Bill for Introduction into the National Assembly —

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THE PUBLIC PROCUREMENT AND DISPOSAL
(AMENDMENT) BILL, 2013

A Bill for

AN ACT of Parliament to amend the Public Procurement and Disposal Act, 2005

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Disposal (Amendment) Act, 2013 and shall come into operation after ninety days from the date of publication.

2. Section 3 of the Public Procurement and Disposal Act 2005 (hereinafter referred to as ‘the principal Act’) is amended by inserting the following new meaning in proper alphabetical sequence –

"youth" means a person who has attained the age of eighteen years and has not attained the age of thirty-five years and includes a company, association or body of persons, corporate or unincorporated in which all its directors or proprietors are persons who have attained the age of eighteen years and have not attained the age of thirty-five years.

3. The principal Act is amended by inserting the following new subsection immediately after subsection (8) –

(9) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement in every financial year is allocated to the youth.

(10) The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (9) in order for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution.
(11) The preferences referred to in subsection (10) shall-

(a) be prescribed within ninety days after commencement of this Act;

(b) be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement.

(12) The right of equality and freedom from discrimination under Article 27 of the Constitution shall be limited as specified under this section for the purposes of-

(a) facilitating affirmative action to ensure that the youth access employment and have opportunities to participate in economic spheres of life as contemplated by Article 55 of the Constitution;

(b) protection or advancement of the youth in accordance with Article 227 of the Constitution who have previously been disadvantaged by unfair competition or discrimination in the procurement process.

(13) For the purpose of Article 94 of the Constitution-

(a) the purpose and object of the delegation of legislative power under this section is to enable the Cabinet Secretary devise mechanisms that safeguard against possible abuse in the legislative endeavor for the attainment of the objects specified in paragraphs (a) and (b) of subsection (12); and

(b) the principles and standards applicable to the regulations made under this subsection are those set out in this Act and in the Interpretations and General Provisions Act and the Statutory Instruments Act, 2013.
MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to make necessary amendments to the Public Procurement and Disposal Act, 2005 so as to ensure that at least thirty percent of the annual procurement by public entities is allocated to the youth in accordance with such conditions as the Cabinet Secretary may prescribe.

It is proposed to delegate to the Cabinet Secretary powers to prescribe the conditions upon which the procurement shall be allocated to the youth so as to safeguard this provision against abuse provided that such conditions do not in any way pose any unnecessary impediment to youth-run enterprises from participating in public procurement.

The Bill also proposes to limit the right of equality and freedom from discrimination under Article 27 of the Constitution so as to facilitate affirmative action for the youth access in accordance with by Article 55 of the Constitution and also advance the youth participation in the procurement process in accordance with Article 227 of the Constitution.

This proposed amendment will mainstream the participation of youth-run enterprises in economic development.

This Bill is a Bill concerning county governments.

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 9th October, 2013.

JOHNSON SAKAJA,
Member of Parliament.
Section 3 of the principal Act which it is proposed to amend

3. (1) In this Act, unless the context otherwise requires—

“accounting officer” means—

(a) for a public entity other than a local authority, the person appointed by the Permanent Secretary to the Treasury as the accounting officer or, if there is no such person, the chief executive of the public entity;

(b) for a local authority, the town or county clerk of the local authority;

“Advisory Board” means the Public Procurement Oversight Advisory Board established under section 21;

“Authority” means the Public Procurement Oversight Authority established under section 8;

“candidate” means a person who has submitted a tender to a procuring entity;

“citizen contractor” means a natural person or an incorporated company wholly owned and controlled by persons who are citizens of Kenya;

“contractor” means a person who enters into a procurement contract with a procuring entity;

“corruption” has the meaning assigned to it in the Anti Corruption and Economic Crimes, Act 2003 and includes, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process or in contract execution.

“Director-General” means the Director-General of the Authority provided for under section 10;

“disposal” means the divestiture of public assets, including intellectual and proprietary rights and goodwill and other rights of a procuring entity by any means including sale, rental, lease, franchise, auction or any combination however classified, other than those regulated by any other written law;
“fraudulent practice” includes a misrepresentation of fact in order to influence a procurement or disposal process or the exercise of a contract to the detriment of the procuring entity, and includes collusive practices amongst bidders prior to or after bid submission designed to establish bid prices at artificial non competitive levels and to deprive the procuring entity of the benefits of free and open competition;

“goods” includes raw materials, things in liquid or gas form, electricity and services that are incidental to the supply of the goods;

“local contractor” means a contractor who is registered in Kenya under the Companies Act and whose operation is based in Kenya;

“Minister” means the Minister responsible for matters relating to finance;

“prescribed” means prescribed by regulation under this Act;

“procurement” means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination;

“procuring entity” means a public entity making a procurement to which this Act applies;

“public entity” means—

(a) the Government or any department of the Government;

(b) the courts;

(c) the commissions established under the Constitution;

(d) a local authority under the Local Government Act;

(e) a state corporation within the meaning of the State Corporations Act;

(f) the Central Bank of Kenya established under the Central Bank of Kenya Act;
(g) a co-operative society established under the Co-operative Societies Act;

(h) a public school within the meaning of the Education Act;

(i) a public university within the meaning of the Universities Act;

(j) a college or other educational institution maintained or assisted out of public funds; or

(k) an entity prescribed as a public entity for the purpose of this paragraph;

“public funds” has the meaning assigned to it in the Exchequer and Audit Act and includes monetary resources appropriated to procuring entities through the budgetary process, as well as extra budgetary funds, including aid grants and credits, put at the disposal of procuring entities by foreign donors, and revenues of procuring entities;

“Review Board” means the Public Procurement Administrative Review Board established under section 25;

“services” means any objects of procurement or disposal other than works and goods and includes professional, non-professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services;

“the regulations” means regulations made under this Act;

“urgent need” means the need for goods, works or services in circumstances where there is an imminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable;

“works” means the construction, repair, renovation or demolition of buildings, roads or other structures and includes—

(a) the installation of equipment and materials;

(b) site preparation; and
(c) other incidental services.

Section 39 of the principal Act which is proposed to amend—

39. (1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and disposal.

(3) The preferences and reservations referred to in subsection (2) shall—

(a) be non-discriminatory in respect of the targeted groups;

(b) allow competition amongst the eligible;

(c) be monitored and evaluated.

(4) The preferences and reservations shall apply to—

(a) candidates such as disadvantaged groups, micro, small and medium enterprises;

(b) works, services and goods, or any combination thereof;

(b) identified regions; and

(c) such other categories as may be prescribed.

(5) A procuring entity shall, when processing procurement, comply with the provisions of this Act the regulations in respect of preferences and reservation.

(6) To qualify for a specific preference or reservation a candidate shall provide evidence of eligibility.

(7) The Authority shall maintain an up-to register of contractors in works, goods and service any combination thereof, in order to be cognizant times of the workload and performance record.

(8) In applying the preferences and reservations under this section—
(a) exclusive preference shall be given to citizens of Kenya where—

(i) the funding is 100% from the Government of Kenya or a Kenyan body; and

(ii) the amounts are below the prescribed threshold.

(b) a prescribed margin of preference may be given—

(i) in the evaluation of bids to candidate offering goods manufactured, mined, extracted and grown in Kenya; or

(ii) works, goods and services where preference may be applied depending the percentage of shareholding of locals on a graduating scale as prescribed.