



Memorandum Presented by the

**KENYA ASSOCIATION OF WOMEN
BUSINESS OWNERS,**

**To the Honorable Members of Parliament
And Relating to Amendments to the Public
Procurement Asset and Disposal Bill 2014**

MARCH 27th, 2015

The Kenya Association of Business Women Owners (KAWBO) would like to bring to your attention the Public Procurement Asset and Disposal Bill 2014 that is currently being debated in the National Assembly. When passed, this bill will become an Act of Parliament that will give effect to Article 227 of the Constitution, to provide procedures for efficient public procurement and for assets disposal by public entities.

The Kenya Association of Women Business Owners (KAWBO) is a national membership based association whose mandate is to empower women in business to grow and excel intended to accelerate the growth of women-owned businesses in scale, stature and excellence. In September 2012, we identified an advocacy campaign named 'Imarisha Biashara' aimed at promoting equal access of women-owned enterprises to government contracts in Kenya. We have found that there is profound interest among women entrepreneurs to become suppliers to government. It's on this basis that KAWBO has consistently advocated for the state to provide a level playing field in public procurement.

We applaud the Government for its efforts in including women, youth and persons with disabilities especially in the formulation and implementation of the Preference and Reservations Regulations of 2011 & 2013 that provide at least 30% of all government procurement spend is reserved for women, youth and persons living with disabilities. However, this Bill is a direct challenge to these gains, as it does not expressly address the provisions and spirit of the Public Procurement and Disposal (Preference and Reservations) Regulations 2011. We would like to see these regulations entrenched in law and as such reflected in the Public Procurement and Asset Disposal Bill, 2014.

This bill if passed, would contradict the President's directive as reflected in the Preference and Reservations Regulations which provide that 30% of all government contracts are reserved for women, youth and persons with disabilities. It will also severely undermine the implementation of the Medium Term Plan II Flagship Programs and targets on women's empowerment.

KAWBO on behalf of its membership, hereby submit this memorandum to Honorable Members of Parliament to draw your attention to several unaddressed concerns, especially in light of the recently passed Public Procurement and Disposal (Amendment) Bill 2013, as well as the Public Procurement and Disposal (Preference and Reservations) Regulations 2011 & 2013.

Eva Muraya, Chairperson
Kenya Association of Women Business Owners (KAWBO)

PART 1 - PRELIMINARY

Section 2 on Interpretation

The definition of Disadvantaged group captures the spirit as envisaged in the Constitution of Kenya. It is important that the definition of Disadvantaged group expressly mentions who these categories of persons are, as was adopted by in the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

We propose the following Section 2 is amended by inserting the following new meaning in proper alphabetical sequence-

“Disadvantaged group” means persons perceived to be denied, by mainstream society access to resources and tools which are useful for their survival in a way that disadvantages them, or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities, and includes ***enterprises owned by women, the youth and persons with disabilities.***

We propose the addition of the following definitions-

“Persons with disability” means a person with disability who has attained the age of eighteen years and includes a company, association or body of persons, corporate or unincorporated in which, at least, seventy percent of the shareholders, members or persons and a majority of the directors are persons with disability;

“Women” means persons of the female gender who have attained the age of eighteen years and includes a company, association or body of persons, corporate or unincorporated in which at least 70 per cent of its directors or proprietors have attained the age of eighteen years and are of the female gender.

“Youth” means a person who has attained the age of eighteen years and has not attained the age of thirty-five years and includes a company, association or body of persons, corporate or unincorporated in which all its directors or proprietors are persons who have attained the age of eighteen years and have not attained the age of thirty five years.

“Accounting Officer means-

- (a) for a public entity other than a county government entity, the person appointed by the principal secretary to the treasury as the accounting officer or, if there is no such person, the chief executive of the public entity;

or

(b) for a county government entity, a person appointed by the county executive committee member responsible for finance as the accounting officer, or if there is no such person, the chief executive of the county entity;

“Public Entity” means-

- (a) the national Government or any department of the national Government;
- (b) the county government or any department of the county government;
- (c) the courts;
- (d) the commissions and independent offices established under the Constitution;
- (e) a state corporation within the meaning of the State Corporations Act;
- (f) the Central Bank of Kenya established under the Constitution;
- (g) a co-operative society established under the Co-operative Societies Act;
- (h) a public school within the meaning of the Education Act;
- (i) a public university within the meaning of the Universities Act;
- (j) a college or other educational institution maintained or assisted out of public funds; or,
- (k) an entity prescribed as a public entity for the purpose of this paragraph”;

PART II – BODIES INVOLVED IN THE REGULATION OF PUBLIC PROCUREMENT AND ASSET DISPOSAL

Section 9 on Functions of Authority

This provision does not specifically state the role and obligations of the Public Procurement Regulations Authority as it pertains to the Preference and Reservations Scheme.

We propose Section 9 (e) be the following:-

- (e) to monitor the implementation of the preference and reservations schemes by procuring entities
 - (i) The Authority shall ensure that the procurement entities implement the preference and reservations and provide disaggregated data to the authority to indicate the number of disadvantaged groups that have benefited”.

PART V – INTERNAL ORGNISATION OF PROCURING ENTITIES

This provision leaves out important obligations of the procuring entity as in regards to the Preference and Reservations.

We propose Section 44 be the following:-

- 44 (2) In the performance of the responsibility under subsection (1), an accounting officer shall-

- (i) submit to the Authority the part in its procurement plan demonstrating application of preference and reservations schemes in relation to the procurement budget within sixty days after commencement of the financial year.

Part VI – GENERAL PROCUREMENT PRINCIPLES

Section 62 on Termination or cancellation of procurement and asset disposal proceedings. This provision needs to add a condition that every bidder who submitted a bid should be notified of the termination. Otherwise, bidders will be waiting for long periods of time to receive information on procurements that were long terminated.

We propose Section 62 (4) be the following:-

- 4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination. The notification will include the reason for termination.

Section 64 on Inappropriate Influence on Evaluations etc

This provision puts a restriction against anyone communicating to the Procuring Entity after opening of tenders. It does not state up to what stage this communication should not be made.

It is important for the provision to clarify that communication is not allowed only within the legally allowed period for evaluation, so that after that period elapses and a bidder has not received any information, then they have a right to inquire from the Procuring Entity on the progress of the procurement process.

We propose Section 64 (3) be the following:-

- 3) A tenderer is allowed to communicate to the procuring entity after the period for evaluation has elapsed.

PART IX – PROCURMENT OF GOODS, WORKS AND NON CONSULTANCY SERVICES

Section 94 on Approval of pre-qualified candidates

This provision needs to add a condition that every candidate who submitted an application to be pre-qualified should be notified of non-approval. Otherwise, candidates will be waiting for long periods of time to receive information on pre-qualification when they did not qualify.

We propose Section 94 (4) be the following:-

- 4) A procuring entity shall send a notification of non-approval every to candidate who submitted an application to be pre-qualified.

Part XII - PREFERENCE AND RESERVATIONS IN PROCUREMENT

This provision recognizes that procuring entities will reserve a percentage of its procurement spend to the disadvantaged group. However, the provision is non-committal on what and how the minimum percentage procurement spend will be prescribed. If left to pass that way, it exposes this provision to abuse.

It is important to specify the minimum percentage as was adopted by in the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

We propose Section 158 (5) be the following:-

An accounting officer of a procuring entity shall when processing, reserve at least thirty percent of the procurement spend to the disadvantaged groups and comply with the provisions of this Act and the regulations in respect of preferences and reservations schemes.

We propose Section 159 (3) be the following:-

All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported. The report will provide disaggregated data to the Authority on a quarterly basis.