REVIEW FEEDBACK ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILLS, 2001 (FEEDBACK ON BOTH THE GLADYS WANGA BILL AND THE AMOS KIMUNYA BILL)

FEEDBACK ON THE PROPOSED AMENDMENTS IN THE AMOS KIMUNYA BILL			
	SECTION OF THE BILL / ACT	**FEEDBACK/ COMMENT**	**RECOMMENDATIONS**
1.	Clauses on correction of minor errors such as use of wrong terminology or / typos in citing sections in the Parent Act.	The Bill contains quite a number of these corrections which we agree with. These corrections are a step in the right direction	Adopt these changes. Comments below will focus on substantive provisions of the Bill that we are opposed to or have different opinion on how they can be implemented better.
2.	Also correct Section 106 (1) (b)	The reference to Section 67 in that section is erroneous as this section is on confidentiality not specific requirements	Replace Section 67 in Section 106 (1) (b) of the Act with Section 60
3.	Clause 2 of the Bill correcting Section 2 of the principal Act – Definition of "Local Contractor"	This definition should be reconciled with the provisions and spirit of Section 147 (1) (a) of the Principal Act which states that a firm shall be qualified (a) As a local contractor if it is registered in Kenya and has above fifty-one (51%) Kenyan shareholding	The definition should not merely be about registration or operation in Kenya, but how the local population benefits. This definition is tied to some benefits such as preferences and reservations. It is of no use if foreigners gain access to such benefits simply because they registered a company in Kenya and operate in Kenya, without any investment.
4.	Clause 2 amending section 2 on definition of Procurement Professional	The Act defines procurement professional and not procurement profession as stated in the Bill.	Make reference to the correct term

	Clause 8 of the Bill, seeking to amend Section 41 of the principal Act - Debarment for filing frivolous and vexatious procurement proceedings.	We are strongly opposed to this proposed amendment and consider it retrogressive and one that is meant to scare potential litigants from challenging procurement proceedings.	The current powers of the Board under Section 172 of the Act to order forfeiture of the deposit and in Section 173 (d) to order payment of costs are a sufficient remedy. Debarment opens the door for further litigation because a bidder who is debarred under this proposed section would still have a right to appeal this decision to the High Court.
5.	Clause 15 of the Bill seeking to amend Section 54 of the Principal Act	The PPRA is mandated in Section 9 (m) to create a database of market prices of goods, services and works, benchmarked prices and price comparisons and in Section 54 of the parent Act to issue a quarterly market price index. The PPRA does this in practice and the index is available on its website	Reconcile this provision with Section 9 (m) and 54 of the Act on the role of the PPRA in order to avoid duplicity and wastage of resources. The idea of PPRA doing this is also to avoid subjectivity in pricing when the index is done by multiple entities. Consider taking the approach of procuring entities utilizing the available information from PPRA or liaising with PPRA to ensure creation of a comprehensive database when they observe that products in their line of work are not covered in PPRA's survey.
6.	Clause 19 of the Bill amending Section 80 of the Principal Act	We are opposed to this amendment and feel the timelines should be left as they are. The reason given for shortening the evaluation period is "hastening the	Abandon this proposed amendment.

		procurement process". This reason is insufficient. Unrealistic timelines and expectations result to non-compliance with the law which reduces the impact of the law. Tenders are bulky, tender review is a time consuming and labor-intensive exercise. Procuring entities are not just reviewing one tender and they also have other tasks. Give them sufficient time to do a proper tender review that will stand the test of scrutiny by the Board and Courts. This proposal is also conflicted noting that the Gladys Wanga Bill proposed an increase in days to 30 Business Days, more than the days in the current law.	Consider stipulating when evaluation should commence for example, *"evaluation should commence within 2 days of tender opening" or "evaluation should commence immediately after tender opening*." This will ensure there is no time wastage and integrity issues do not arise when tenders are received and opened and then evaluation commences 2 weeks later.
7.	Clause 24 amending Section 94 (4) of the parent Act (timelines)	Same comment as above opposing reduction of timelines for compilation of bids. 14 days is a reasonable timeline that allows bidders sufficient time to submit quality and responsive bids. The 14 days are also useful in cases of complex tenders where bidders need to form joint ventures or such other teaming arrangements which may take time to set up. The law provides for emergency procedures where procurement needs to be undertaken in a speedier manner.	Abandon this proposed amendment. Leave the timelines in Section 94 as they are.
8.	Clause 25 of the Bill in amending Section 96 of the Act	The addition of advertising in Radio and Television is commendable to reach those unreached populations. However, this should be in addition to advertising in the Government Portal and in the website of the procuring entity. The advertising in the Government tender portal and the website of the procuring entity	We propose the wording to be revised to read as follows. 96 (2) …, the procuring entity shall advertise in the dedicated Government tenders' portals **and** in its own website,

		should be a mandatory minimum. That way, even with oral advertising in radio or television, there is a good written record of the tender advertisement.	**or** a notice in at least two daily newspapers of nationwide circulation **or** a notice in at least two free to air television stations and two radio stations of national reach.
9.	Clause 32 of the Bill in amending Section 126 of the Act	Leave the timelines as they are. 21 days is an upper limit, nothing stops a procuring entity from reviewing the document within 7 days if is able to do so. Unrealistic timelines promote non-compliance with the law. There is no point in creating unrealistic timelines then have to include provisos (126 (3A)) which add extra procedural tasks like extending deadlines to the already busy Accounting Officers.	Abandon the proposed amendment and the proposed proviso in Section 126 (3A)
10.	Clause 33 of the Bill in amending Section 135 of the Act	Leave the timelines as they are.	Abandon the proposed amendment
11.	Clause 35 seeking to amend Section 139 of the Act	The proposed amendment is to the effect that a procurement contract can be varied anytime. The justification issued for this is that it is meant to cover a variation in terms of quantity which might be occasioned due to unforeseen circumstances.	The clause, can be amended in a such a way that the one-year cap is only waived where quantity is to be varied. Otherwise, prices should only be varied after one year of signing the contract.
12.	Clause 39 seeking to amend Section 172 of the Principal Act	See comments above on Section 8 of the Bill, correcting Section 41 of the Act. Use of debarment to punish bidders who file requests for review which the Review Board deems as frivolous and vexatious is a disproportionate punishment, especially noting the subjective element in deciding what is frivolous. Most Applicants believe their case is strong while the opposing party almost always claims the case is frivolous.	The current powers of the Board under Section 172 of the Act to order forfeiture of the deposit (once the deposit issue is operationalized) and in Section 173 (d) to order payment of costs are a sufficient remedy. Nothing stops the Board from slapping a bidder who

			files a frivolous and vexatious claim with higher costs than it would ordinarily do, in addition to ordering forfeiture of their deposit for claims which are so obviously frivolous and vexatious.
FEEDBACK TO THE PROPOSED AMENDMENTS TO THE GLADYS WANGA BILL			
	SECTION OF THE BILL / ACT	**REVIEW FEEDBACK / COMMENTS**	**RECOMMENDATIONS**
1.	Clause 2 of the Bill amending Section 55 of the principal Act	While we agree with the objective of this proposed amendment which is to avoid disqualifying bidders due to technicalities brought about by preliminary/mandatory requirements, we hold the view that the proposed amendment is not the right way of addressing this concern. In a country where corruption is rampant, replacing the requirement to provide documents which can be verified with a statement on oath is doing too little. Incidents of false Affidavits are not uncommon in Kenya. It is unclear whether the purpose of the declaration on oath is to do away with mandatory requirements. Most of the eligibility requirements under Section 55 of the Act are what procuring entities classify as mandatory requirements. It is unclear how verification of declarations under the amendment will be done. In terms of the practicalities of the tender evaluation process, provision of copies of the documents required during the preliminary mandatory stage (most of which are captured in Section 55), could ease the work of the evaluation committee of the procuring entity for purposes of verifying compliance with mandatory requirements.	The implementation of this amendment requires further engagement with stakeholders especially procuring entities so that they can propose the most efficient approach. It also requires an amendment to Section 79 of the Act 1 and 2 of the Act. See below some proposed amendments to this section: A Tender Evaluation Committee may contact a bidder in writing who has omitted a document in support of eligibility and mandatory requirements or other information and require them to provide the document or such other missing information within a period of forty-eight (48) hours. The tender evaluation committee shall extend this opportunity of bidders availing missing

		Amend the law such that accidental omission to include a mandatory document / or provide some information e.g., filling a certain part of the form, stamping some pages etc. in a bid is not fatal but an oversight that can be cured by the procuring entity being legally authorised to request bidders to avail those documents / information or correct those minor technicalities during evaluation. This will save the country a lot of money, since many times technically qualified bidders are disqualified simply because they accidentally omitted one document or for failing to meet some minor technicality. e.g. If China Road and Bridge Corporation (a well-known and obviously technically qualified contractor) accidentally omits to attach a Tax Compliance Certificate (TCC) to its bid but its price is KES. 300 million cheaper than the next bidder, the law should allow the Evaluation Committee to contact them in writing and ask them to send their TCC for verification or do an online check. If they indeed have a valid TCC, they should be evaluated and awarded the tender. However, if it turns out they did not attach it because they do not have a valid TCC, then they can be disqualified for failure to meet the requirements of Section 55 of the Act.	documentation after tender closing date to all bidders without favour or discrimination. The evaluation committee shall document this fact in the evaluation report. A bidder who conforms to the eligibility and mandatory requirements after providing necessary documentation / information pursuant to the evaluation committee's request to provide the information after the tender closing date shall be deemed responsive based on the requirement of Section 79 (1) of the Act.
2.	Clause 4 of the Bill amending Section 80 (6)	This proposed amendment is confusing, especially when read against the Kimunya Bill which proposes reduction of many timelines in the Act. The timelines in the current Act are reasonable.	A safe middle ground it to abandon the proposed amendments on reducing timelines in the current Act and leave Section 80 (6) as is.
3.	Clause 5 of the Bill proposing to Amend Section 82 of the Act	This amendment is acceptable as the reading out of prices promotes transparency and competition.	Adopt the amendment

	Clause 7 of the Bill proposing to amend Section 96 of the Act	The content that the proposed Section 96 (5) is seeking to add are already covered under Section 74 of the Act under the marginal note, "invitation to tender". Our understanding is that this section applies to all invitations to tender	Rather than duplicate the provisions of Section 74, indicate that in addition to the provisions of Section 74, then list the additional items or amend Section 74 to cover any new situations such as those that a two-stage proposal open tender system would introduce (in the event that this proposal for a two stage open tender process is adopted)
4.	Clause 8 of the Bill proposing to amend Section 98 of the Act by introducing a Section 98A	Timelines - We are opposed to amendment of the evaluation timelines provided under Section 80 (6) of the Act i.e. evaluation shall be carried out within a maximum period of thirty days. Adding the concept of "business" to the days complicates interpretation. In any event, 30 calendar days for purposes of evaluation is reasonable and sufficient. 24 hours to submit a financial proposal – this extremely short and unrealistic timeline creates room for a lot of mischief. It is possible that the procuring entity may not reach all bidders within 24 hours, noting a day has at most 10 working hours. This creates the risk of leaving out bidders who could not be reached, especially for international bids where time zones may limit accessibility to some bidders.	Leave the evaluation timelines under Section 80 (6) as they are in the Act. In the event that the 2-stage proposal method for open tender is adopted, revise this timeline for submission of financial proposals to something more realistic like at least forty-eight (48) hours.
5.	Clause 9, seeking to amend Section 175 (5) of the Bill	We are strongly opposed to this proposed amendment. Deleting Section 175 (5) renders the timelines in this section useless as there are no tangible consequences for not complying with the timelines. Currently, Judges and staff of the	Abandon the proposed amendment. Leave Section 175 (5) of the Act as is. It is one of the most progressive provisions in the Act that promotes speedy resolution of procurement disputes.

		High Court, parties to cases and their counsels are doing their best to meet these timelines. Once the consequence of non-compliance in Section 175 (5) is removed, we go back to the days of justice being delayed and therefore denied. Failure to comply with the law must have consequences.	

Yours Faithfully,

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