



**REPUBLIC OF KENYA
THE NATIONAL TREASURY**

Telegraphic Address: 22921
Nairobi
00100 FAX NO. 310833
Telephone: 2252299
When Replying Please Quote:

THE NATIONAL TREASURY
P. O. BOX 30007-00100
NAIROBI

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29th March, 2016

TREASURY CIRCULAR NO. 02/2016

**To: All Principal Secretaries/Accounting Officers
CEC Members For Finance, All County Governments**

(With sufficient copies to all Chief Executive Officers of State Corporations and Semi-Autonomous Government Agencies)

**RE: OPERATIONALIZATION OF THE NEW PUBLIC PROCUREMENT
AND ASSET DISPOSAL ACT, 2015**

The Government of Kenya has been carrying out Public Financial Management (PFM) reforms in order to enhance transparency and accountability including prudent utilization of public resources and thus improve service delivery to the public. A major component of these ongoing reforms is in the area of public procurement. A key milestone was achieved in this regard with the enactment of the Public Procurement and Disposal Act, 2005.

In the year, 2010, a new era dawned in Kenya when the Constitution was promulgated. Article 227 of the Constitution of Kenya requires that *"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented."*

Consequently, the National Treasury in consultation with stakeholders embarked on reviewing the Public Procurement and Disposal Act, 2005 to resonate with the Constitution. This process resulted in the enactment of the Public Procurement and Asset Disposal Act, 2015 which has repealed the Public Procurement and Disposal Act, 2005.

The Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the Act) has been aligned to the Constitution and Vision 2030 and is designed to achieve the following:-

- i. Address challenges that existed in the repealed law;
- ii. Enhance devolution of procurement decisions;
- iii. Incorporate emerging issues such as e-procurement, framework contracting, green and sustainable procurement, among others;
- iv. Embrace new procurement methods such as e-Reverse Auctions, Design Competition, Force Account, Competitive Negotiations, and Two Stage Tendering Method, among others;
- v. Bring under its ambit New Procuring Entities such as Independent & Constitutional Offices, Kenyan Diplomatic Missions, County Government Entities, Pension Funds and any other entity that uses, is maintained or assisted by Public Funds;
- vi. Harmonize procurement procedures to simplify operations and compliance, by increasing clarity.

For smooth transition to this new procurement dispensation, there are several important issues that require the attention of all the Procuring Entities as highlighted below: -

1. Commencement of the new Public Procurement And Asset Disposal Act, 2015

The effective date of the Act is 7th January, 2016 and it is applicable to all procurements which commenced on or after 7th January, 2016.

Section 1 (2) of the Third Schedule (Transitional Provisions) to the Act provides that a

'...procurement proceeding commences when the first advertisement relating to the procurement proceeding is published or, if there is no advertisement, when the first documents are given to persons who wish to participate in the procurement proceeding.'

However, all procurement proceedings commenced before the commencement date of the Act shall be continued in accordance with the Public Procurement and Disposal Act, 2005 and its subsidiary legislations.

It is imperative that procuring entities pay critical attention of the provisions contained in the Third Schedule (Transitional Provisions) to the Act.

2. Processing of Procurements under the new Public Procurement And Asset Disposal Act, 2015

The National Treasury is developing Regulations contemplated under the Act in line with clause (11) of the Third Schedule (Transitional Provisions) of the Act. The draft will be shared for input by stakeholders in due course. In the meantime, and in line with section 24 of the Interpretation and General Provisions Act, Cap 2 of the Laws of Kenya, Procuring Entities are instructed to use/apply the existing Public Procurement and Disposal Regulations including Standard Tender Documents, Manuals, and directives issued under the repealed Public Procurement and Disposal Act, 2005. Section 24 states that:-

“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder”.

3. Regulation of Public Procurement and Asset Disposal System

The National Treasury, the Public Procurement Regulatory Authority (PPRA) and the Public Procurement Administrative Board are the bodies involved in the regulation of the public procurement and asset disposal as provided under Part II of the Act. The Public Procurement Oversight Authority is transiting to the Public Procurement Regulatory Authority (the Authority) established under Section 8 of the Act.

4. Procurement Function

The procurement function as defined under Section 2 of the Act shall be handled by procurement professionals and the head of the procurement function in a Procuring Entity shall among other functions, be responsible for rendering procurement professional advice to the Accounting Officer.

5. Procurement Planning

In accordance with Section 44 (2) (c) & (i) of the Act, *‘An Accounting Officer shall ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and submit them to the National Treasury’* The part of the procurement plan demonstrating

application of preference and reservations schemes should be submitted to the Authority..

6. Segregation of Responsibilities

Section 46 of the Act provides for appointment of an *ad hoc* evaluation committee to deal with technical and financial aspects of a procurement. In addition, an Accounting Officer may establish an *ad hoc* Inspection and acceptance committee pursuant to Section 48 of the Act.

A key departure from past practice is that procurement awards are not to be done by either the tender or procurement committees, since committees have been done away with by the Act. Section 84 (1) provides that *the Head of procurement function shall provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings on receiving the evaluation report from the evaluation committee*. This will inform/guide the Accounting Officer in making the decision to award a tender.

7. Methods of Procurement

Part IX of the Act outlines various procurement methods that a procuring entity can use. Procuring entities are reminded that open tendering method is the preferred method of procurement and an entity may use an alternative procedure only if that procedure is allowed under the Act and upon fulfillment of the conditions set out in the Act for use of such alternative procurement method. Amongst the new methods provided for in the Act, a lot of enquiries have been received on how to apply Force Account Method. Pending the preparations and conclusions of the Regulations, the following interim guidelines are hereby issued;

A procuring entity may use Force Account method where the following conditions are satisfied:-

- i) it has the requisite internal technical expertise, capacity and competence to carry out the task by its own employees
- ii) it is uneconomical to outsource the works and services;
- iii) items/materials are to be procured using conventional methods provided under the Act.
- iv) it is established that the cost of the items to be procured are at the prevailing competitive market price; and

- v) it is established that the works/services are urgent and may be carried out without any interruptions on ongoing operations using available internal skills, equipment and materials;
- vi) where the intention is to complete the works where the contractors either abandoned or delayed completion of works/services and the cost or retendering is uneconomical;

The Procedure for application of force account shall be as follows:-

- i) The user department must first prepare a detailed proposal with the following details:-
 - a) Scope of goods, works and services to complete the project,
 - b) Status of the project where applicable,
 - c) Justification for use of method,
 - d) List of materials and bills of quantities to be procured,
 - e) Available internal expertise, capacity and competencies to undertake the assignment, and
 - f) Cost analysis of fees/rates using approved government subsistence rates
- ii) The proposal shall be submitted to the head of procurement function for review and recommendation to the accounting officer for approval.
- iii) Upon approval the user department and procurement function shall commence implementation
- iv) The head of user department shall be departmental representative (DR) in the subject project.
- v) In the interim and pending issuance of the Regulations, the total costs of the project shall not exceed Kenya Shilling 5 Million.

It is further clarified that force account is not equivalent to community participation as it (force account) focuses on use of Public Servants, Public assets, equipment and labour to the procurement assignment. Procurement entities are advised to use existing Legislative framework of preference and Reservation to promote community Participation by using registered disadvantage groups namely Youth, Women and Persons with Disability within communities of subject procurements. Similarly, procurements can be unbundled so as to be procured within manageable capacity.

Procuring Entities are advised to seek guidelines from the National Treasury on the other methods introduced where necessary.

8. Procurement Contracts

Pursuant to Section 134 (2) of the Act, Accounting Officers are required to ensure that all contracts of a value exceeding Kenya Shillings five billion shall be cleared by the Attorney-General before they are signed.


9. Publication of Procurement Contracts

Section 138 (1) of the Act requires that a procuring entity shall publish and publicise all contract awards on their notice boards at conspicuous places, and on its website if available, in addition to submitting reports to the Authority.

Conclusion

It is imperative that those charged with the responsibility of spending public resources through public procurement familiarize themselves with the provisions of the Public Procurement and Asset Disposal Act, 2015 and ensure that they are understood and applied uniformly by all procuring entities. The National Treasury and Public Procurement Regulatory Authority (PPRA) remain ready to offer any assistance required including any clarification on the application of the Act. Kindly bring the contents of this circular to the attention of all officers working within your jurisdiction.

Copies of the Public Procurement and Asset Disposal Act, 2015 are available from the Government Printer, Nairobi or can be accessed from the National Treasury or the Public Procurement Regulatory Authority Websites. The National Treasury and the Public Procurement Regulatory Authority have commenced sensitization and awareness of the new Public Procurement and Asset Disposal Act, 2015 to all Public Entities at the National and County levels.



HENRY K. ROTICH, EGH
CABINET SECRETARY/NATIONAL TREASURY

Copy to:-

Mr. Joseph K. Kinyua, EGH
Chief of Staff and Head of Public Service
Office of the President
Harambee Avenue
NAIROBI

Mr. Edward Ouko
Auditor General
Kenya National Audit Office
12th Floor, Anniversary Towers
NAIROBI

Ms Jacqueline Mogeni
Ag. Chief Executive Officer
Council of Governors
Delta House
NAIROBI

