

ICPAK SUBMISSIONS ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL 2014

March 2015

1.0 Objective

The objective of this position paper is to make proposals on the Public Procurement and Asset Disposal Bill 2014. The Bill aims to provide procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus assets by public entities and to provide for other related matters.

2.0 Background

Public procurement forms the largest domestic market in many countries. It is an important function of government for several reasons. If well managed, the public procurement system can contribute to a country's economic development by maximizing economy and efficiency. In addition, public procurement can form a vital tool for improving service delivery.

The Institute welcomes the initiative to reform public procurement laws and regulations to comply with the citizens' needs and aspirations, the Constitution of Kenya 2010 and international best procurement standards. This position paper therefore, aims to enrich the provisions on the Public Procurement and Asset Disposal Bill 2014.

3.0 Summary of Proposals on the Public Procurement and Asset Disposal Bill 2014

Clause of Bill	Issue of Concern	Proposal	Justification
Part I: Preliminary			
	Clause 3: Guiding Principles	The Bill provides guiding principles for Public Procurement and asset disposal. Nevertheless, the principles are not comprehensive.	<p>We propose that the following amendments:</p> <p>3 j) Interrelationship between the two levels of government provided for under Article 6(2) and 189 of the Constitution</p> <p>To ensure vital Constitutional provisions are embedded in the new Public Procurement and Asset Disposal law. It will be important for the new public Procurement law to respect the devolved system of governance in the Country</p>
PART II: BODIES INVOLVED IN THE REGULATION OF PUBLIC PROCUREMENT AND ASSET DISPOSAL			
	Clause 7: Role of the National Treasury on Public Procurement and Asset Disposal	Some of the functions provided in the Bill for the National Treasury are technical and operational in nature and therefore will be better performed if assigned to the Public Procurement Regulatory Authority (PPRA)	<p>Amend 7(2) by deleting sub-clauses d, e and i and transfer the functions to Clause 9 on functions of the Authority</p> <p>d) provide technical assistance of procurement;</p> <p>e) enforce any standards developed under this Act;</p> <p>i) issue guidelines to public entities with respect to procurement matters and monitor their implementation and compliance;</p> <p>This amendment to the Clause aims at providing a demarcation on policy and operation issues of Public Procurement. As such, Policy resides at the National Treasury while operational issues are at the Public Procurement Regulatory Authority (PPRA).</p>

	Clause 10: Public Procurement Regulatory Board	The Board as constituted is not representative enough of all disciplines and sectors of the economy and thus may not work effectively	<p>We propose the following:</p> <p>The provisions of the current Procurement Act on the composition of Advisory Board (Section 22-1) should be modified and applied to the Public Procurement Regulatory Board;</p> <p><i>Amend to read, “The Public Procurement Regulatory Board shall consist of-</i></p> <p><i>a) Nine members competitively recruited and approved by Parliament from persons nominated by the prescribed organisations; and</i></p> <p><i>b) The Director General”</i></p> <p>Add a provision to ensure compliance to Article 27(8) of the Constitution</p>	<p>We note that the current provision on the board composition provides adequate mix of skills borrowed from members of diverse professional backgrounds. The proposed law seems to reverse this by advocating for only members of one professional body.</p> <p>The review of procurement law was occasioned by the need to align it to the provisions of the Kenyan Constitution 2010. It is therefore important that a third gender rule is equally applied in board composition.</p>
	Clause 12 Functions of the Board	The functions of the Public Procurement Regulatory Board as given are limiting.	Add another function after (i) risk management.	The Board should also play an important advisory role in risk management, particularly

				ensuring in planning, audit, compliance and general financial management.
	Clause 14: Procedures of the Board	Due to the fact that ICPAK proposes to increase the number of Board Members to 9 the quorum in current form is limiting	Amend 14(3) (3) Three Five members of the Board shall constitute a quorum for the transaction of any business of the Board	Due to the fact that ICPAK proposes to increase the number of Board Members to 9 the quorum in the Bill is limiting
	Clause 26-Annual reports	<p>The clause provides that for each financial year, the Board shall cause an annual report to be prepared.</p> <p>The Board shall submit to the Cabinet Secretary the quarterly reports within thirty days after the end of the quarter and the annual report within three months at the end of the year to which the report relates.</p>	<p>Provide for the creation of Finance Committee; and Audit, Risk and Governance Committees of the board.</p> <p>Amend sub-clause two to read ø...the chairman of finance committee of the board shall submit the report to the Board.....ø</p> <p>Further, provide for both committees to be chaired by members of the Institute of Certified Public Accountants of Kenya who are of good standing</p> <p><i>The creation of the committees should be left to the Board as part of corporate governance structures.</i></p> <p><i>Under Section 14, they should consider introducing Section</i></p>	<p>It is good practice that annual reports be presented by the chairman of finance committee of the board. Audit Risk and Assurance committees play vital role in instilling financial discipline and enhancing good corporate governance practices.</p>

			<i>14(5) that will provide that “The Board may for the purposes of performing its responsibilities under this Act, establish such committees of the Board as it deems necessary for the effective functioning of the Board and the Board may delegate to any such Committee such of its responsibilities as it deems fit”. This will, therefore, cover for the establishment of any committees that may be necessary.</i>	
	Clause 27-32 Public Procurement Administrative Review Board	Clauses 27 to 32 of the Bill establish the Public Procurement Administrative Review Board and other attendant clauses. We are concerned that establishment of another autonomous institution to the Authority may lead to duplicity of functions and strains to the current overstretched wage Bill.	<p>We propose that the entire section on the Public Procurement Administrative Review Board be amended, to make the Board a Committee within the Public Procurement Regulatory Board</p> <p>The Clause should read, Public Procurement Administrative Review Committee</p>	<p>This will help reduce overlap of functions and duplicity. Establishment of numerous institutions may occasion a strain to the economy particularly the Wage Bill.</p>
	PART III- COUNTY GOYBRNMENT RESPONSIBILITIES WITH RESPECT TO PUBLIC PROCUREMENT AND ASSET DISPOSAL			

	Clause 33 : Roles and Responsibilities of County Governments	ICPAK is concerned that the linkage between the County Governments and the Authority is weak	Amend the functions as follows; 33(2)(e) co-ordinate county government monitoring and evaluation of supply chain function of county government entities including ensuring compliance in liaison with the Authority;	This in essence ensures that County Procurement Departments maintain linkage with the Authority. Respects the devolved system of government
PART IV-POWERS TO ENSURE COMPLIANCE				
	Clause 39 Request for a Judicial review	The order of appeal fails to exhaust all the available channels before resorting to Court/Judicial intervention.	Amend the Clause to Read The procuring entity and any other person who was entitled to be given an opportunity to make representations under section 38 (2) May appeal to the Review Committee, if unsatisfactory, request for Judicial Review against an order of the Board to the High Court within fourteen days after the order is made.	This ensures that all available review and appeal channels are exhausted before appeal to the High Court.
	Clause 40: No Investigation if Issue is Before	We had earlier proposed an amendment to the Board to make a Committee within the Authority	Amend to read "Review Committee"	To take into account the earlier proposed amendment to the Board to make a Committee

	Review Board			within the Authority
	PART V-INTERNAL ORGANISATION OF PROCURING ENTITIES			
	Clause 51(1) : Transfer of Procuring Responsibility to another Public entity	Delay alone may not be sufficient for transfer of procuring responsibility	51(1) Should be expanded to include other specific instances that may cause a transfer such as gross violation of the Act, substandard work, integrity issues 1or any other information	To enhance fairness in the transfer of procuring responsibility to another public entity
	PART VI -GENERAL PROCUREMENT AND ASSET DISPOSAL PRINCIPLES			
	Clause 65: Corrupt, Coercive, Obstructive, Collusive or Fraudulent Practice, Conflicts of Interest	Lack of means of verification of interests	Add another sub-clause(65(11)- The Procuring entity should establish a register of interests	This helps in ensuring transparency, accountability & ethical issues.
	Clause 67: Procurement records	6 years as provide by Bill for keeping of procurement records after the resultant contract has been completed may not be sufficient. Some items with tax implications might require the Commissioner to make reference to procurement	Amend 67(1) to read, öfor at least 10 yearsö	To align it with the Income Tax Act(Section 55(2)) for purposes of taxation, especially for a procurement matter that might have implications on tax

		records.		
	Clause 67(4) Procurement Records	Sub clause 4 provides that the. The accounting officer of a procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available to any person. It is difficult to establish the cost for availing records.	Amend 67(4) to include ðThe Procurement entity may charge a fee not exceeding the cost of making the records available, the fee shall not exceed Ksh. Ksh. 20, 000	To avoid charging exorbitantly for availing records.
	Other Proposals			
	Clause 163 Management of Inventory, Stores and Assets	Valuation of stock not well captured	Add sub clause 163(4) All stocks to be recorded at the Net Realizable Value as per IFRS by the Procuring entity	To help in estimating the value of an asset at the point of disposal.
	Part XVII: Repeal, Transition And Savings Provisions	The Transition and Savings Provisions for the existing offices and institutions such as the Public Procurement Advisory Board are inadequate	Provide Savings and Transitional Provisions for the Advisory Board and institutions that existed before the commencement of this Act Amend by including a new sub-clause 183(5) ð(a) Notwithstanding the	This ensures smooth transition and continuity on public procurement proceedings

			<p>provisions of this Act</p> <p>any function transaction and investigation, carried out by Institutions under the Public Procurement and Disposal Act 2005 or any other law, before the commencement of this Act, shall be deemed to have been carried out under this Actö.</p> <p>(b) Save as otherwise provided for in this Act any undertaking or responsibility falling on the Public Procurement Oversight Advisory Board shall be assumed by the Public Procurement Regulatory Board</p>	
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The Institute of Certified Public Accountants of Kenya (ICPAK) is the professional organization for Certified Public Accountants in Kenya established in 1978 by the Accountants Act, CAP 531. ICPAK is dedicated to development and regulation of the accountancy profession in Kenya so as to enhance its contribution and that of its members to national economic growth and development. In this regard, ICPAK wishes to advise the public that an Accountant by Law is an individual who has qualified by passing the three levels of the CPA examinations and is duly registered by the Institute of Certified Public Accountants of Kenya. For more information on this position paper and other papers on Governance and Accountability please contact us on icpak@icpak.com.