

THE PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005

The Public Procurement and Disposal Act No. 3 of 2005 is an Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters.

The Public Procurement Oversight Authority is established as a body corporate by section 8(1) of the Act. Under section 46(1) of the Act the Public Procurement Oversight Authority shall publish notices of the contracts awarded by procuring entities together with such other information as may be prescribed.

1. PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005 AND THE ASSIGNMENT OF GOVERNMENT CONTRACTS.

The Act provides that the contracts entered into by the procuring entity pursuant to that Act shall be published in the Kenya gazette.

Section 46 of the Act provides as follows:-

46.(1) The Authority shall publish notices of the contracts awarded by procuring entities together with such other information as may be prescribed.

(2) The Authority shall issue directions governing the publication of notices under this section, including directions specifying what must be included in a notice and how it must be published.

The Act provides that any amendments to a contract entered into in pursuance of the Act shall only be amended with the prior written consent of the tendering committee of the procuring entity.

Section 47 of the Act provides as follows:-

47. An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if:-

- a. the amendment has been approved in writing by the tender committee of the procuring entity; and
- b. any contract variations are based on the prescribed price or quantity variations for goods, works and services.

The Act provides that the contracts entered into in pursuance of the Act shall be inspected by the Director-General of the Authority and the procuring entity' s accounts in relation thereto shall be audited by the Controller and Auditor General.

Section 49 of the Act provides as follows:-

49.(1) The following shall apply in relation contract for a procurement:-

- a. the Director-General, or anyone authorizing the Director-General, may inspect, at reasonable time, the records and accounts of the procuring entity and contractor relating to contract and the procuring entity and contract shall co-operate with and assist whoever conducts such an inspection; and
- b. the Controller and Auditor-General, or auditor authorized by the Controller Auditor-General, may audit the accounts of the procuring entity and contractor relating to, contract and the procuring entity and contract shall co-operate with and assist whoever such an audit.

(2) The costs of an audit under subsection (1)(b) shall be borne by the Authority if the audit was conducted the request of the Director-General.

Section 68 of the Act provides as follows:-

68.(1) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(2) The written contract shall be entered into within the period specified in the notification under section 67(l) but not until at least fourteen days have elapsed following the giving of that notification.

(3) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into.

The Act provides that in cases of open tendering, the contract to be entered into between the procuring entity and the successful party shall be based on the tender documents.

Whether the tender documents would allow assignment of contractual responsibilities would be a question of fact depending on the facts of each case. Therefore it is discernible from the provisions of the Act that where the tender documents do not contemplate the assignment of contractual responsibilities, such an assignment would contravene the provisions of section of the Act and would therefore be illegal.

Assignment of contractual responsibilities is governed by the provisions of common law of contract in pursuance of section 2 of the Law of Contract Act Cap 23 Laws of Kenya.

Whereas an assignment of a contract not entered into in pursuance of the Act is possible under common law of England applicable to Kenya by virtue of the provisions of section 2 of the Law of Contract Act, the provisions of section 5 of the Act would operate to exclude the assignment of a contract entered into under the Public Procurement and Disposal Act since:

- a. section 5(1) of the Act provides that if there is a conflict between the Public Procurement and Disposal Act or the regulations made under the Act and any other Act or regulations, in matters relating to procurement and disposal, the Act or the regulations made under the Act shall prevail.
- b. in these premises if the tender documents make no provision for assignment of contractual obligations, then a contract entered in pursuance of the provisions of section 68 of the Act should be based on those tender documents which contain no provision for assignment
- c. should a contract entered into in pursuance of tender documents containing no provision for assignment of contractual obligations make provision for assignment, such a contract would be illegal as being contrary to the provisions of section 68 of the Act
- d. in such a case it cannot be the answer of the parties that under the common law of England applicable in Kenya pursuant to section 2 of the Law of Contract Act parties may assign their contractual responsibilities since there will be a conflict between the right of the parties to assign their contractual responsibilities in pursuance of the Law of Contract Act and the provisions of section 68 of the Act which provide that the contract should be based on tender documents, in which event by virtue of section 5(1) of the Act the provisions of 68 of the Act shall prevail and the contract entered in contravention of the said section shall be illegal.

It should be noted that the Act prohibits the procuring entity from changing the contractual obligations from those set out in the tender documents.

Section 70 of the Act provides that:-

70. The procuring entity shall not request or require, as a condition of awarding a contract that a person who submitted a tender undertake responsibilities not set out in the tender documents.

It can be argued that by corollary although the Act does not impose such a condition of the part of the successful party, such a party should not similarly change contractual responsibilities.

2. THE PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005 AND PAYMENT PROCEDURES.

The Act is silent on what payment procedures should be adopted by each procuring entity. Payment procedures in any event should be included amongst the terms of contract between the successful party and the procuring entity.

Section 48 of the Act provides that:-

Payment of interest on any over due amounts in the following terms:

48. The following shall apply with respect to overdue amounts owed by a procuring entity and contract for a procurement -

- a. unless the contract provides otherwise, procuring entity shall pay interest on the over amounts; and
- b. the interest to be paid under paragraph (a) shall be in accordance with prevailing comment bank rates.

From the tone of the section it is discernible that when payments shall be made and what interest shall be due on any outstanding sum is a matter of the contractual terms.

3. PUBLIC PROCUREMENT AND DISPOSAL ACT NO. 3 OF 2005 AND RECOURSE AGAINST THE GOVERNMENT IN PURSUANCE OF AN ASSIGNMENT OF A GOVERNMENT CONTRACT.

The Government Proceedings Act Cap. 40 Laws of Kenya makes provision for the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government. Section 3 of the Act provides that any person with a claim against the Government may enforce their claims against the Government by way of proceedings subject to the provisions of the said Act.

Section 3 of the Act provides as follows:-

3. Where any person has a claim against the Government after the commencement of this Act and, if this Act had not been enacted, the claim might have been enforced in accordance with the provisions of the Petitions of Right Ordinance (now repealed), or might have been enforced by a proceeding provided by any statutory provisions repealed by this Act then, subject to the provisions of this Act, the claim may be enforced as of right by proceedings taken against the Government for that purpose in accordance with the provisions of this Act.

Under section 12 of the Act proceedings against the Government shall be instituted against the Attorney General.

Section 12 provides as follows:-

12.(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.

(2) No proceedings instituted in accordance with this Part by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.

Section 13A provides that a notice of intention to sue the Government shall be served upon the Attorney General before proceedings may be instituted.

Section 13A reads as follows:-

13A.(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars -

- a. the full names, description and place of residence of the proposed plaintiff;
- b. the date upon which the cause of action is alleged to have accrued;

- c. the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;
- d. a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;
- e. the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.

The relief that a party may obtain against the Government have been outlined under section 16 of the Act. The section provides in the proviso to section 16(1)(i) that no order of injunction or specific performance may be granted against the Government.

Section 16(1)(ii) provides that no order for delivery of property may also be made against the Government.

It should also be noted that under section 16(2) no injunction may be issued against an officer of the Government if the effect of that order would be to give a relief against the Government that is prohibited by the Act.

Section 16 of the Act provides as follows:-

16.(1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that:-

(i) where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order will be to give any relief against the Government which would not have been obtained in proceedings against the Government

The nature of relief available to a party against the Government pursuant to section 16 of the Act is therefore limited in scope.

It should be noted that pursuant to section 17 of the Act costs may be awarded against the Government in proceedings instituted by a party against it.

Section 17 of the Act provides as follows:-

17. In any civil proceedings or arbitration to which the Government is a party, the costs of and incidental to the proceedings shall be awarded in the same manner and on the same principles as in cases between subjects, and the court or arbitrator may make an order for the payment of costs by or to the Government accordingly:

Provided that:-

(i) in the case of proceedings to which by reason of any written law or otherwise the Attorney-General, a Government department or any officer of the Government as such is authorized to be made a party, the

court or arbitrator shall have regard to the nature of the proceedings and the character and the circumstances in which the Attorney General, the department or officer of the Government appears, and may in the exercise of its or his discretion order any other party to the proceedings to pay the costs of the Attorney-General, department or officer whatever may be the result of the proceedings or; and

(ii) nothing in this section shall affect the power of the court or arbitrator to order, or any written law providing for, the payment of costs out of any particular fund or property, or any written law expressly relieving any department or officer of the Government of the liability to pay costs.

It should also be noted that under section 20 of the Act, interest may be awarded against the Government in proceedings instituted against it under the Act.

Section 20 of the Act provides as follows:-

20.(1) Section 26 of the Civil Procedure Act (which provides that a judgment debt shall carry interest) shall apply to judgment debts due from or to the Government.

(2) The provisions of any written law empowering a court to award interest on costs shall apply to orders made in any proceedings by or against the Government.

(3) The provisions of any written law empowering a court to award interest on debts and damages shall apply to orders made in any proceedings by or against the Government.

(4) This section shall apply both in relation to proceedings pending at the commencement of this Act and in relation to proceedings instituted thereafter.

Whereas it is possible to maintain an action against the Government in recourse, such an action if successful would entitle the party instituting proceedings to relief that are limited in scope pursuant to section 16 of the Act. In such proceedings the Court would lack jurisdiction to give a mandatory injunction compelling the Government to pay sums of money to the successful party.

The successful party would have to commence judicial review proceedings for an order of mandamus to compel the Government official to pay to such a party the moneys due and owing to them in pursuance of the declaratory orders issued by the Court.

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