



**Memorandum on proposed amendments to the Public Procurement and Assets Disposal Act 2015 by the Statute Law (Miscellaneous Amendment) (No. 2) Bill, 2018**

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**To: Michael R. Sialai, EBS,  
Clerk of the National Assembly,  
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P. O. Box 41842 – 00100,  
Nairobi.**

**Cc: Chairperson  
Finance and National Planning Committee  
National Assembly  
P. O. Box 41842 – 00100,  
Nairobi.**

**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. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

**General Remarks**

The Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2018 seeks to amend the Public Procurement and Asset Disposal Act 2015. This memorandum contains views on proposed amendments to the Public Procurement and Asset Disposal Act 2015 in response to the call for submission of memorandum made by the National Assembly pursuant to Article 118(1)(b) of the Constitution, which states that Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

**Analysis Matrix - on proposed amendments to the Public Procurement and Assets Disposal Act 2015 by the Statute Law (Miscellaneous Amendment) (No. 2) Bill, 2018**

Amendment No and Subject Matter	Issue	Proposal
<p><b>Section 2 – Interpretation</b></p> <p><b>"local contractor"</b> means a person or a firm registered in Kenya under the Companies Act or any other written law and whose operation is based in Kenya.</p>	<p>The guiding principles provide that public procurement should seek to promote local, industry, sustainable development and promotion of citizen contractors.</p>	<p>The proposal to include a category of “local contractor” may squeeze out Kenyan citizens as this new category opens up the procurement to include non-citizens who have registered businesses in Kenya, and may include branches of multinational companies with much higher leverage. If this amendment is passed, in the long run it will deny citizen contractors, access for youth, women and persons with disabilities from competing for opportunities.</p>
<p><b>Section 2 – Interpretation</b></p> <p>The Amendments propose to delete the definition of the term "procurement professional" and substitute therefor the following new definition</p> <p><b>"procurement professional"</b> means a person who has professional qualifications in procurement or supply chain management from a recognized institution and is a member of the Kenya Institute of Supplies Management or any other supply chain professional body.</p>	<p>The Supplies Practitioners Management Act 2007 (SPMA) makes provision for the training, registration and licensing of supplies practitioners: to regulate their practice and for connected purposes. Section 3 establishes the Kenya Institute of Supplies Management (KISM)</p> <p>The option to belong to any other supply chain professional body will lead to break down of the profession and invasion by quacks that are not subject to oversight by the legally mandated professional body.</p> <p>KISM is established under an Act of Parliament and is the legally mandated body to register procurement professionals in Kenya. The import of the amendment will mean some procurement professionals will not satisfy the</p>	<p>The proposed amendment to redefine a “procurement professional” is inconsistent with other professional associations. These include bodies such as; Law Society of Kenya (LSK); Institute of Certified Public Accountants of Kenya (ICPAK); Engineers Board of Kenya (EBK) etc.</p> <p>These professional bodies are solely responsible for standards, capacity building, registration of members, issuing practice certificates and generally improve performance and sanction members for non-compliance etc.</p> <p>The amendment will undermine and damage the procurement profession as some members will not be subject to the SPMA 2007 and Regulations 2017.</p>

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	provisions of the SPMA 2007 and Regulations 2015.	
<p><b>Section 7(2)</b> Insert the following new paragraphs immediately after paragraph (1) (1a) to develop, promote and support the training and capacity development for procurement and supply chain management services cadre at the national and county level;</p>	The role of the National Treasury in this case is on the development and training of procurement staff. However, the other parties especially the disadvantaged groups who are also players need capacity enhancement in order to participate meaningfully.	The amendment should be enhanced to include provision for training of suppliers and contractors especially for the disadvantaged groups, that is, youth, women and persons living with disabilities
<p><b>Section 9 (1)</b> Insert the following new paragraph immediately after paragraph (r} (s) to develop, promote and support the training and capacity development of persons involved in procurement and asset disposal.</p>	It is not clear what the training and capacity development of persons involved in procurement and asset disposal entails. Suppliers and contractors especially the disadvantaged groups require training and capacity building to understand what is involved in the preparation of bids.	The amendment should be enhanced to include provision for training of suppliers and contractors especially from the disadvantaged groups that is, youth, women and persons living with disabilities
<p><b>Section 53 – Procurement Planning</b> Insert the following new subsections immediately after subsection (11) (12) Upon submission of the procurement plans to the national treasury pursuant to section 44(2) (c), the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.  (13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.</p>	<p>The bill seeks to ensure that the public are informed on the future procurement opportunities, which are a step in the right direction.</p> <p>However, the subsections are couched in terms, which may limit the dissemination of information to the general public. The procuring entity is only required to publish on its website and the National Treasury on the state tender portal, which is limiting.</p>	<p>This section should be made clear that publicise should have the meaning in the Public Finance Management Act 2012 which defines “publicise”,in relation to a document, means to make known to the public, through the national or local media— (a) the general nature of the document; and (b) how and where it may be accessed and read by members of the public;</p> <p>There should be a robust disclosure regime by the procuring entities as these are crucial documents, which will foster transparency, competition and accountability. The procuring entities in preparing a</p>

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		<p>procurement plan shall indicate procurement timelines, procurement methods, estimated costs, special conditions, any special requirements etc. This information guides tenderers in decision making whether to bid or not, whether they will need to associate with other firms to enhance their qualifications etc. Therefore the information should be widely circulated not only on websites but also print media.</p>
<p><b>Section 80</b> Delete the word "thirty" and substitute therefore the words "seven".</p>	<p>Section 80 (6) provides that <i>"The evaluation shall be carried out within a period of thirty days"</i>. Procurement in State organs and public bodies differ in terms of magnitude and complexities ranging from huge infrastructure projects to common of the shelf items. Evaluation is a critical function and shall be done using the procedures and criteria in the tender documents.</p>	<p>A Procuring Entity may seek clarifications of a tender from a tenderer as provided in Section 81.</p> <p>Further Section 83 allows entities to undertake due diligence to ascertain the qualifications of the lowest evaluated bidder and must be done within the evaluation period, the seven days may not be adequate to seek the clarifications and due diligence take these into consideration within the evaluation period.</p> <p>Section 84 – be amended to provide a timeframe in which the head of procurement function shall render the professional opinion, as this is an area of delay.</p>
<p><b>Section 80 (7)</b> Insert the following subsection immediately after subsection ( 6) (7) Where a tender is complex or has attracted a <u>high number of procurement entities</u>, the</p>	<p>The new subsection talks of <i>"..a high number of procurement entities..."</i></p>	<p>We presume this was a typographical error and should read <i>"a high number of tenderers/candidates...."</i></p>

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accounting officer may extend the tender evaluation period for a further period of seven days.		
<b>Proposal to amend S.94 (4)</b> to Delete the words "fourteen days" and substitute therefore the words "seven days"	<p>The call for prequalification is reduced from 14 to 7 days.</p> <p>Prequalification is carried out for complex and specialized goods, works and services for the purpose of identifying the best few qualified firms.</p> <p>To be shortlisted firms spend time and financial resources in the preparation of these documents and hence require time to respond adequately.</p>	<p>The purpose is to invite as many qualified firms as possible. The effect of the shortened period of time may not afford firms sufficient time to prepare and submit responsive prequalification documents. Qualified firms may not be able to participate.</p>
<b>Section 126 (3)</b> Delete the expression "twenty-one" and substitute therefore the word "seven". Insert the following proviso immediately after subsection (3) <i>"Provided that where the subject of procurement is complex or attracts a high number of tenderers, the accounting officer may extend the evaluation period for a further period not exceeding seven days."</i>	<p>Evaluation of proposals is critical in the identification of consultants in the same manner that other evaluations are undertaken.</p>	<p>The seven days proposed is inadequate especially when dealing with complex and highly specialized consultancy services. The Procuring Entity may require clarifications that need to be communicated in writing sometimes to firms in different time zones.</p>
<b>Section 135</b> Delete the words "fourteen days" and substitute therefore the words "seven days".	<p>The purpose of this section was to allow sufficient time for candidates or a tenderer who risk suffering from a breach of a duty by a procuring entity sufficient time to obtain documents and file an appeal.</p>	<p>The reduction of the period from 14 to 7 days may potentially deny candidates or tenderers a right of appeal as the time may not be adequate to study and file appeals on time including the necessary fees.</p>
<b>Section 139 (4)</b> Delete the words "after twelve months from the date of signing the contract and shall only be considered".	<p>Tenderers may bid low in the knowledge that they can seek for a variation after signing the contract raising uncertainty in the final contract cost.</p>	<p>There is need to include further safeguards in this section to mitigate against bidders who may quote a lower price and seek variations at the earliest opportune moment.</p>

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<p><b>Section 167 (1)</b> Delete the word "fourteen" and substitute therefor the word "seven".</p>	<p>The purpose of this section was to allow sufficient time for candidates or a tenderer who risk suffering from a breach of a duty by a procuring entity sufficient time to obtain documents and file an appeal.</p>	<p>The reduction of the period from 14 to 7 days may potentially deny candidates or tenderers a right of appeal as the time may not be adequate to study and file appeals on time including the necessary fees.</p>
<p><b>Section 169</b> Renumber the existing provision as subsection ( 1) and insert the following subsection immediately after the renumbered subsection ( 1 ) {2) Notwithstanding provisions of subsection (1) filing fees for review by candidates under reserved procurements for women, youth, persons with disabilities and other disadvantaged groups may be waived by the secretary or where required fees shall be as prescribed.</p>	<p>The secretary is given discretionary powers to waive the fees for this group, which may be used to their disadvantage.</p>	<p>There should be an explicit provision that candidates falling within reserved procurements for women, youth, persons with disabilities and other disadvantaged groups shall not be required to pay fees.</p>

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