

Approved for tabling. *Pat SNA*

28/11/18

REPUBLIC OF KENYA

*Paper laid
By Hon J. Lirio (Chair)
on Wed, 28/11/18*



NATIONAL ASSEMBLY

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TWELFTH PARLIAMENT – SECOND SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE AND
NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE GOVERNMENT CONTRACTS,
BILL, 2018

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 28 NOV 2018	DAY:
BY:	
CLERK-AT THE-TABLE:	NOVEMBER, 2018

TABLE OF CONTENTS

CHAIRPERSON’S FOREWORD..... 3

EXECUTIVE SUMMARY 4

1.0 PREFACE..... 8

 1.1 ESTABLISHMENT OF THE COMMITTEE..... 8

 1.2 MANDATE OF THE COMMITTEE..... 8

 1.3 COMMITTEE MEMBERSHIP..... 9

 1.4 COMMITTEE SECRETARIAT 9

2.0 COMMITTEE CONSIDERATION OF THE BILL 10

 2.1 BACKGROUND INFORMATION 10

 2.2 CLAUSE BY CLAUSE ANALYSIS..... 10

3.0 PUBLIC PARTICIPATION 12

 3.1 THE NATIONAL TREASURY..... 12

 3.2 COUNCIL OF GOVERNORS 13

 3.3 THE STATE LAW OFFICE AND DEPARTMENT OF JUSTICE 13

4.0 PROPOSED AMENDMENTS..... 14

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings on the consideration of the Government Contracts Bill, 2018, which was published on 10th April, 2018 and went through the First Reading on 24th April, 2018. The Bill was subsequently committed to the Departmental Committee on Finance and National Planning for consideration and facilitation of public participation pursuant to Standing Order 127.

In processing the Bill, the Committee invited comments from the public by placing an advertisement in the Daily Nation and Standard Newspapers on 23rd May, 2018 pursuant to Article 118 of the Constitution. In spite the request to the public for memoranda, no memorandum was submitted by close of the period for submission as advertised in the print media. In a bid to carry out further engagements with stakeholders, the Committee wrote to the National Treasury, State Law Office and Department of Justice, Council of Governors and the Ministry of Devolution and ASAL requesting for submissions. The Committee received comments on the Bill from the National Treasury, State Law Office and Department of Justice and the Council of Governors. The Committee proceeded to consider the Bill by holding a meeting on Thursday, 22nd September, 2018 and proposed amendments as contained in the report.

The Bill could not have come at a better time especially now that the country is dealing with issues relating to corruption primarily on issuance of Government contracts for goods and services. This Bill if enacted into law will ensure that all contracts made for or on behalf of national and county government shall have to be cleared by the Attorney and the county attorney respectively before award. This is aimed at weeding out the practice of top government officials awarding tenders to relatives or cronies and dummy companies to siphon public funds.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Government Contracts Bill, 2018.

EXECUTIVE SUMMARY

The Government Contracts Bill, 2018 was published on 10th April, 2018 and went through the First Reading on 24th April, 2018 and was immediately referred to the Departmental Committee on Finance and National Planning.

The main objective of the Bill is that it seeks to set out conditions of contract entry. One of the outstanding conditions 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. In addition, 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.

Mr. Speaker Sir,

The provision is meant to ensure that the so called contractors do not solicit for contracts by “*bribing*” officials of contracting authorities. These contractors will also be expected to make a declaration that they haven’t been convicted of an offence under the Anti-Corruption and Economic Crimes Act, 2003 or any other laws applicable. It also provides remedial measures if a contractor makes a false declaration. Contracting Authorities have also been given an opportunity to terminate a contract in case of a false declaration and if there is such advance payments, the contractor to return the money.

In terms of public participation, the Committee placed an advert in the newspapers on 23rd May, 2018. Unfortunately, the Committee didn’t receive any memoranda from the public and key stakeholders. The Committee during its meeting held on Thursday 22nd November, 2018 scrutinized the Bill and observed that:-

1. The Government Contracts Bill, 2018 was seeking to repeal the Government Contracts Act Cap 25 and provide for the powers of the Government to enter into contracts and for connected purposes.
2. The Bill was further seeking to repeal the Government Contracts Act, Cap 25 so as to align the management of government contracts to the Constitution of Kenya, Public Finance Management

Act, 2012, Public Procurement and Asset Disposal Act, 2015 and the Public Private Partnerships Act, 2013.

3. The Government Contracts Bill, 2018 proposes the following:-

- i. 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;
 - ii. That if enacted shall apply to all contracts that are entered 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 fulfill an interim requirement for defense supplies or services to ensure defense logistical capabilities on the interim basis and any related contracts.
 - iii. to dispel any fear in the case of existence of inconsistencies and conflict in law; therefore, it sets to ensure that the Government Contracts Act will prevail in such circumstances including government circulars and notices 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.
 - iv. The Bill seeks to recognize County governments within the definition of a government and therefore the applicability of this Act in contracting for the supply of any works, public goods and services
4. The Bill in Clause 6(1) reiterates that 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 authorized in writing by the accounting officer, either specifically in 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 authorization.
5. Furthermore, the Bill seeks to provide for recognition of contracts entered outside Kenya for or on behalf of national government by authorized person in writing shall be deemed to be contracts made on behalf of the national government.

6. The same contractual obligation will be applicable for county governments where contracts entered on behalf of county governments are recognizable with respect to the specific authorization as that of national government.
7. The first schedule sets out the form of Authorization that each contract will bind the Accounting Officer of government department or county government as the contracting entity and the supplier of works, goods and services as relate to Clause 6(1) and 7(1).
8. Clause 9(1) stipulates that for 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 and the County Attorney for county government contracts for the performance of legal services; this provision does not apply in respect to Parliament and Judiciary as stipulated in the second schedule of the Bill (respect for separation of powers and the independence of the Judiciary).
9. That contracts are a product of public procurement processes and that all contracts shall be subjected to the due process of the law particularly the Public procurement and Asset Disposal Act, 2015 and the Regulations made there under, the Public Private Partnership Act, 2013 and any other applicable law.
10. To safeguard the performance and delivery of contracts a contracting authority may require the supplier for work, goods and services to provide contract security; this security requirement shall be dealt with in the manner set out in the Public Procurement and Asset Disposal Act, 2015 and the Regulations made there under and the Public Finance Management Act, 2012.
11. Clause 12 of the Bill provides for terms that are implied in every contract to warrant 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.
12. The above provision seeks to discourage the possibility of influencing the outcome of contract arrangements with the Contracting Authority through undue practices.

13. Additionally, the Bill provides for the limitation of personal liability and indemnity of Government and Public Officers acting on behalf of Government. This is a protection for the officers acting for government given that the officer is not liable under section 202 and 203 of the Public Finance Management Act, 2012.
14. Clause 15 of the Bill provides that the Attorney General may make Regulations for the better carrying out of the provisions of the Act and as well may issue guidelines to facilitate the implementation of the Government Contracts Act. This is in accordance with the provisions of Article 94(5) and (6) of the Constitution regarding to delegation of legislative Authority by an Act of parliament.
15. That upon the enactment of the Government Contracts Bill, 2018, the Government Contracts Act, Cap.25 is repealed.
16. The Government Contracts Act will in effect align Government Contracts and its management to the Constitution of Kenya and the provisions of relevant Acts of Parliament including; Public Finance Management Act, 2012, Public Private Partnership Act, 2013 and the Public Procurement and Asset Disposal Act, 2015.

1.0 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:

1. To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
2. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
3. **To study and review all the legislation referred to it;**
4. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
5. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
6. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
7. To examine treaties, agreements and conventions;
8. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
9. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
10. To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, Public finance, Monetary policies, Public debt, Financial institutions (excluding those in securities exchange), Investment and divestiture policies, Pricing policies, Banking, Insurance, Population revenue policies including taxation and National planning and development.

In executing its mandate, the Committee oversees the following government Ministries/ Commissions

1. The National Treasury and Ministry of Planning
2. Ministry of Devolution

3. Commission for Revenue Allocation
4. Office of the Controller of Budget
5. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

The Committee on Finance and National Planning was constituted by the House in December, 2017 and comprises of the following Members:-

1. The Hon. Joseph K. Limo, MP – **Chairperson**
2. The Hon. Isaac W. Ndirangu – **Vice-Chairperson**
3. The Hon. Jimmy O. Angwenyi, MP
4. The Hon. Christopher Omulele, M.P
5. The Hon. Dr. Enoch Kibunguchy, MP
6. The Hon. Shakeel Shabbir Ahmed, MP
7. The Hon. Abdul Rahim Dawood, MP
8. The Hon. Daniel E. Nanok, MP
9. The Hon. Andrew A. Okuome, MP
10. The Hon. David M. Mboni, MP
11. The Hon. Francis K. Kimani, MP
12. The Hon. Joseph M. Oyula, MP
13. The Hon. Joshua C. Kandie, MP
14. The Hon. Lydia H. Mizighi, MP
15. The Hon. Mohamed A. Mohamed, MP
16. The Hon. Purity W. Ngirici, MP
17. The Hon. Samuel Atandi, MP
18. The Hon. Stanley M. Muthama, MP
19. The Hon. Edith Nyenze, M.P

1.4 COMMITTEE SECRETARIAT

1. Ms. Leah W. Mwaura – **Senior Clerk Assistant/Lead Clerk**
2. Ms. Jenifer Ndeto – **Principal Legal Counsel I**
3. Ms. Laureen Wesonga – **Third Clerk Assistant**
4. Mr. Josephat Motonu – **Fiscal Analyst I**
5. Mr. Chelang'a Maiyo – **Research & Policy Analyst III**

2.0 COMMITTEE CONSIDERATION OF THE BILL

2.1 BACKGROUND INFORMATION

The Government Contracts Bill, 2018 was published on 10th April, 2018 and went through the First Reading on 24th April, 2018 and was immediately referred to the Departmental Committee on Finance and National Planning. The Bill seeks to repeal the Government Contracts Act, Cap 25 so as to align the management of government contracts to the Constitution of Kenya, Public Finance Management Act, 2012, Public Procurement and Asset Disposal Act, 2015 and the Public Private Partnerships Act, 2013. It proposes 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.

2.2 CLAUSE BY CLAUSE ANALYSIS

Part I (Clauses 1-5) Preliminary Matters.

1. This part contains the short title, interpretation of terms, the application clause, objects of the Act, the application of the Bill where the Act will apply to all contracts that are entered into by a contracting authority with an exception of contracts whose purpose is, for operational reasons, to fulfill an interim requirement for defence supplies or services or to ensure defence logistical capabilities on an interim basis. Clause 5 provides for the supremacy of the Act where there will be a conflict between the 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.
2. Part two (Clauses 6- 11) of the Bill contains provisions relating to conditions of contract entry. It requires that all contracts entered into by the national government or county government shall, subject to the pecuniary threshold provided for in Section 134 of the PPADA be cleared by the Attorney General or the county Attorney, respectively, before they are signed. It further provides that where the contracts are entered outside of Kenya for or behalf of the national government by either generally or specifically authorized 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. The same authorization shall also be required for county governments where all contracts within the pecuniary threshold provided in Section 134 of the

PPADA shall be cleared by the relevant authority before they are signed. Clause 8 of the Bill sets out the form of authorization to be done in writing (as contained in the First Schedule). Clause 9 seeks to ensure that all contracts for performance of legal services offered on behalf of the national Government shall be entered into only under the authority. This provision will require all Ministries, agencies/ departments to first get clearance from the AG before engaging any legal firm. The same provision will apply to the county governments where clearance by the county attorney shall be sought prior to entry of contract. It is important to note that the Parliamentary Service Commission and Judicial Service Commission have been exempted from this provision due to principal of separation of powers (as contained in the Second Schedule).

3. 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. The provision seeks to discourage the possibility of influencing the outcome of contract arrangements with the Contracting Authority through undue practices.
4. 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). This is a protection for the officers acting for government given that the officer is not liable under section 202 and 203 of the Public Finance Management Act, 2012. Additionally, Clause 15 of the Bill provides that the Attorney General may make regulations for the better carrying out of the provisions of the Act and as well may issue guidelines to facilitate the implementation of the Government Contracts Act. This is in accordance with the provisions of Article 94(5) and (6) of the Constitution regarding the delegation of legislative Authority by an Act of parliament. Clause provides for the repealing of the Government Contracts Act Cap 225. It further provides a saving clause where any contract entered into in good faith for the public service before the commencement of the Act shall be deemed to be contract dully entered on behalf of the government as if it was entered under this act.

It is important to point out that all contracts will be required to comply with the provisions Public Procurement and Asset Disposal Act, 2015 and the Public Private Partnership Act, 2013 and the Act

shall operate as a framework guiding the contractual agreements in accordance with the aforementioned laws.

3.0 PUBLIC PARTICIPATION

Following the call for memoranda from the public on 23rd May, 2018 the Committee did not receive any memoranda from the public. The Committee mapped out key stakeholders and wrote to the National Treasury, State Law Office and Department of Justice, Council of Governors and the Ministry of Devolution and ASAL wide letters **NA/DCS/F&NP/2018/90**, **NA/DCS/F&NP/2018/91**, **NA/DCS/F&NP/2018/92**, **NA/DCS/F&NP/2018/93** respectively. Consequently, the Committee received comments from all the mapped out stakeholders save for the Ministry of Devolution and ASAL. The respective stakeholders responded as hereunder captured:-

3.1 THE NATIONAL TREASURY

The National Treasury submitted that there was need for a provision to ensure that there is disclosure of contract information. In view of this, they proposed an additional amendment as follows:-

Disclosure of contract information:-

Insert a new clause 14A that provides as follows:-

“Nothing in this Act shall limit the obligation of a Public Entity from disclosing any contract related information pursuant to the Access to information Act, 2016 and any other guidelines or frameworks issued by the Government from time to time”

Justification

The new clause will ensure consistency with Government policy and law on disclosure of information relating to public projects.

Committee supported the new amendment as proposed by the National Treasury based on the argument provided.

3.2 COUNCIL OF GOVERNORS

The Council of Governors submitted that they appreciate that in realizing the objects of Devolution, the principles of consultation and cooperation under Article 6(2) and Article 189 of the Constitution are inevitable. Based on that, the Council of Governors was in support of the Bill.

3.3 THE STATE LAW OFFICE AND DEPARTMENT OF JUSTICE

The State Law Office and Department of Justice submitted their comments by stating that they spearheaded the development of the Bill and therefore were in full support of all the provisions as contained in the Bill.

4.0 PROPOSED AMENDMENTS

The Committee considered the Bill and wishes to propose the following amendments for consideration during Committee Stage:-

(i) **CLAUSE 2**

THAT, clause 2 of the Bill be amended in the definition of the term “contracting authority” by deleting the word “and” wherever it appears in paragraph (b) and substituting therefor the word “or”;

JUSTIFICATION

The amendment seeks to ensure that the provisions contained in the paragraph are referred to as alternatives and not collectively. The paragraph will therefore provide that a “contracting authority” means a national or county government department or agency with the legal authority to enter into a contract.

(ii) **CLAUSE 4**

THAT, clause 4 of the Bill be amended by deleting the word “interim” wherever it appears and substituting therefor the word “emergency”;

JUSTIFICATION

The amendment seeks to guard against any possible abuse of the exception of defence supplies from the application of the Act once enacted. The use of the term “interim” is ambiguous and may be subject to various interpretations, therefore it is prudent to use the more clearer term “emergency” since an emergency situation can be determined with sufficient clarity.

(iii) **CLAUSE 6**

THAT, clause 6 of the Bill be amended in sub-clause (1) by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;

JUSTIFICATION

This amendment is necessary for purposes of conforming to the House drafting style and also for correction of grammatical errors.

(iv) **CLAUSE 7**

THAT, clause 7 of the Bill be amended—

- (a) in sub-clause (1), by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;
- (b) in sub-clause (2), by inserting the word “that” immediately after the words “contracts made on behalf of”;

JUSTIFICATION

The amendment is necessary for purposes of conforming to the House drafting style as well as for purposes of proper grammatical flow.

(v) CLAUSE 9

THAT, clause 9 of the Bill be amended in sub-clause (2) by deleting the word “authorities” and substituting therefor the word “authority”

JUSTIFICATION

The amendment is necessary for purposes of proper grammatical flow.

(vi) CLAUSE 12

THAT, clause 12 of the Bill be amended in sub-clause (2)–

(a) by renumbering the current paragraph (c) as paragraph (d); and

(b) by inserting the following new paragraph immediately after paragraph (b)–

“(c) the bidder 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 relating to the commercial interests;”

JUSTIFICATION

The amendment is necessary for purposes of correct numbering as well to include a new paragraph providing for the requirement of disclosure by the bidder, since this paragraph was inadvertently left out of the Bill but is referred to as one of the conditions that must be met in regard to every bid contract involving the government.

SIGNED..........DATE.....28/11/18.....

THE HON. JOSEPH LIMO, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

Annextures

1. Minutes of the Proceedings

2. Adoption Schedule

REPUBLIC OF KENYA



NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE

ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE GOVERNMENT CONTRACTS BILL, 2018

DATE : 27TH NOVEMBER, 2018

NAME	SIGNATURE
1. HON. JOSEPH K. LIMO, MP – CHAIRMAN	
2. HON. ISAAC W. NDIRANGU – VICE-CHAIRMAN	
3. HON. JIMMY O. ANGWENYI, MP	
4. HON. CHRISTOPHER OMULELE, MP	
5. HON. SHAKEEL SHABBIR AHMED, MP	
6. HON. DR. ENOCH KIBUNGUCHY, MP	
7. HON. ABDUL RAHIM DAWOOD, MP	
8. HON. DANIEL E. NANOK, MP	
9. HON. ANDREW A. OKUOME, MP	
10. HON. DAVID M. MBONI, MP	
11. HON. KURIA KIMANI, MP	
12. HON. JOSEPH M. OYULA, MP	
13. HON. JOSHUA KANDIE, MP	
14. HON. LYDIA H. MIZIGHI, MP	
15. HON. MOHAMED ALI, MP	
16. HON. PURITY NGIRICI, MP	
17. HON. SAMUEL ATANDI, MP	
18. HON. STANLEY M. MUTHAMA, MP	
19. HON EDITH NYENZE, MP	

MINUTES OF THE 76TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
FINANCE AND NATIONAL PLANNING HELD ON TUESDAY, 27TH NOVEMBER,
2018 IN THE BOARD ROOM, 9TH FLOOR, HARAMBEE SACCO PLAZA AT 11.00 AM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MP
4. Hon. Shakeel Shabbir Ahmed, MP
5. Hon. Abdul Rahim Dawood, MP
6. Hon. Daniel E. Nanok, MP
7. Hon. Andrew A. Okuome, MP
8. Hon. David M. Mboni, MP
9. Hon. Joshua C. Kandie, MP
10. Hon. Joseph M. Oyula, MP
11. Hon. Edith Nyenze, MP
12. Hon. Francis K. Kimani, MP
13. Hon. Purity Ngirici, MP
14. Hon. Samuel Atandi, MP

APOLOGY

1. Hon. Christopher Omulele, MP
2. Hon. Stanley M. Muthama, MP

ABSENT

1. Hon. Dr. Enoch Kibunguchy, MP
2. Hon. Mohamed A. Mohamed, MP
3. Hon. Lydia H. Mizighi, MP

INATTENDANCE - SECRETARIAT

- | | | |
|------------------------|---|-----------------------------------|
| 1. Ms. Leah Mwaura | - | Senior Clerk Assistant/Lead Clerk |
| 2. Ms. Jennifer Ndeto | - | Principal Legal Counsel I |
| 3. Ms. Laureen Wesonga | - | Third Clerk Assistant |
| 4. Mr. Chelang'a Maiyo | - | Research and Policy Analyst |

- | | | |
|------------------------|---|------------------|
| 5. Mr. Collins Mahamba | - | Audio Officer |
| 6. Mr. John Njoro | - | Serjeant-At-Arms |
| 7. Mr. Vitalis Augo | - | Office Assistant |

Agenda

AGENDA

1. Prayers
2. Preliminaries/Introductions
3. Communication from the Chair
4. Confirmation of Minutes of the proceedings of the 69th to 75th sittings
5. Matters Arising
6. **Consideration and adoption of reports on the following Bills:-**
 - (i) **Government Contracts Bill, 2018**
 - (ii) **Insurance (amendment) Bill, 2018**
7. Adjournment/ Date of the next meeting

MIN.NO.NA/F&NP/2018/426: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 11.27 am with prayer from the Chairperson. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2018/427: CONFIRMATION OF MINUTES

Agenda deferred

MIN.NO.NA/F&NP/2018/428: CONSIDERATION OF THE GOVERNMENT CONTRACTS BILL, 2018

The Committee adopted the report on the consideration of the Government Contracts Bill, 2018 after being proposed and seconded by Hon. Jimmy Angwenyi, MP and Hon. Joshua Kandie, MP respectively.

The Committee proposed the following amendments to be considered during the Committee Stage:-

CLAUSE 2

THAT, clause 2 of the Bill be amended in the definition of the term "contracting authority" by deleting the word "and" wherever it appears in paragraph (b) and substituting therefor the word "or";

JUSTIFICATION

The amendment seeks to ensure that the provisions contained in the paragraph are referred to as alternatives and not collectively. The paragraph will therefore provide that a

“contracting authority” means a national or county government department or agency with the legal authority to enter into a contract.

CLAUSE 4

THAT, clause 4 of the Bill be amended by deleting the word “interim” wherever it appears and substituting therefor the word “emergency”;

JUSTIFICATION

The amendment seeks to guard against any possible abuse of the exception of defence supplies from the application of the Act once enacted. The use of the term “interim” is ambiguous and may be subject to various interpretations, therefore it is prudent to use the more clearer term “emergency” since an emergency situation can be determined with sufficient clarity.

CLAUSE 6

THAT, clause 6 of the Bill be amended in sub-clause (1) by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;

JUSTIFICATION

This amendment is necessary for purposes of conforming to the House drafting style and also for correction of grammatical errors.

CLAUSE 7

THAT, clause 7 of the Bill be amended—

- (a) in sub-clause (1), by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;
- (b) in sub-clause (2), by inserting the word “that” immediately after the words “contracts made on behalf of”;

JUSTIFICATION

The amendment is necessary for purposes of conforming to the House drafting style as well as for purposes of proper grammatical flow.

CLAUSE 9

THAT, clause 9 of the Bill be amended in sub-clause (2) by deleting the word “authorities” and substituting therefor the word “authority”

JUSTIFICATION

The amendment is necessary for purposes of proper grammatical flow.

CLAUSE 12

THAT, clause 12 of the Bill be amended in sub-clause (2)–

(a) by renumbering the current paragraph (c) as paragraph (d); and

(b) by inserting the following new paragraph immediately after paragraph (b)–

“(c) the bidder 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 relating to the commercial interests;”

JUSTIFICATION

The amendment is necessary for purposes of correct numbering as well to include a new paragraph providing for the requirement of disclosure by the bidder, since this paragraph was inadvertently left out of the Bill but is referred to as one of the conditions that must be met in regard to every bid contract involving the government.

MIN.NO.NA/F&NP/2018/429: CONSIDERATION OF THE INSURANCE (AMENDMENT) BILL, 2018

The Committee adopted the report on the consideration of the Government Contracts Bill, 2018 after being proposed and seconded by Hon. David Mboni, MP and Hon. Joseph Oyula, MP respectively.

The Committee dropped the amendment that they had earlier proposed to Clause 2 on the definition of “micro-insurance business.”

The Committee proposed the following amendments to be considered during the Committee Stage:-

CLAUSE 2

THAT, clause 2 of the Bill be amended —

(a) by deleting the definition of the term “insurance fraud”;

JUSTIFICATION: the offence has been clearly defined in the proposed section 204 B and the definition is going to contradict what is contained under section 204 B

(b) by deleting paragraph (b) and substituting therefor the following paragraph—

(b) in the definition of “insurance business” by inserting the following new paragraph immediately after paragraph (d)—

- (e) micro-insurance business;
- (f) social insurance schemes.

JUSTIFICATION: The amendment is meant to include additional definition to insurance business to also introduce a new form of insurance business i.e social insurance schemes so that they can be regulated by IRA. This is also meant to also widen scope of coverage to also include micro insurance business.

CLAUSE 3

THAT, clause 3 of the Bill be amended in the proposed new section 5A by deleting subsection (1)—

- (1) The Commissioner may direct an Insurance Group through the regulated entity's Principal Officer to provide any information necessary for effective group-wide supervision.

JUSTIFICATION: The amendment is meant to ensure that only the Principal Officer of An Insurance Group is duly authorized to provide information whenever required by the Commissioner.

NEW CLAUSE

THAT, the bill be amended by inserting the following new clause-

- 7A. Section 87 of the principal Act is amended in subsection (2) by inserting the words “or email or other electronic or telecommunication mode” immediately after the word “post”.

JUSTIFICATION: The amendment is meant to also take care of other forms of communication especially in the advent of growth of technology. This will allow policy holders to also receive their insurance policy via email or any other electronic mode.

CLAUSE 10

THAT, the Bill be amended by deleting clause 10 and substituting therefor the following new clause-

- 10. The principal Act is amended by repealing section 156 and replacing it with the following new sections—

Advance payment
of premiums.

- 156. (1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such

time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.

(2) Where an insurer engages or, is approached by an intermediary intending to transact insurance business and receive premiums for that insurer, the insurer shall enter into a contract with the particular intermediary.

(3) A contract made between an insurer and intermediary under subsection (2) shall contain such mechanisms or terms as to guarantee that the premiums received by the intermediary are remitted to the insurer.

(4) A premium collected by an intermediary or a cheque received by an intermediary shall be deposited with, or dispatched and received by the insurer within thirty days of receipt by the intermediary.

(5) Subject to subsection (4), an insurance cover shall commence immediately a premium is collected or received by an intermediary.

(6) An intermediary who contravenes subsection (4) shall be guilty of an offence and shall pay a penalty equivalent to twenty percent of the unremitted premiums on each contravention, payable to the Policy Holder Compensation Fund.

(7) A director or employee of an intermediary who contravenes subsection (4) shall on conviction be liable to a fine not exceeding one hundred thousand or to imprisonment for a term of three months or to both.

(8) The Cabinet Secretary may make regulations to give effect to this section.

JUSTIFICATION: ~~The proposed amendment serves to guarantee premium holders that once the money has been received by the intermediary on behalf of insurers, the insurance cover is effective from the date of receipt of such monies by the intermediary. The second part of the amendment is meant to ensure that the intermediary remits the monies to the~~

failure to remit the money to the insurance company. This is so in the case of an accident, the risk shall have been covered.

NEW CLAUSE

THAT, the Bill be amended by inserting the following new clause immediately after clause 10-

10A. The principal Act is amended by inserting the following new section immediately after section 156-

Payment of **156A.** (1) An insurer shall pay an intermediary an intermediary insurance commission within thirty days of receipt of premiums.
intermediary
insurance
commission.

(2) An insurer who contravenes this section shall be guilty of an offence and shall pay a penalty equivalent to twenty percent of the unpaid intermediary insurance commission on each contravention.

(3) A penalty under this section shall be paid into the Policy Holders Compensation Fund.

JUSTIFICATION: The proposed amendment is meant to ensure that Insurance Companies remit commission payable to intermediaries is paid within thirty days of receipts of premiums. This will cure the issue of delays arising from non payment of commissioned dues.

NEW CLAUSE

THAT the Bill be amended by inserting the following new clause immediately after clause 11-

11A. Section 119 of the principal Act is amended by inserting the words “or email or other electronic mode”

JUSTIFICATION: The amendment is meant to also take care of other forms of communication especially in the advent of growth of technology.

CLAUSE 12

THAT, clause 12 of the Bill be amended in the proposed section 204A in subsection (1) by inserting the word “written” immediately after the words “lodge a”;


JUSTIFICATION: The amendment is meant to ensure that all complaints arising out of the Insurance Act are lodged in a written form.

MIN.NO.NA/F&NP/2018/430: ADJOURNMENT/ DATE OF THE NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 2.00 p.m. The date of the next meeting will be communicated.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED  DATE. 28/11/18

MINUTES OF THE 75TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON THURSDAY, 22ND NOVEMBER, 2018 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 10.00 AM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MP
4. Hon. Christopher Omulele, MP
5. Hon. Abdul Rahim Dawood, MP
6. Hon. Daniel E. Nanok, MP
7. Hon. Andrew A. Okuome, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. Joseph M. Oyula, MP
10. Hon. Edith Nyenze, MP
11. Hon. Francis K. Kimani, MP
12. Hon. Purity Ngirici, MP
13. Hon. Samuel Atandi, MP
14. Hon. Lydia H. Mizighi, MP

APOLOGY

1. Hon. Shakeel Shabbir Ahmed, MP
2. Hon. Stanley M. Muthama, MP
3. Hon. David M. Mboni, MP

ABSENT

1. Hon. Dr. Enoch Kibunguchy, MP
2. Hon. Mohamed A. Mohamed, MP

INATTENDANCE - SECRETARIAT

- | | | |
|---------------------------|---|-----------------------------------|
| 1. Ms. Leah Mwaura | - | Senior Clerk Assistant/Lead Clerk |
| 2. Ms. Christine Odhiambo | - | Legal Counsel II |
| 3. Mr. Collins Mahamba | - | Audio Officer |
| 4. Mr. John Njoro | - | Serjeant-At-Arms |
| 5. Mr. Vitalis Augo | - | Office Assistant |

Agenda

AGENDA

1. Prayers
2. Preliminaries/Introductions
3. Communication from the Chair
4. Confirmation of Minutes of the proceedings of the 69th to 74th sittings
5. Matters Arising
6. **Bills**
 - (i) **Government Contracts Bill, 2018**
 - (ii) **Insurance (amendment) Bill, 2018**
7. Adjournment/ Date of the next meeting

MIN.NO.NA/F&NP/2018/421: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 10.25 am with prayer from the Chairperson. The Chairperson informed the meeting that due to the upcoming long recess, the House Business Committee had directed that the two Bills namely; the Government Contract Bill, 2018 and the Insurance (Amendment), Bill 2018 be concluded.

MIN.NO.NA/F&NP/2018/422: CONFIRMATION OF MINUTES

Agenda deferred

MIN.NO.NA/F&NP/2018/423: CONSIDERATION OF THE GOVERNMENT CONTRACTS BILL, 2018

The Committee was taken through the policy brief on the above mentioned Bill as follows: -

- (i) The Government Contracts Bill, 2018 is a Bill of the Act of Parliament that was seeking to repeal and re-enact the Government Contracts Act and provide for the powers of the Government to enter into contracts and for connected purposes;
- (ii) The Bill is also seeking to repeal the Government Contracts Act, Cap 25 so as to align the management of government contracts to the Constitution of Kenya, Public Finance Management Act, 2012, Public Procurement and Asset Disposal Act, 2015 and the Public private partnerships Act, 2013;
- (iii) The Bill is further proposing 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;
- (iv) The Bill in Clause 6(1) reiterates that 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 authorized in writing by the accounting officer, either specifically in

- 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 authorization;
- (v) Furthermore the Bill is seeking to provide for recognition of contracts entered outside Kenya for or on behalf of national government by authorized person in writing shall be deemed to be contracts made on behalf of the national government;
 - (vi) The same contractual obligation would be applicable for county governments where contracts entered on behalf of county governments are recognizable with respect to the specific authorization as that of national government;
 - (vii) The first schedule is meant to set out the form of Authorization that each contract would bind the Accounting Officer of government department or county government as the contracting entity and the supplier of works, goods and services as relate to Clause 6(1) and 7(1);
 - (viii) Clause 9(1) stipulates that for 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 and the County Attorney for county government contracts for the performance of legal services; this provision does not apply in respect to Parliament and Judiciary as stipulated in the second schedule of the Bill. (Respect for separation of powers and the independence of the Judiciary);
 - (ix) The Bill further emphasizes that contracts were a product of public procurement processes and that all contracts shall be subjected to the due process of the law particularly the Public procurement and Asset Disposal Act, 2015 and the Regulations made there under, the Public Private Partnership Act, 2013 and any other applicable law;
 - (x) The Bill further provides that in order to safeguard the performance and delivery of contracts a contracting authority may require the supplier for work, goods and services to provide contract security; this security requirement shall be dealt with in the manner set out in the Public Procurement and Asset Disposal Act, 2015 and the Regulations made there under and the Public Finance Management Act, 2012;
 - (xi) Clause 12 of the Bill provides for the terms that were implied in every contract to warrant for the payment of any money by the Government; This included the declaration that the contractor had 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;
 - (xii) The above provision is seeking to discourage the possibility of influencing the outcome of contract arrangements with the Contracting Authority through undue practices;
 - (xiii) Additionally, the Bill is providing for the limitation of personal liability and indemnity of Government and Public Officers acting on behalf of Government. This is a protection for the officers acting for government given that the officer is not liable under section 202 and 203 of the Public Finance Management Act, 2012;

- (xiv) Clause 15 of the Bill provides that the Attorney General may make Regulations for the better carrying out of the provisions of the Act and as well may issue guidelines to facilitate the implementation of the Government Contracts Act. This is in accordance with the provisions of Article 94(5) and (6) of the Constitution regarding to delegation of legislative Authority by an Act of parliament; and
- (xv) The Government Contracts Act, Cap.25 would be repealed as soon as the Bill is enacted.

The Committee was taken through the clauses and the schedules of the Bill as follows:-

- (i) Clause 3 - agreed to
- (ii) Clause 4 - proposed amendments
- (iii) Clause 5 - agreed to
- (iv) Clause 6- proposed amendments
- (v) Clause 7 - proposed amendments
- (vi) Clause 8 - agreed to
- (vii) Clause 9 - proposed amendments
- (viii) Clause 10 - agreed to
- (ix) Clause 11- agreed to
- (x) Clause 12- proposed amendments
- (xi) Clause 13 - agreed to
- (xii) Clause 14 - agreed to
- (xiii) Clause 15 - agreed to
- (xiv) Clause 16 - agreed to
- (xv) First Schedule - agreed to
- (xvi) Second Schedule - agreed to
- (xvii) Clause 2 – proposed amendments
- (xviii) Title – agreed to

Proposed Committee amendments for consideration during the Committee Stage:-

(i) CLAUSE 2

THAT, clause 2 of the Bill be amended in the definition of the term “contracting authority” by deleting the word “and” wherever it appears in paragraph (b) and substituting therefor the word “or”;

JUSTIFICATION

The amendment seeks to ensure that the provisions contained in the paragraph are referred to as alternatives and not collectively. The paragraph will therefore provide that a “contracting authority” means a national or county government department or agency with the legal authority to enter into a contract.

(ii) **CLAUSE 4**

THAT, clause 4 of the Bill be amended by deleting the word “interim” wherever it appears and substituting therefor the word “emergency”;

JUSTIFICATION

The amendment seeks to guard against any possible abuse of the exception of defence supplies from the application of the Act once enacted. The use of the term “interim” is ambiguous and may be subject to various interpretations, therefore it is prudent to use the more clearer term “emergency” since an emergency situation can be determined with sufficient clarity.

(iii) **CLAUSE 6**

THAT, clause 6 of the Bill be amended in sub-clause (1) by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;

JUSTIFICATION

This amendment is necessary for purposes of conforming to the House drafting style and also for correction of grammatical errors.

(iv) **CLAUSE 7**

THAT, clause 7 of the Bill be amended—

- (a) in sub-clause (1), by deleting the words “All contracts made for” and substituting therefor the words “Every contract made by”;
- (b) in sub-clause (2), by inserting the word “that” immediately after the words “contracts made on behalf of”;

JUSTIFICATION

The amendment is necessary for purposes of conforming to the House drafting style as well as for purposes of proper grammatical flow.

(v) **CLAUSE 9**

THAT, clause 9 of the Bill be amended in sub-clause (2) by deleting the word “authorities” and substituting therefor the word “authority”

JUSTIFICATION

The amendment is necessary for purposes of proper grammatical flow.

(vi) **CLAUSE 12**

THAT, clause 12 of the Bill be amended in sub-clause (2)—

- (a) by renumbering the current paragraph (c) as paragraph (d); and
- (b) by inserting the following new paragraph immediately after paragraph (b)–
 - “(c) the bidder 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 relating to the commercial interests;”

JUSTIFICATION

The amendment is necessary for purposes of correct numbering as well to include a new paragraph providing for the requirement of disclosure by the bidder, since this paragraph was inadvertently left out of the Bill but is referred to as one of the conditions that must be met in regard to every bid contract involving the government.

MIN.NO.NA/F&NP/2018/424: CONSIDERATION OF THE INSURANCE (AMENDMENT) BILL, 2018


The Committee also considered clauses 4 and 5 that were not concluded during the consideration of the Insurance (Amendment), Bill. Having considered the comments by the National Treasury and Planning, the Committee further agreed with the two Clauses as proposed in the Bill.

MIN.NO.NA/F&NP/2018/425: ADJOURNMENT/ DATE OF THE NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 1.20 p.m. The date of the next meeting is Tuesday, 27th November, 2018 at 11.00am.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED  DATE 28/11/18