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**REPUBLIC OF KENYA**

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**KENYA GAZETTE SUPPLEMENT**

**NATIONAL ASSEMBLY BILLS, 2018**

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**NAIROBI, 10th April, 2018**

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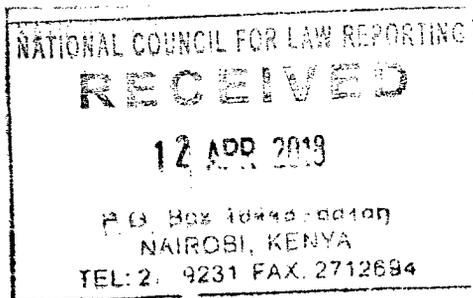
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## THE GOVERNMENT CONTRACT BILL, 2018

### A Bill for

**AN ACT of Parliament to repeal and re-enact the Government Contracts Act and to provide for the powers of the Government to enter into contracts and for connected purposes**

**ENACTED** by Parliament of Kenya, as follows—

### PART I—PRELIMINARY PROVISIONS

1. This Act may be cited as the Government Contracts Act, 2018. Short title.
2. In this Act, unless the context otherwise requires— Interpretation.
- “accounting officer” has the meaning assigned to it under section 2 of the Public Finance Management Act, 2012; No. 18 of 2012.
- “advance payment” means a payment made by or on behalf of the national or county government under the terms of a contract before the performance of that part of the contract;
- “contract security” means—
- (a) a payment bond or a performance bond given on behalf of a person to the Government to make good on any default by that person under the contract by—
    - (i) compensating the Government thereof; or
    - (ii) completing the performance of the contract to the extent required by the terms and conditions of the payment bond or performance bond;
  - (b) a security deposit given by the person to the Government to ensure the performance of the contract to the extent required by the terms and conditions of the contract;
- “contracting authority” means—
- (a) the Cabinet Secretary responsible for matters relating to finance on behalf of the national government;
  - (b) a national and county government department and

agency that has the legal authority to enter into a contract on behalf of national or county government;

- (c) any individual who is duly authorized by or under an Act of Parliament to enter into a contract; or
- (d) any individual who is duly authorized by the accounting officer of the national government or a county government as prescribed under this Act;

“Government” means the national government or the county government;

“government contract” includes any agreement, contract, lease, licence, permit or other concession or authority issued by a public entity or agreement entered into by a public entity for any works or for the supply of any works, goods or services;

“public entity” has the meaning assigned to it under section 2 of the Public Procurement and Asset Disposal Act, 2015;

“public officer” has the meaning assigned to it under Article 260 of the Constitution; and

“security deposit” means—

- (a) a bill of exchange that is payable to the National Treasury and that is certified by an approved financial institution on itself;
- (b) a Government guarantee bond; or
- (c) such other security as may be deemed appropriate by the contracting authority and approved by the National Treasury.

**3.** The object of this Act is to empower a contracting authority to enter into government contracts for acquisition of works, goods and services in a manner that enhances access, competition and results in best value or, if appropriate the optimal balance of overall benefits to the government and the public.

Object of the Act.

**4.** This Act shall apply to all contracts that are entered into by a contracting authority and that provide for the payment of any money by the Government, except a contract whose purpose is, for operational reasons, to fulfil

Application.

an interim requirement for defence supplies or services or to ensure defence logistical capabilities on an interim basis, and any related contract.

5. This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars in matters relating to government contracts except the Public Finance Management Act, 2012, the Public Procurement and Asset Disposal Act, 2015 and the Public Private Partnership Act, 2013.

Conflict with other Acts.

No. 18 of 2012.

No. 33 of 2015.

No. 15 of 2013.

## PART II—CONDITIONS OF CONTRACT ENTRY

6. (1) All contracts made for or on behalf of the national government shall be in writing and signed by an accounting officer or by any public officer duly authorised in writing by the accounting officer, either specifically in any particular case, or generally for all contracts below a certain value in his or her contracting entity or agency or otherwise as may be specified in such authorisation.

Contracts on behalf of national government.

(2) Where national government contracts are entered into outside Kenya for or on behalf of the national government by a person either generally or specially authorised in writing in that behalf by the accounting officer shall, so far as they come within the jurisdiction of the courts in Kenya, be deemed to be contracts made on behalf of the national government.

(3) Subject to the pecuniary threshold provided for under section 134 of the Public Procurement and Asset Disposal Act, 2015 an accounting officer of a procuring entity shall ensure that all contracts are cleared by the Attorney-General before they are signed.

7. (1) All contracts made for or on behalf of a county government shall be in writing and shall be signed by the accounting officer, or by any public officer duly authorized in writing by the accounting officer, either specially in any particular case, or generally for all contracts below a certain value in his or her department, agency or otherwise as may be specified in the authorisation.

Contracts on behalf of county governments.

(2) Where county government contracts are entered into outside Kenya for or on behalf of a county government by a person either generally or specially authorised in writing in that behalf by the accounting officer shall, so far

as they come within the jurisdiction of the courts in Kenya, be deemed to be contracts made on behalf of county government.

(3) Subject to the pecuniary threshold provided for under section 134 of the Public Procurement and Asset Disposal Act, 2015 an accounting officer of a procuring entity shall ensure that all contracts are cleared by the relevant authority before they are signed.

8. Any authority given under sections 6(1) and 7(1) of this Act shall be in the form set out in the First Schedule to this Act. Form of authorisation.

9. (1) A contract for the performance of legal services on behalf of the national government shall be entered into only by or under the authority of the Attorney-General. Legal services.

(2) Subsection (1) does not apply in respect of a contracting authorities referred to in the Second Schedule to this Act.

(3) A contract for the performance of legal services on behalf of a county government shall be entered into only by or under the authority of the County Attorney.

10. Before any contract is entered into, the contracting authority shall comply with the provisions of the Public Procurement and Asset Disposal Act, 2015 and the Regulations made thereunder, the Public Private Partnership Act, 2013 and any other applicable law. Contract entry.

11. Where a contracting authority requires a person to give contract security, that security shall be dealt with in the manner set out in the Public Procurement and Asset Disposal Act, 2015 and the Regulations made thereunder, the Public Finance Management Act, 2012 or any other applicable law. Contract security.

### **PART III—PROVISIONS RELATING TO DEEMED TERMS IN THE CONTRACT**

12. (1) The following terms are deemed to be expressly set out in every contract that provides for the payment of any money by the Government— Deemed terms.

- (a) the contractor declares and warrants that the contractor has not, directly or indirectly, paid or agreed to pay, and shall not, directly or indirectly,

pay a facilitation or contingency fee to any individual for the solicitation, negotiation or obtaining of the contract contrary to the provisions of the Anti-Corruption and Economic Crimes Act, 2003 or any other applicable Anti-Corruption and Anti-Bribery laws;

- (b) the contractor declares that the contractor has not been convicted of an offence under the Anti-Corruption and Economic Crimes Act, 2003 or other applicable Anti-Corruption and Anti-Bribery laws or that, if the contractor has been convicted of any of those offences, it is one which—
- (i) a pardon was granted under the provisions of the Penal Code and other applicable criminal laws;
  - (ii) a record suspension has been ordered under the Penal Code or any other applicable law and that has not been revoked or ceased to have effect;
  - (iii) an order of restoration was made under the Penal Code or any other applicable law that restores the contractor's capacity to enter into the contract or to receive any benefit under the contract as the case may be; or
  - (iv) the conviction was set aside by a competent authority;
- (c) the contractor consents to public disclosure of basic information other than information limited by the provisions of section 6 (1) (e) of the Access to Information Act, 2016, relating to the commercial interests; and
- (d) if the contractor makes false declaration under paragraph (a) or (b) or fails to comply with the terms set out in paragraph (c), it is an act of default under the contract and the contractor agrees, in addition to any other remedies that may be available against the contractor, to immediately return any advance payments and agrees that the contracting authority may terminate the contract.

(2) The following terms are deemed to be expressly set out in every bid contract that provides for the payment of any money by the Government—

- (a) the bidder declares that the bidder has not, directly or indirectly, paid or agreed to pay, and shall not, directly or indirectly, pay a contingency fee to any individual for the solicitation, negotiation or obtaining of the contract contrary to the provisions of the Anti-Corruption and Economic Crimes Act, 2003 or other applicable Anti-Corruption and Anti-Bribery laws; No. 3 of 2003.
  
- (b) the bidder declares that the bidder has not been convicted of an offence under the Anti-Corruption and Economic Crimes Act, 2003 and other applicable Anti-Corruption and Anti-Bribery laws or that, if the bidder has been convicted of any of those offences, it is one which— No. 31 of 2016.
  - (i) a pardon was granted under the provisions of the Penal Code and other applicable criminal laws;
  - (ii) a record suspension has been ordered under the Penal Code and that has not been revoked or ceased to have effect;
  - (iii) an order of restoration was made under the Penal Code that restores the bidder's capacity to enter into the contract or to receive any benefit under the contract as the case may be; or Cap. 63.
  - (iv) the conviction was set aside by a competent authority.
  
- (c) if the bidder makes false declaration under paragraph (a) or (b) or fails to comply with the terms set out in paragraph (c), it is an act of default under the contract and the bidder agrees, in addition to any other remedies that may be available against the bidder, that the contracting authority may terminate the contract.

**PART IV—GENERAL PROVISIONS**

**13.** A contract made after the commencement of this Act shall not be binding upon the government, unless entered into in accordance with this Act and the Constitution.

No other contracts to be binding.

**14.** (1) A public officer shall not—

Limitation of personal liability and indemnity of Government and public officers.

- (a) in his personal capacity, be liable to be sued upon any contract which he makes in his or her capacity as an accounting officer or as a duly authorised officer, but a public officer shall be personally liable when he expressly pledges his or her personal credit or where he or she contracts otherwise than as the authorised agent of the government;
- (b) when acting on behalf of the government, be liable to be sued for breach of an implied warranty of his authority to enter into any contract, if that public officer is not liable under the grounds set out under sections 202 and 203 of the Public Finance Management Act, 2012;
- (c) in his personal capacity, be liable in civil or criminal proceedings in respect of any act or omissions done in good faith in the performance of his duties under this Act;

(2) A procuring entity shall indemnify an employee or member of a board of a procuring entity who is a party to a suit or a proceeding whether civil, criminal or administrative in nature brought against him or her in performance of his or her official functions in a procurement or asset disposal proceeding:

Provided that employee or member of a board of a procuring entity shall have engaged the services of a private lawyer or external counsel and has not been adjudged guilty of gross negligence, misconduct or grave abuse of office.

**15.** (1) The Attorney-General may make Regulations for the better carrying out of the provisions of this Act and, without limiting the generality of the foregoing, may issue guidelines to facilitate the implementation of this Act.

Making of Regulations.

(2) For the purpose of Article 94(6) of the Constitution—

- (a) the purpose and objective of the delegation under this section is to enable the Attorney General to make regulations to provide for the better carrying into effect the provisions of this Act;
- (b) the authority of the Attorney General to make regulations under this Act will be limited to bringing into effect the provisions of this Act and fulfillment of the objectives specified under this section;
- (c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act.

**16. (1)** The Government Contracts Act is repealed.

Repeal of Cap. 25.

(2) Notwithstanding the provisions of subsection (1), any contract entered into in good faith for the public service of the government before the commencement of this Act, and purporting to be made on behalf of the government shall be deemed to be a contract duly entered into on behalf of the government as if it was entered into under this Act.

**FIRST SCHEDULE  
AUTHORIZATION**

(Section 8)

I,.....Accounting Officer,..... hereby authorise  
..... to sign the contract between the national  
government/county government and .....

.....  
for.....

.....  
(Here briefly describe the particular contract)

*(Signed)*

.....

*Accounting Officer*

*(Signed)*



**SECOND SCHEDULE**

(Section 9 (2))

**EXEMPTIONS**

The following contracting authorities exempted from the provisions of  
section 9 (1)—

- (a) The Parliamentary Service Commission of Kenya
- (b) Judicial service Commission.

## MEMORANDUM OF OBJECTS AND REASONS

The principal object of the Bill is to provide for the making of contracts on behalf of the Government and for connected purposes.

**PART I (Clauses 1-5)** of the Bill provides for preliminary matters, including the interpretation of technical terms used in the Bill, the object of the Act and its application.

**PART II (Clauses 6-11)** of the Bill contains provisions relating to conditions of contract entry. One of the outstanding condition is that all contracts entered into by the national government or county government shall, subject to the pecuniary threshold, be cleared by the Attorney-General or the county Attorney, respectively, before they are signed.

**PART III (Clauses 12)** of the Bill provides for terms that are implied in every contract that provides for the payment of any money by the Government. This includes the declaration that the contractor has not, directly or indirectly, paid or agreed to pay, and shall not, directly or indirectly, pay a contingency fee to any individual for the solicitation, negotiation or obtaining of the contract contrary to the provisions of the Anti-Corruption and Economic Crimes Act, 2003 or other applicable Anti-Corruption and Anti-Bribery laws.

**PART IV (Clauses 13-16)** of the Bill provides for general provisions of the Act and amongst them the limitation of personal liability and indemnity of government and public officers. Clause 16 further repeals the Government Contract Act (*Cap. 25*).

### **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

The Bill does not limit fundamental rights and freedoms.

### **Statement that the Bill concerns county governments**

The Bill may concern County Governments in terms of Article 110 (1) (a) of the Constitution as it affects the functions and powers of County Government set out in the Fourth Schedule.

### **Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution**

The enactment of this Bill shall not occasion additional expenditure of public funds to be provided for through the annual estimates.

Dated the 25th March, 2018.

ADEN DUALE,  
*Leader of Majority.*