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Memorandum on Finance Bill, 2017

Submitted to:

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CC:

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About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya.

Amendment to the Public Procurement and Assets Disposal Act No. 3 of 2015

The Finance Bill 2017 proposes to amend, among other Acts of Parliament, the Public Procurement and Assets Disposal Act 2015 by providing for the composition of the Public Procurement Regulatory Review Board and the introduction of specially permitted procurement method as an alternative procurement method.

Section 47 of the Finance Bill 2017 proposes to amend section 10 of the Public Procurement and Assets Disposal Act 2015 (PPAD Act 2015), which establishes the Public Procurement Regulatory Board by deleting paragraph 10 (1)(c) that includes youth and persons with disabilities as part of the Public Procurement Regulatory Board.¹ The Public Procurement Board is responsible for the management of the Public Procurement Regulatory Authority (the Authority).² It also ensures the Authority properly and effectively performs its functions.³ Therefore, the proposed amendment removes the section that guarantees youth and persons with disabilities participation in the management of the Public Procurement Regulatory Authority.

Among the functions of the Public Procurement Regulatory Authority is to monitor and evaluate the implementation of the performance of the preference and reservation schemes by procuring entities and report on the same to the public.⁴ The PPAD Act 2015 includes youth among the target group that preference and reservation scheme applies. In particular, section 157 (10) of the PPAD Act 2015 provides that every procuring entity shall ensure at least thirty percent of its procurement value in every financial year is allocated to youth among others. Therefore, the role of youth in the Public Procurement Regulatory Board is to ensure implementation of this section. Other functions of the Authority is to ensure Public Procurement Regulatory Authority performs its functions effectively,

¹Section 10 (1) Public Procurement Regulatory Board

(1) The management of the Authority shall vest in a board to be known as the Public Procurement Regulatory Board which shall consist of—

(a) a chairperson nominated by the Cabinet Secretary and appointed by the President;

(b) four members who shall be appointed by the Cabinet Secretary after nomination, through a fair process, by—

(i) the Law Society of Kenya;

(ii) the Institute of Certified Public Accountants of Kenya;

(iii) the Kenya Institute of Supplies Management;

(iv) the Association of Professional Societies in East Africa, provided that the appointed nominee is not a member of a professional body under subparagraphs (i) to (iii);

(c) two persons nominated by the respective organizations representing—

(i) the youth; and

(ii) persons with disabilities;

(d) the Cabinet Secretary or his or her representative; and

(e) The Attorney-General or his or her representative

² Public Procurement and Assets Disposal section 10(1), The management of the Authority shall vest in a Board known as the Public Procurement Regulatory Board.

³ Ibid. Section 12(1) (a) The Board shall ensure the proper and effective performance of the functions of the authority

⁴ Public Procurement and Assets Disposals Act 2015 Section 9 (e), 9(l) and 9(r)

monitor the public procurement system and ensure the Public Procurement and Asset Disposal system respects national values as provided for in the Constitution including Article 227.⁵

The proposed amendment to section 10 (1)(c) of the PPAD Act 2015 is unconstitutional because of the following reasons:

1. The proposed amendment goes against the national values and principles of governance set out under Article 10 the Constitution including: protection of the marginalized, non discrimination, inclusiveness, social justice, democracy, participation of the people, equality, rule of law, democracy, good governance, transparency and accountability.
2. The proposed amendment contravenes Article 55 (a) and (b) of the Constitution that provides the State shall take measure including affirmative action programmes to ensure that the youth have opportunities to associate, be represented, participate in political, social, economical, and other spheres of life; and access employment respectively.
3. The proposed amendment is contrary to Article 227(1) of the Constitution that provides for the enactment of a law prescribing a framework within which policies relating to procurement and asset disposal shall be implemented and provides for the protection or advancement of persons previously disadvantaged by unfair competition and discrimination.⁶
4. The proposed amendment goes against the Ministry of Finance Access to Government Procurement Opportunities program that aims to facilitate youth to participate in government procurement and the Presidential Directive that 30% of all Government procurements are to be allocated to the Youth, Women and Persons with Disabilities.⁷ Youth must be included in the Public Procurement Regulatory Board to ensure this is implemented.

The proposed amendment to delete the provision in the PPAD Act 2015 that guarantees inclusion of youth in the Public Procurement Regulatory Board will disempower youth from promoting social

⁵ Ibid, section 9(a), 9(b)

⁶ Constitution Article 227(2)(b) An Act of Parliament shall prescribe a framework within which policies relating to procurement and assets disposal shall be implemented and may provide for the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition of discrimination.

⁷ Treasury Circular Number 14 of 2013

accountability. Social accountability involves demand for transparency, accountability and public participation. Transparency is the availability of information to the public and clarity about government rules, regulations and decisions. Transparency empowers citizens and supports their right to know. It allows citizen to monitor the implementation, and performance of social protection and affirmative action programmes. Social accountability empowers the marginalized thus resulting to poverty reduction and sustainable development.⁸ Lack of youth representation in the Public Procurement Regulatory Board means that their contribution will not be considered in decision-making processes and they will be unable to monitor and oversee the implementation of the Public Procurement and Assets Disposal Act 2015, and in particular, the provision on preference and reservation scheme for disadvantaged groups particularly the youth.

Signed on behalf of TISA



Wanjiru Gikonyo

National Coordinator

⁸ The Institute for Social Accountability, Jipeshughuli Main Report, Pages 9 and 10