

**International  
Comparative  
Legal Guides**



Practical cross-border insights into public procurement

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**EU Public Procurement Rules**

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## 1 Relevant Legislation

### 1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

#### The Constitution of Kenya, 2010

The Constitution in Article 227 requires that public procurement be carried out in a system that is fair, equitable, transparent, competitive and cost-effective. Supplementary Constitutional provisions which ought to be adhered to in public procurement include:

- the national values (Article 10);
- equality and freedom from discrimination (Article 27);
- affirmative action programmes (Article 55);
- principles of Public Finance (Article 201);
- the values and principles of public service (Article 232); and
- Chapter 6 of the Constitution on Leadership and Integrity.

#### The Public Procurement and Asset Disposal Act, 2015 (PPADA) and the Public Procurement and Asset Disposal Regulations, 2020 (PPADR)

The PPADA and PPADR serve as the guide in all matters of procurement and asset disposal in Kenya. They bring to life the provisions of Article 227 (1) of the Constitution. The Act establishes the Public Procurement Regulatory Authority (PPRA) and the Public Procurement Administrative Review Board (PPARB), which serve as the watchdogs for public procurement in Kenya.

The PPADA and PPADR detail roles and responsibilities of county governments in the following areas: public procurement; the powers of regulatory bodies to ensure compliance with the procurement laws; internal organisation of procuring entities in procurement; general procurement principles and procurement planning; various modes of procurement and applicable procedures; administrative review of decisions of procuring entities; and offences and sanctions applicable in public procurement.

### 1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The basic underlying principles are provided under Article 227(1) of the Constitution (see question 1.1 above).

Section 3 of the PPADA provides the national values and principles and affirmative action programmes provided for under Articles 10, 27, 55, 56, 201 and 232 of the Constitution; principles of integrity, value for money and promotion of local industry and citizen contractors.

### 1.3 Are there special rules in relation to procurement in specific sectors or areas?

Procurements for all public entities, including national security organs must comply with the provisions of the PPADA and use the procurement methods provided therein. The PPADA provides for Classified Procurement Methods and procedures for procurements carried out by the national security organs. The PPADA also allows a procuring entity to use Specially Permitted Procurement Procedures in specific cases such as when use of other methods is impractical or uneconomical, if permitted by the National Treasury.

### 1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

#### The Public Finance Management Act, 2012 (PFMA)

The object of the PFMA is to ensure public finances are managed in accordance with the principles in the Constitution and to ensure accountability, transparency and efficiency in the management of public finances. The PFMA outlines the role of accounting officers of public entities to ensure the keeping of accurate and legally compliant accounting records, among other duties.

#### The Public Officers Ethics Act, 2003

This Act advances the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers. It details how public officers should carry out their duties, with efficiency, honesty, professionalism and integrity, avoiding conflicts of interest, and with political neutrality.

#### The Public Audit Act, 2015

This Act empowers the Auditor General to undertake audit activities in state organs and public entities to confirm whether

public money has been applied lawfully. This includes auditing public procurements in public entities.

### Leadership and Integrity Act, 2012

The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution, these being the values and principles provided for in Articles 10, 73, 75, 99(1)(b) and 193(1)(b), 174 and 132 and the fundamental rights and freedoms in Chapter Four of the Constitution.

### Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003

This Act contains provisions on the protection of public property and revenue including in tendering. Failure to comply with procurement laws and guidelines is an offence under the Act.

#### 1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

According to section 4 of the PPADA, public procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or multilateral agency are not procurements or asset disposals to which the PPADA applies, unless the Regulations or the International Agreement or rules prescribe otherwise. This allows for implementation of such Agreements without conflict with the applicable municipal legislation.

## 2 Application of the Law to Entities and Contracts

### 2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

The PPADA gives effect to Article 227 of the Constitution and provides procedures for efficient public procurement and for assets disposal by public entities.

Section 2 of the PPADA defines public entities and includes a comprehensive list of such entities at both the national and county governments levels including the Judiciary, Legislature and offices established under the Constitution. These are entities that use public money for purposes of procurement and any entity declared to become a public entity under PFMA.

### 2.2 Which types of contracts are covered?

Contracts for procurement of goods, works or services, including asset disposal. Section 4 (2) of the PPADA provides for contracts which are excluded from the Act, such as employment contracts or contracts for services offered between government departments or procurements under other laws such as the Public Private Partnerships Act.

### 2.3 Are there financial thresholds for determining individual contract coverage?

Yes. Section 45 of the PPADA provides that all procurement processes shall be undertaken within the approved budget and as per the prescribed threshold matrix. The Second Schedule of the PPADR provides the threshold matrix which provides for the maximum and minimum level of expenditure allowed for the use of a particular procurement method.

Financial thresholds are also set for exclusive preference to citizen contractors in regulation 163, this being: (a) 1 billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and (b) 500 million shillings for procurements in respect of goods and services.

### 2.4 Are there aggregation and/or anti-avoidance rules?

Section 54 of the PPADA prohibits splitting of contracts. No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure, except where prescribed.

Collusion among bidders is included in the definition of fraudulent practices in section 2 of the PPADA. Splitting of contracts contrary to section 54 of the PPADA and fraudulent acts are listed in section 176 (h) which outlines prohibitions and offences and provides for penalties for the offences.

### 2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Rules for concession contracts are provided for in the Public Private Partnership Act, Act No. 14 of 2021 (the PPP Act). The Regulations for the PPP Act are currently being drafted.

Section 2 of the PPP Act defines “**concession**” to mean a contractual licence formalised by a project agreement, which may be linked to a separate interest or right over real property, with or without a fee to the Government, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession.

The Second Schedule of the PPP Act provides for a Brownfield Concession permitted for no more than 30 years. Other arrangements in the Second Schedule may qualify as concessions depending on the Agreement.

### 2.6 Are there special rules for the conclusion of framework agreements?

Yes. Sections 2 and 114 of the PPADA defines framework agreements and applicable rules. These prescribe circumstances under which a procuring entity may enter into a framework agreement, the maximum term of the framework agreements (three years), evaluation of bids carried out under the framework agreement and reporting requirements. Regulations 103 to 105 of the PPADR provides for detailed rules including thresholds, indexing of prices and the process of making call-off orders.

### 2.7 Are there special rules on the division of contracts into lots?

Yes. Regulation 154 of the PPADR stipulates that a procuring entity may, for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities.

A procuring entity in unbundling procurements in paragraph (1) may allocate goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings.

### 2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Outside Kenya, purchasers owe the following obligations to suppliers:

- Obligation to treat them fairly and equitably.
- Obligation to evaluate their tenders in accordance with the procedures and criteria in the tender document.
- Obligation to inform them, in writing, of the outcome of their bids, including why they were unsuccessful.
- Obligation to comply with the terms of the contract entered between the purchaser and the supplier and legal provisions on relating to contracts.
- Ensuring that technical requirements shall be based on international standards or standards widely used in international trade.
- Use of currencies widely used in international trade in tendering.
- Respect and observance of international norms in procurement.
- Providing for use of Letters of Credit in international transactions.
- Ensuring wide reach in advertisement of tenders.
- Allowing adequate time in tender processes.

## 3 Award Procedures

### 3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

Section 86 of the PPADA provides that procuring entities shall award a tender to the tenderer who meets any one of the following requirements as specified in the tender document:

- the tender with the lowest evaluated price;
- the responsive proposal with the highest score determined by the procuring entity by combining the scores assigned to the technical and financial proposals where Request for Proposals method is used;
- the tender with the lowest evaluated total cost of ownership; or
- the tender with the highest technical score, where a tender is to be evaluated based on procedures provides guidelines for arriving at applicable professional charges.

The award procedures are linked to specific procurement methods provided in Part IX of the PPADA and there is no free choice e.g., when using Open Tender method, an award is made to the tender with the lowest evaluated price.

### 3.2 What are the minimum timescales?

There are no minimum timescales prescribed for award. However, the award has to be made before the expiry of the period within which tenders must remain valid.

### 3.3 What are the rules on excluding/short-listing tenderers?

Any tender submitted after the deadline shall not be accepted by the procuring entity (section 77 (3) of the PPADA).

Section 78 (7) of the PPADA provides that no tenderer shall be disqualified by the procuring entity during opening of tenders.

During evaluation of tenders, bidders are eliminated if they fail to meet eligibility and mandatory requirements provided in

sections 55 and 79 (1) of the PPADA. Failure to meet mandatory tender formalities, even minor ones, leads to automatic disqualification of a bidder, regardless of the strength of a bidder's technical proposal.

Shortlisting at the technical stage will be based on other procedures and criteria in the tender document (section 80 of the PPADA). Thereafter, short-listing on price is based on the rules in section 86 of the PPADA (see question 3.1 above).

Tenderers that have made it past preliminary, technical and financial evaluation may be eliminated during post qualification – due diligence (section 83 of the PPADA).

### 3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The evaluation committee appointed by the accounting officer pursuant to section 46 of the PPADA evaluates and compares the responsive tenders other than rejected tenders.

- The evaluation and comparison of tenders is carried out using the procedures and criteria set out in the tender documents and, in the tender for professional services, consideration of laws on regulation of fees (section 80 of PPADA).
- The evaluation committee prepares an evaluation report and submits the report to the person responsible for procurement for review and recommendation, who submits such report with recommendations to the accounting officer for approval.
- The evaluation and comparison of tenders should be carried out within 30 days or 21 days for requests for proposals.
- Award is based on the provisions of section 86 of the PPADA and is dependent on the procurement methods found in part IX and X of the PPADA (see question 3.1 above).
- Social value considerations are incorporated through preferences and reservations in Part XII of the PPADA. Tenders may be reserved for disadvantaged groups or impose local content requirements.

### 3.5 What are the rules on the evaluation of abnormally low tenders?

The rules on abnormally low tenders are addressed under Standard Tender Documents available on the PPRA website. Procuring entities are required to use them as a basis for preparation of their tender documents as stipulated in section 70 (2) of the PPADA.

Section 70 (5) (b) of the PPADA provides in part that a person shall not be disqualified on the basis that a bidder quoted above or below a certain percentage of engineer's estimates.

Clause 37. 2 of the Standard Tender Document for Works provides that in the event of identification of a potentially Abnormally Low Tender, the procuring entity shall seek written clarifications from the tenderer, including detailed price analyses of its tender price.

After evaluation of the price analyses, if the procuring entity determines that the tenderer has failed to demonstrate its capability to perform the Contract for the offered tender price, the procuring entity shall reject the tender.

### 3.6 What are the rules on awarding the contract?

It starts with identification of that tenderer as provided for in section 86 of the PPADA (see question 3.1 above).

Upon award of the contract and prior to the expiry of the tender validity period, a procuring entity should issue a

Notification of Intention to Enter into a Contract/Notification of Award to all tenderers containing the information in section 87 of PPADA and regulation 82 of PPADR, such as name and contract price of the successful tender.

A contract should not be signed earlier than the expiry of a standstill period of 14 days to allow any dissatisfied tenderer to launch a complaint before the PPARB.

### 3.7 What are the rules on debriefing unsuccessful bidders?

Section 87 (3) of the PPADA requires that when a person submitting the successful tender is notified, the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

Additionally, a debriefing clause is included in standard tender documents issued by the PPRA. An unsuccessful tenderer may make a written request to the procuring entity for a debriefing on specific issues and stipulates the timelines and manner of the debriefings.

The days spent on the debriefing form part of the 14-day window to appeal to the PPARB. The procuring entity cannot reverse its decision after issuance of the award letters even if the debriefing uncovers a material error. The reversal of the award can only be done by the PPRA or PPARB.

### 3.8 What methods are available for joint procurements?

A tenderer may be a firm that is a private entity, a state-owned enterprise or institution, or any combination of such entities in the form of a joint venture (JV) or consortium under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent.

The joint venture is required to nominate a representative who should have the authority to conduct all business on behalf of all the members of the JV during the tendering process and contract execution if successful.

Section 50 of the PPADA provides for consortium buying where procuring entities with common interests may come together to procure jointly to enjoy economies of scale.

### 3.9 What are the rules on alternative/variant bids?

The PPADA and PPADR do not contain provisions on alternative/variant bids. Provisions on alternative bids are contained in Standard Tender Documents.

In the Standard Tender Document for Works, the rules on alternative tenders include:

- The procuring entity should specify in the tender document whether it will allow alternative bids.
- A tenderer (individually or JV) shall not participate in more than one tender, except for permitted alternative tenders.
- Alternative tenders may take the form of allowing for alternative times for completion or alternative technical requirements.
- Where the tender document allows for alternative technical requirements, more detailed rules should be provided.

### 3.10 What are the rules on conflicts of interest?

Where a person submitting a tender, proposal or quotation; or if direct procurement is being used, a person with whom the procuring entity is negotiating has a conflict of interest, that person shall be:

- disqualified from entering into a contract for a procurement or asset disposal proceeding; or
- if a contract has already been entered into with the person, the contract shall be voidable.

An employee, agent, member of the Board or committee of a procuring entity who has a conflict of interest with respect to a procurement:

- should not take part in the procurement proceedings;
- should not take part in any decision relating to the procurement or contract; and
- should not be either a subcontractor for the bidder to whom the contract was awarded, or a member of the group of bidders to whom the contract was awarded.

Public officers of a procuring entity, their spouses, children, parents, brothers or sisters, children, parents, brothers or sisters of a spouse, their business associates or agents, and firms/organisations in which they have a substantial or controlling interest are not eligible to tender or be awarded a contract. Public officers are also not allowed to participate in any public procurement proceedings.

If an employee, agent, or member of the Board or committee of a procuring entity takes part in the procurement proceedings, and the contract is awarded to either the person, their relative, or to another person in whom one of them had a direct or indirect pecuniary interest; the contract shall be terminated and all costs incurred by the public entity must be made good by the awarding officer.

Standard tender documents contain a form on disclosure of conflict of interest which tenderers are required to fill.

### 3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Market engagement may take the form of pre-bid conferences and site visits, as provided in the Tender Documents and inquiries/request for clarifications from bidders, which may result in the modification of the Tender Documents through issuance of Addenda to factor in feedback from bidders (*see section 75 of the PPADA and regulations 184 and 186 of PPADR*).

In cases regarding a potential bidder, or any of its affiliates, who participates in the preparation of the design or technical specifications of works, goods or services, that are the subject of a procurement procedure as a consultant; or any of its affiliates has been hired (*or is proposed to be hired*) by a procuring entity, or for contract implementation, or would be providing lease items, works, or non-consulting services resulting from, or directly related to, consulting services for the preparation or implementation of a project (that it provided or were provided by any affiliate that directly or indirectly controls, is controlled by, or is under common control with that potential bidder); such a bidder is considered to have a conflict of interest, and the rules outlined in question 3.10 above will apply as appropriate.

## 4 Exclusions and Exemptions (including in-house arrangements)

### 4.1 What are the principal exclusions/exemptions?

Section 4 (2) of the PPADA provides activities which are not considered procurements or asset disposals with respect to which the PPADA applies. The exempt procurements include employment contracts for a limited term other than contract of service, the transfer of assets/procurements between state

organs without financial consideration, procurements under the PPP Act and between government under an international agreement or treaty.

#### 4.2 How does the law apply to “in-house” arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Section 4 (2) (b) and (c) of the PPADA (*see question 4.1 above*) provides that the PPADA does not apply to such procurements that involve the transfer of assets between public entities without valuable consideration and acquiring services provided by government departments by other government entities.

## 5 Remedies

#### 5.1 Does the legislation provide for remedies and if so what is the general outline of this?

Yes. A request for review is an application made to the PPARB by a candidate or a tenderer who claims to have suffered or to risk suffering loss or damage due to breach of a duty imposed on a procuring entity by the PPADA and/or PPADR. The administrative review should be sought within 14 days of notification of award or the date of occurrence of alleged breach at any stage of a procurement process (*section 171 (1) of the PPADA*).

The parties to a request for review consist of the person who requested the review, the accounting officer of the procuring entity, the tenderer who was notified as successful by the procuring entity and such other persons as the PPARB may determine.

The PPADA affords a person aggrieved by the decision of the PPARB the right to seek judicial review at the High Court within 14 days from the date of the decision of the PPARB, failure to which the decision of the PPARB will be final and binding (*section 175 (3) of the PPADA*).

The PPARB has wide powers and may give any of the remedies outlined in section 173 of the PPADA, including annulling the decision of the accounting officer, terminating the procurement proceedings or ordering costs.

A person who is aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of the decision of the High Court. The decision made by the Court of Appeal shall be final (*section 175 (4) of the PPADA*).

They may also Request the PPRA initiate an investigation of procurement or disposal proceedings or contract to determine whether there has been a breach of the PPADA, if the matter is not subject to review by PPARB.

If the Director General of the PPRA is satisfied there has been a breach off the PPADA, he can make orders such as termination of the procurement proceedings or debarment (*sections 38 and 41 of PPADA*).

A person who is aggrieved by the PPRA orders may file a request for judicial review to the High Court within 14 days after the orders are made.

#### 5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

Yes – one may file a Constitutional Petition. The doctrine of exhaustion may be raised as a bar for not utilising the remedies provided under the PPADA. This procedure takes a long time and may be ineffective without a stay order, since the procurement process may be concluded before the judgement is delivered.

#### 5.3 Before which body or bodies can remedies be sought?

- The Public Procurement Administrative Review Board (PPARB).
- The Public Procurement Regulatory Authority (PPRA).
- The High Court of Kenya.
- The Court of Appeal.
- The Ethics and Anti-Corruption Commission for corruption complaints.

#### 5.4 What are the limitation periods for applying for remedies?

See question 5.1 above for the limitation periods.

The Court of Appeal has held that the above timelines are cast in stone. The PPARB and the Courts lack jurisdiction to entertain appeals filed outside time. (See question 5.8 below.)

The PPADA does not specify the timelines within which a person should request the PPRA to initiate an investigation.

No timelines are stipulated for filing and hearing constitutional petitions relating to public procurement. Delays in filing might deny the aggrieved person a meaningful remedy where the Judgment is delivered after implementation of the procurement contract.

#### 5.5 What measures can be taken to shorten limitation periods?

The following measures can be taken to shorten limitation periods:

- Strict compliance by the PPARB and the Courts with the timelines provided in the PPADA by refusing to assume jurisdiction where appeals are filed out of time.
- In the case of constitutional petitions relating to public procurement to address issues in Articles 10, 35, 47, 201, 227 & 232 of the Constitution, timelines need to be prescribed in legislation.
- Prescribing timelines for PPRA investigations.

#### 5.6 What remedies are available after contract signature?

A judicial review or other application can be filed before the High Court, and if dissatisfied with the decision of the High Court, an appeal lies at the Court of Appeal. Contracts signed irregularly may be annulled by PPARB.

#### 5.7 What is the likely timescale if an application for remedies is made?

See timelines in question 5.1 above.

#### 5.8 What are the leading examples of cases in which remedies measures have been obtained?

*Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR* – an authority which has resulted to the quashing of illegal tender terminations. It was held “*the Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to*

warrant termination of a procurement process, in order to make a determination whether the Boards jurisdiction is ousted by section 167 (4) (b) of the Act.”

*Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/s Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR*, is a leading authority on compliant tenders and due diligence/post-qualification. It held that “in public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders.”

*Miscellaneous Civil Application 140 of 2019, Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR* – Mandatory requirements in a bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

*Civil Appeal E039 of 2021 Aprim Consultants vs Parliamentary Service Commission & The Public Procurement Administrative Review Board* – the timelines under section 175 of the PPADA cannot be varied as they accentuate the intention of Parliament to ensure public procurement disputes are disposed of expeditiously. This has ensured timely decision making and quashing of judgements issued outside of these timelines.

*Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment)* – the broad powers of the PPARB under section 28 and 173 of the PPADA include the power to extend tender validity in situations where a rogue accounting officer fails to adhere to statutory timelines or disobeys the Board’s directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. The accounting officer was ordered to issue a notification of award to the bidder within 30 days of the judgment.

*Civil Appeal No. 13 of 2015 – Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR* – In this case on the procurement of the Standard Gauge Railway (SGR), the Court of Appeal held that in enacting section 6 of the PPADA, it was not intended that the identification of a supplier of goods and services (in effect the procurement) would precede the loan agreement to oust the application of procurement procedures under the PPADA. The contract could not be quashed as it had already been implemented due to the lengthy timelines of the case.

#### 5.9 What mitigation measures, if any, are available to contracting authorities?

The PPADA allows the procuring entity to request for a tender security from tenderers and performance security from the successful bidder and provides for circumstances under which the securities may be forfeited (sections 61 and 142 of the PPADA). Sections 63 and 153 of the PPADA allow a contracting authority to terminate a procurement process or a contract where procurement processes have been overtaken by operation of law or substantial technological changes, inadequate budgetary provision, *force majeure*, non-performance or upon receiving evidence of fraud or corruption by the tenderer.

## 6 Changes During a Procedure and After a Procedure

#### 6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes

#### to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Section 75 (1) of the PPADA provides that procuring entities may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum, without materially altering the substance of the original tender and may extend the deadline for tender submission to give sufficient time to bidders to respond.

A person who submitted a tender may withdraw or modify its bid, including by changing the composition of the consortia, before the deadline for submitting tenders.

Once the deadline for submitting tenders has been reached, a procuring entity wishing to introduce changes to the tender document may only do so through tender termination under section 63 of the PPADA and re-advertising the tender.

A bidder cannot withdraw their bid after the deadline for submission of tenders without forfeiting its tender security as per section 61 of the PPADA.

Modification of bids after the submission date is not permitted except for pricing where competitive negotiations are permitted subject to the rules in section 128 and 131 of the PPADA.

The Rules are aimed at promoting fairness by prohibiting the changing of the rules after tender submission or after contract award.

#### 6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where:

- there is a tie in the lowest evaluated price by two or more tenderers;
- there is a tie in the highest combined score points;
- the lowest evaluated price is in excess of available budget; or
- there is an urgent need that can be met by several known suppliers.

#### 6.3 To what extent are changes permitted post-contract signature?

An accounting officer of a procuring entity, on the recommendation of an evaluation committee or as prescribed in the signed Contract Agreement, may approve the request for the extension of the contract period, which request shall be accompanied by a letter from the tenderer making justifications for such extension or may approve the request for use of certain costs such as prime costs or contingencies.

Amendments and variation of contracts must comply with PPADA provisions such as ensuring the cumulative value of all variations do not exceed by original contract price by 25 per cent (section 139 of PPADA).

#### 6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

If the tender documents do not prohibit subcontracting, the successful tenderer may subcontract part of the tender but only if the person to be subcontracted has not been debarred from procurement proceedings or participated in the procurement of goods, works or services related to that contract. The successful



tenderer is then responsible for the sub-contractor's obligations towards the procuring entity. (Section 149 (1) of the PPADA).

Tender Documents contain clauses on assignment of contracts with conditions such as requiring the procuring entity be informed and give prior approval for sub-contracting.

## 7 Privatisations and PPPs

### 7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Yes. The Privatization Act, No. 2 of 2005 provides for the privatisation of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatisation programme by a Privatization Commission to be established by the Act.

The Privatization Act inhibits privatisations since only the Privatization Commission is mandated to exclusively manage and implement any privatisation programme.

In October 2022, the President of the Republic of Kenya instructed relevant parties to commence the review of the Privatization Act with a view to repealing and replacing it with a more facilitative framework that will accelerate privatisations.

### 7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

Yes. PPPs are governed by the PPP Act, 2021. It provides for the participation of the private sector in the design, financing, construction, development, rehabilitation, operation, equipping or maintenance of infrastructure, or development projects through PPPs, and streamlines the regulatory framework for PPPs.

The provisions of the PPADA do not apply to PPP projects, if all the monies for the project are from the private party but apply if there is counterpart public funding for the PPP project.

The PPP Act includes a framework for streamlined project processes with clear timelines, expanded procurement options and robust processes for Privately Initiated Investment Proposals (PIIP).

Under the PPP Act, the role of the private sector in PPP initiatives is stipulated beyond financing to include construction, operation and maintenance of the projects. It adds permissible contract structures, including public-private joint ventures and strategic partnerships. This has broadened the scope of what is classified as a PPP, channelling more contracting arrangements between the public and private sector.

## 8 The Future

### 8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Yes. The new Government sworn in on 13<sup>th</sup> September 2022 has indicated it might re-introduce the Public Procurement and Asset Disposal (Amendment) Bill, 2019. The Bill proposes reservation of tenders below KES 1 billion for local/citizen contractors.

More changes in form of better implementation or revisions to the provisions on Preferences and Reservations as provided in Part XII of the PPADA could be made to enable more involvement of disadvantaged groups in public procurement.

### 8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

In June 2022, the PPRA issued Guidelines for Registration and Licensing of Procuring or Asset Disposal Agents to operationalise section 51 of the PPADA and regulation 38 of the PPADR. The effect, if any, of the Guidelines will be seen over the next three years.

The finalisation of the PPP Regulations may divert some capital-intensive infrastructure projects from the PPADA to the PPP Act, to reduce use of public funding and expensive debt instruments for procurement.



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George has extensive experience in advising clients on procurement and disposal of assets. His expertise includes representation of clients in procurement proceedings before the Public Procurement Administrative Review Board (PPARB), High Court and Court of Appeal, and provision of public procurement consultancy and advisory services.

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In 2017, as an Associate at Wambugu & Muriuki Advocates, she worked with Mr. George Karuthui Kamau in successfully defending the cases involving Ballot Papers prior to the 2017 elections at the High Court at Nairobi and the Court of Appeal at Nairobi.

Further, Sylvia has been involved in handling various public procurement and asset disposal matters from 2016 to date, including drafting of request for reviews and various memorandums of response and submissions.

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Gerivia Advocates LLP is a Kenyan and African boutique law firm based in Nairobi that aims to provide tailor-made legal solutions to our clients. The firm was established in February 2020, with a leadership team of three Partners with vast legal experience gained within law firms, the private sector, government parastatals and in the UN/NGO sectors.

The firm is situated in two unique locations. Our Head Office is based at Gigiri while the second office is based at the Jomo Kenyatta International Airport (JKIA).

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