In the second stage, the procuring entity shall invite tenderers whose tenders were retained to submit final tenders inclusive of prices with respect to a single set of specifications.

Design competition

This procurement method is governed by sections 100-101 of the PPAD Act. An accounting officer of a procuring entity may use a design competition procedure for the purpose of determining the best architectural, physical planning and any other design scheme, engineering, graphic or any other design scheme for its use. The designers of the best three assessed design schemes receive an honorarium subject to the guidelines set out in the applicable county or national level. Bidders in design competitions are obliged to transfer all intellectual property rights applicable to the design to the procuring entity.

Restricted tendering

This procurement method is governed by Section 102 of the PPAD Act. Under this method, a procuring entity is required to establish a procurement unit which shall identify pre-qualified contractors through advertising for providers of various services, goods and works and these serve on a register of suppliers for a period of two to five years. The

public entity is then permitted to invite tenders from at least ten persons selected from the register for each category of goods, works or services.

Direct procurement

This procurement method is governed by sections 103–104 of the PPAD Act. This method is used in very limited circumstances including where there is only one provider of the goods or services, where there is an urgent need to procure the goods or services due to a catastrophic event, war, natural disaster or other cause of disorder that renders it impossible to utilise other procurement methods. Direct procurement may also be used where additional goods, equipment, technology or services need to be procured and there is need to maintain compatibility with those previously procured. Finally, the direct procurement method may be used where procurement is from another public entity, provided that the price is fair and reasonable and compares with market-related prices.

Request for quotations

This procurement method is governed by sections 105–106 of the PPAD Act. As with restricted tendering, a public entity may draw from its register of pre-qualified suppliers provided that the request is given to as many persons as necessary to ensure effective competition, subject to a minimum of three such suppliers.

Low-value procurement

This procurement method is governed by sections 107–108 of the PPAD Act. The public entity may procure low-value items which are not procured on a regular or frequent basis and are not covered in a framework agreement subject to the maximum thresholds prescribed in the regulations.

Force account

This procurement method is governed by Section 109 of the PPAD Act. A procuring entity may use force account by making recourse to the state or public officers and using public assets, equipment and labour. This procurement method may be used where the quantities of work are small, scattered or in remote locations for which qualified construction firms are unlikely to tender at a reasonable price and the works cannot be defined in advance. It may also be utilised where unforeseen and urgent work is required to be carried out without disrupting ongoing operations or where the public entity has to complete works delayed by a contractor who has failed to respond to written warnings for completion of the works.

Electronic reverse auction

This procurement method is governed by under sections 110–113 of the PPAD Act. A procuring entity may invite all its registered suppliers in a specific category to compete for the supply of the goods, works or non-consultancy services. The process may only be undertaken by a public entity with

a procurement portal and appropriate secure software with electronic procurement capabilities approved by the Public Procurement Regulatory Authority. The prices of all bidders within a prescribed time are required to be visible to all bidders without, however, revealing the bidder's identities; the public entity is obliged, subject to the reserve price set for the procurement, to award the tender to the bidder with the lowest price at the bid submission deadline.

Framework agreement

This procurement method is governed under Section 114 of the PPAD and is utilised where the public entity requires goods, works or non-consultancy services but is not able to determine the exact quantities required at the time of entering into the agreement. The term of the agreement is limited to three years and a minimum of seven alternative vendors must be included for each category. When implementing the framework agreement, the public entity may procure through call-off orders or invite mini-competitions among persons that have entered into the framework agreement in the respective category.

Specially permitted procurement procedures

The Finance Act, No 15 of 2017 amended the PPAD Act by incorporating new procurement mechanisms referred to as 'specially permitted procurement procedures.' These procurement procedures became effective on 1 July 2017. Under Section 114A, the National Treasury may allow a public entity to utilise a specially permitted procedure where exceptional requirements make it impossible, impracticable or uneconomical to comply with the PPAD Act or where market conditions or behaviour do not allow the effective application of the Act. A public entity may also seek consent for specialised requirements which are regulated or governed by harmonised international standards. Finally, the public entity may also explore strategic partnership sourcing, credit financing procurement or such other circumstances as may be prescribed by the Cabinet Secretary.

Request for proposals

This procurement method is regulated in Part X, sections 115–130 of the PPAD Act. Request for proposals may only be used if the procurement is of services or a combination of goods and services and the services being procured are advisory or otherwise of a predominantly intellectual nature. This is a two-stage procurement process that is initiated with a request for expressions of interest, and once a shortlist of evaluated bidders is available, the second stage is initiated through the RFP issued to the shortlisted bidders. The RFP is to be issued to a minimum of six shortlisted bidders; where less than six expressions of interest were received, the minimum shortlisted bidders is reduced to three.

Competitive negotiations

While these are listed as a separate procurement method, they are usually held as a continuation of an ongoing pro-

curement process. Under Section 131 of the PPAD Act, competitive negotiations may be entered into by a public entity where there is a tie in the lowest evaluated price by two or more tenderers or in the highest combined score points. This procedure may also be used where the lowest evaluated price is in excess of the available budget or there is an urgent need that can only be met by several known suppliers.

Finally, under the PPP Act, there are two types of procurement processes – namely, (i) solicited proposals and (ii) privately initiated investment proposals (PIIPs). All solicited proposals under the PPP Act are undertaken as two-stage tendering processes initiated through an invitation of requests for qualification under Section 37 of the PPP Act. Once the shortlist of bidders is available, the second stage is then initiated through an invitation to bid under Section 43 of the Act.

Privately initiated investment proposals are regulated under Section 61 of the PPP Act and Part VII (Regulations 51-53) of the PPP Regulations. This is a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid. The PPP Act permits public entities to consider PIIPs for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process.

This process is, however, subject to strict conditions being met, including there being an urgent need for continuity in the construction or development of a project or provision of a service making it impractical to utilise the two-stage process. The PIIP may also be considered where the costs relating to the intellectual property of the proposed design of the project is substantial or there exists only one firm capable of undertaking the project. The public entity is not allowed to consider PIIPs that do not demonstrate value for money, affordability or the appropriate risk transfer to the private party.

Restrictions on the Conduct of any Permissible Negotiations

Negotiations are permissible under both the PPAD Act and the PPP Act.

Section 128 (1) of the PPAD Act allows the accounting officer to negotiate with the person who submitted the successful proposal and may request and permit changes. Where negotiations with the person who submitted the successful proposal do not result in a contract, the public entity may negotiate with the second-best bidder.

Variations effected during negotiations should not vary from the requirements of the terms of reference, the request for proposals or the terms of the successful proposal. The result-

ing contract may provide for a different price but only if there is a proportional increase or reduction in what is to be provided under the contract. Finally, the variations should be such that the proposal would still be the successful proposal if the proposal, with those variations, was evaluated again.

The PPD Regulations, under Regulation 31, further provide that a variation to a contract shall be effective only if: the price variation is based on the prevailing consumer price index obtained from the Central Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya; the quantity variation for goods and services does not exceed 10% of the original contract quantity; the quantity variation for works does not exceed 15% of the original contract quantity; and the price or quantity variation is to be executed within the period of the contract.

For negotiations under the PPP Act, Section 52 (4) and (5) provides that negotiations should not result in an increase in pricing and should not affect the non-negotiable terms and conditions specified as non-negotiable conditions in the invitation to tender, the financial structure, or the conditions in respect of which there were no reservations raised by the bidder in the bid. Further, the parties to a negotiation should not amend the negotiated terms and the terms upon which the bid has been evaluated.

2.4 Choice/Conditions of Tender Procedure

The choice of procedure is subject to fulfilment of various conditions for use of each alternative procurement procedure. However, as already stated above, the preferred procurement method is the open tender as stipulated in Section 91 of the PPAD Act.

The two-stage tendering procedure may only be employed by the public entity where, due to complexity and inadequate knowledge on its part or advancements in technology, it is not feasible for the procuring entity to formulate detailed specifications for the goods or works or non-consultancy services in order to obtain the most satisfactory solution to its procurement needs.

Design competitions may only be used for the purpose of determining the best architectural, physical planning and any other design scheme, engineering, graphic or any other design scheme for its use.

Restricted tendering may be used where the public entity can demonstrate that: competition for contract, because of the complex or specialised nature of the goods, works or services is restricted to pre-qualified tenderers; the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured; or if there is evidence to

the effect that there are only a few known suppliers of the whole market of the goods, works or services.

Direct procurement may be utilised where the conditions discussed in **2.3 Tender Procedure for Award of Contract**, above, are met and all relevant approvals obtained in accordance with the Act. Most importantly, this procurement method should not be used in order to avoid competition.

Public entities may utilise the other procurement methods subject to meeting the conditions further described in **2.3 Tender Procedure for Award of Contract**, above.

2.5 Timing for Publication of Documents

There is no requirement to publish procurement documents prior to initiation of the procurement process. The procurement process commences once the advertisement is published in accordance with the PPAD Act.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

Regulation 40 of the PPDA Regulations requires that the maximum period between the invitation to tender and deadline for submission of the tenders shall be 21 days.

For international tendering, Regulation 36 provides that the period of time between advertisement and deadline for submission of international tenders shall be 30 days.

In practice, this period may be extended, especially for more complex procurements; such an extension of time is published in a clarification notice which should be issued to all potential bidders who may have registered on the public entity's records as having purchased or downloaded the tender documents, as well as published on the public entities' website.

2.7 Eligibility for Participation in Procurement Process

This is provided for under Section 55 (1) of the PPAD Act and Section 38 of the PPP Act.

Under the PPAD Act a person is eligible to participate in a procurement process where they have the legal capacity to enter into a contract and are not insolvent, in receivership, bankrupt or in the process of being wound up. Where a procurement requires demonstration of good standing in a regulated profession, the bidder should demonstrate that they have satisfied all the professional requirements and are of good standing. A bidder should also not be debarred from participating in procurement proceedings, been convicted of corrupt or fraudulent practices or found guilty of any serious violation of fair employment laws and practices. Finally, each bidder should demonstrate that they have fulfilled tax obligations, and this is evidenced by the provision of a tax

clearance certificate from the relevant tax authorities in the country of incorporation.

Under the PPP Act, a bidder should, in addition to meeting the minimum criteria specified in the request for qualification issued by the contracting authority, demonstrate that they have the technical and financial capacity to undertake the project.

2.8 Restriction of Participation in Procurement Process

A procuring entity, where applicable, may conduct a pre-qualification procedure as a basic procedure prior to adopting an alternative procurement method other than open tender for the purpose of identifying the best few qualified firms for the subject procurement. Once firms are pre-qualified, the public entity may then employ various procurement methods such as restrictive tendering, low-value procurement, etc, as further described in **2.3 Tender Procedure for Award of Contract**, above.

Section 71 also requires the public entity to maintain and continuously update lists of registered suppliers, contractors and consultants in various specific categories of goods, works or services according to its procurement needs. An application by a supplier to be included in the list of the procuring entity may be made at any time, at no cost, and shall contain proof of its eligibility criteria and capability criteria that defines necessary qualifications, experience, resources, equipment and facilities to provide what is being procured.

The minimum number of qualified suppliers that may be invited to participate in a restricted tendering process or request for quotations is ten and three, respectively (unless this is not possible based on the number of pre-qualified suppliers for that specific category).

2.9 Evaluation Criteria

Section 80 of the PPAD Act provides that the evaluation of tenders is carried out by an evaluation committee appointed by the accounting officer of the procuring entity.

The evaluation and comparison for tenders of goods, works and services shall be done using the procedures and criteria set out in the tender documents. For the procurement of consultancy services, the request for proposal shall be evaluated by using the selection method that was indicated in the request for proposal.

The criteria for evaluation shall, to the extent possible, be objective and quantifiable and each criterion shall be expressed so that it is applied taking into consideration price, quality, time and service for the purpose of evaluation.

Subject to the specifications in the tender document, the successful tender shall be the one with either the lowest

evaluated price, the highest combined technical and financial score or the lowest evaluated total cost of ownership. Where proposals are to be evaluated, based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges, the proposal with the highest technical score would be the winning bid.

Where the public entity is procuring professional services through the two-stage requests for proposals method, the entity may use various evaluation criteria, including quality-based selection which focuses on the quality of the proposal and in which selection is based on the highest quality proposal as opposed to the lowest price. The most popular criteria for selecting consultants for assignments of a standard or routine nature is the least-cost selection which selects the lowest priced proposal which meets the public entity's technical requirements. Other alternatives include consultants' qualifications selection, individual consultants' selection, fixed budget selection or single source selection.

Under the PPP Act, sections 44 to 57, a bidder who intends to bid for a project is required to complete and submit a technical and financial bid. Each bid shall then be evaluated separately; a contracting authority is not permitted to open the financial bid submitted by a bidder unless it has already opened and approved the technical offer submitted by that bidder.

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

Under Section 58 (2) of the PPAD Act, a procuring entity is required to ensure that its tender documents contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications. The requirements for each invitation to tender are further discussed in **2.1 Prior Advertisement of Regulated Contract Award Procedures**, above.

Section 123 (2) of the PPAD Act also requires that requests for proposals also include the procedures and criteria to be used to evaluate and compare proposals.

Section 68 of the Act further obliges the public entity to retain procurement records for a period of at least six years after the resulting contract has been completed; such records should include a summary of the proceedings of the tender opening, evaluation and comparison of the tenders and the evaluation criteria used.

Section 43 (2) of the PPP Act requires that the tender documents shall have information on the criteria and method to be used in evaluating a bid.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

Section 87 (3) of the PPAD Act and Section 56 (3) of the PPP Act requires the accounting officer of the procuring entity to notify in writing to all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and providing reasons thereof. The notification can be in electronic form; a similar method of notification must be used to all bidders to avoid discrimination.

3.3 Obligation to Notify Bidders of Contract Award Decision

Upon evaluation, the successful tenderers, together with other tenderers, are notified of awards and a period of 14 days, prior to signing of the contract, is given to allow for any reviews as provided for under Section 167 (1) of the PPAD Act.

Further, Section 138 of the PPAD Act requires the accounting officer to publish and publicise all contract awards on their notice boards in conspicuous locations and on their website, if available. These awards also have to be notified to the Public Procurement Regulatory Authority which is also obliged to publish contract awards by public entities on its own website.

However, contracts awarded by national security organisations are exempt from the requirement to publish procurement contract awards.

3.4 Requirement For 'Standstill Period'

Section 135 (3) of the PPAD Act provides for a 14-day period between the contract award and the execution of the contract.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

Section 167 of the PPAD Act provides that a candidate or a tenderer who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity may seek administrative review at the Public Procurement Administrative Review Board. Decisions of the Review Board may be appealed to the High Court of Kenya through a Judicial Review application under Section 175 of the Act. A person aggrieved by the decision of the High Court may appeal to the Court of Appeal and such decision made by the Court of Appeal shall be final.

The PPP Act under Section 67 establishes a Petition Committee responsible for considering all the petitions submitted by a private party during the process of tendering and enter-

ing into a project agreement. The decision of the committee is final and binding on both parties.

4.2 Remedies Available for Breach of Procurement Legislation

Section 173 of the PPAD Act provides that, upon completing a review, the Review Board may 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.

The Review Board may also 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 or substitute its decision for any decision of the accounting officer of a procuring entity. The Review Board may also order the termination of the procurement process and the commencement of a new procurement process.

4.3 Interim Measures

Under Section 168 of the PPAD Act, the Review Board is required to notify the accounting officer of a procuring entity of the pending review and the suspension of the procurement proceedings.

However, Section 171 (2) provides that any review before the Review Board should not delay the procurement process beyond the time stipulated in the PPAD Act.

Regulation 60 (2) of the PPP Regulations provides that the Petition Committee may suspend the PPP tendering process while the petition or complaint is being heard and determined.

4.4 Challenging Awarding Authority's Decisions

The PPAD Act under Section 167 (1) provides that any candidate or a tenderer who claims to have suffered or risks suffering, loss or damage due to the breach of a duty of an awarding authority may challenge the decision of that awarding authority.

In relation to PPPs, the PPP Act under Section 67 (1) provides that a private party that participated in a solicited proposal process may submit a complaint or petition to the Petition Committee.

4.5 Time Limits for Challenging Decision

Awards or alleged breaches under the PPAD Act should be challenged within 14 days of notification of the award or of the date of occurrence of the alleged breach at any stage of the procurement process or disposal process. Parties aggrieved by the decision of the Review Board have 14 days within which to lodge an appeal to the High Court; further appeals to the Court of Appeal should be lodged within seven days of the decision made by the High Court.

The PPP Act Section 67 (4) requires that a petition for review be made within 15 days from the date of the decision.

4.6 Length of Proceedings

Section 171 (1) of the PPAD Act requires the PPARB to complete its review within 21 days upon receiving the request for the review.

In the case of an appeal at the High Court or Court of Appeal, each court is required to make a decision within 45 days of filing the application. If either the High Court or the Court of Appeal fails to decide within the prescribed timeline, the decision of the PPARB shall be final and binding to all the parties.

Regulation 59 (3) of the PPP Regulations requires the petition committee to make a determination within seven working days.

4.7 Annual Number of Procurement Claims

The Review Board has reported that it was able to finalise 36 claims in 2018 and 75 claims in 2017.

4.8 Costs Involved in Challenging Decision

The PPD Regulations, 2006 (under the fourth schedule, part II) provides that a party filing a request for review is required to pay KES5,000 (USD50) as an administrative fee.

In addition, for tenders of ascertainable value that do not exceed KES2 million (USD20,000), an additional fee of KES10,000 (USD100) shall be paid out. Thereafter, for procurements valued at between KES2 million (USD20,000) and 50 million (USD500,000), a further fee of 0.1% on the amount above KES2 million is applicable.

Finally, for procurements valued at above KES50 million (USD500,000), a further additional fee of 0.025% on the amount above KES50 million is levied subject to a maximum fee of KES80,000 (USD800).

For tenders of unascertainable value, an additional fee of: KES10,000 (USD100) shall be paid out for simple tenders; KES20,000 (USD200) for medium tenders; and KES40,000 (USD400) for complex tenders.

For any other tenders the fees shall be determined by the secretary to the Review Board subject to a minimum of KES10,000 (USD100) and a maximum of KES20,000 (USD200).

5. Miscellaneous

5.1 Modification of Contracts Post-award

Section 139 of the PPAD Act provides that a variation or amendment to a contract is effective only if it has been

approved in writing by the respective tender-awarding authority and such variations or amendments for goods, works and services shall be as prescribed in the Act.

On recommendation of an evaluation committee, an accounting officer may approve the request for: an extension of the contract period; use of prime costs; use of contingencies; reimbursable costs; and use of provisional sums, which request shall be accompanied by a certificate from the tenderer making a cogent justification for such costs.

No contract variations are permissible before the expiry of 12 months after the contract has been executed. Further, for a contract to be varied, the public entity must demonstrate that the price variation is based on the prevailing consumer price index obtained from the Kenya National Bureau of Statistics or on the monthly inflation rate issued by the Central Bank of Kenya. For variation of goods or services, the variation should not exceed 15% of the original contract value or quantity while variations of contracts for works should not exceed 20% of the original contract value. Where multiple variations are effected, the cumulative value of all contract variations should not result in an increment of the total contract price exceeding 25% of the original contract price; where such increment exceeds this threshold, then such variations should be tendered for separately.

Finally, the price or quantity variation should be executed within the initial period of the contract.

5.2 Direct Contract Awards

Section 103 of the PPAD Act allows for direct procurement to be carried out by a procuring entity. The conditions for implementing this procurement method are further discussed in **2.3 Tender Procedure for Award of Contract**, above.

5.3 Legislative Amendments Under Consideration

While the PPAD Act came into effect in 2016, the Public Procurement and Asset Regulations, 2016 have yet to be passed and, therefore, the applicable regulations are those passed under the repealed 2005 procurement legislation.

One key provision on the procurement thresholds for preferential procurement is found under Regulation 181 which proposes to increase the minimum contract value from KES1 billion (USD10 million) for procurements in respect of works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya. This regulation also raises the threshold to KES500 million (USD5 million) for all other procurements for goods and services to be exclusively available to citizen contractors.

Regulation 183 also addresses Section 157 (9) of the PPAD Act which required international bidders to procure a mini-

imum of 40% of their supplies from citizen contractors. This regulation clarifies that the requirement is not limited to supplies but also includes goods, works, non-consulting and consulting services.

Proposed amendments to the PPP Act under the Public Private Partnership (Amendment) Bill, 2017 seek to, amongst other things, reduce the bureaucracy associated with procurement of PPPs by removing the provisions relating to the Public Private Partnership Committee and confer functions on the Cabinet Secretary responsible for finance. The Bill also seeks to amend Section 28 of the PPP Act and empower the Cabinet Secretary to impose a success fee to be paid by a successful bidder on a transaction.

The Government Contracts Bill, No 9 of 2018 is intended to repeal and re-enact the Government Contracts Act, Cap 25 and to provide for the powers of the Government to enter into contracts. It is notable that if the Bill is assented to, and in line with Section 134 of the PPAD Act, all contracts of a value exceeding KES5 billion (USD50 million) entered into by the national government or county government shall be cleared by the Attorney General or the county attorney, respectively, before they are signed. The proposed definition of 'government contract' is also broadened to include all contracts under both the PPAD Act and the PPP Act.

Part III of the Government Contracts Bill proposes various provisions that are automatically deemed to be terms of a government contract, whether or not they are expressly provided in the contract. These include declarations by contractors that they have not been convicted of offences under the Anti-corruption and Economic Crimes Act, 2003 and consents to public disclosure of basic information under the Access to Information Act, 2016. False declarations and failure to comply with the public disclosure requirements is deemed an act of default on the part of the contractor and entitles the public entity to terminate the contract.

Finally, the Public Finance Management (Amendment) Bill, No 51 of 2017 proposes to amend the PFM Act. A notable amendment is found in Section 8 which seeks to amend Section 17 of the PFM Act by prohibiting any procurement by the national and county governments within a period of three months prior to a general election, except with the approval of the National Treasury.

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