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THE REPUBLIC OF UGANDA

State House,
P. O. Box 25497,
Kampala,
Uganda.

IN ANY CORRESPONDENCE ON THIS SUBJECT PLEASE QUOTE NO. **PO/1**

9 July 2020

Rt. Hon. Rebecca Kadaga
Speaker
Parliament of Uganda
KAMPALA

13 JUL 2020

**THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
(AMENDMENT) ACT, 2020**

I am in receipt of the above mentioned Bill which was forwarded to me for assent. I have, however, identified the following issues that Parliament need to reconsider:

1. The renaming of the Public Procurement and Disposal Authority to the Public Procurement Regulatory Authority without providing for the transfer of the liabilities and obligations of the PPDA Authority to the Public Procurement Regulatory Authority will cause a lacuna in the law. The contracts of employment and the contracts entered into with service providers, the pending Court cases and all other contractual obligations should be transferred to the Regulatory Authority to avoid any uncertainties. Section 5 of the Act establishing the PPDA Authority should be retained, but a subsection transferring the obligation of PPDA to PPDA Regulatory Authority should be added on.
2. The omission by Parliament to repeal Section 90 of the Act which is similar to Section 89 renders Section 90 as retained in the Act redundant and may in some instances contradict Section 89. Parliament did not repeal Section 90 of the Act as had been proposed in Clause 37 of the Bill. Clause 37 of the Bill had repealed both Sections 90 and 91. However, Parliament only repealed Section 91. Section 91 provided for administrative review by the Authority, which was removed from the Administrative Review process on the instruction of Cabinet. With the removal

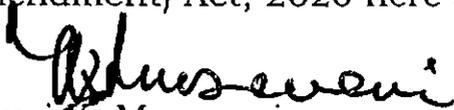
of the Authority from the Administrative Review process, Sections 89 and 90 were merged because Section 89 applied to both Sections 90 and 91. The retention of Section 90 alongside Section 89 will, therefore, cause conflict within the Act, especially where the provision of Section 90 differs from the provisions of Section 89 as amended. Section 90 should, therefore, be repealed.

3. The amendment of Part VIIA of the Act on the PPDA Tribunal, which is in most cases contradictory.

Parliament effected several amendments to Part VIIA of the PPDA Act, which establishes the PPDA Tribunal. The changes by Parliament on the membership of the Tribunal, the functions, procedures and powers need to be reconsidered to enable the effective operation of the Tribunal.

4. The transitional provision of the contract of the Executive Director of the PPDA Authority is not clear. The term of office of the Executive Director was extended from three to five years in Clause 12 of the Bill which needs to be clarified to avoid any uncertainties.

I also wish to draw your attention to the letter from Attorney General's Chambers Ref: ADM.7/170/01 dated 3rd July, 2020 and more salient issues for your consideration which are detailed in the matrix of the comments on the Public Procurement and Disposal of Public Assets (Amendment) Act, 2020 here attached.



Yoweri K. Museveni

P R E S I D E N T

Encs....

Copy to: The Hon. Minister of Finance Planning and Economic
Development
The Attorney General, Ministry of Justice and Constitutional
Affairs



ATTORNEY GENERAL'S CHAMBERS
P O BOX 7183,
Kampala, Uganda

3rd July, 2020

Hon. Minister
Ministry of Finance, Planning and
Economic Development
Kampala



**THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
(AMENDMENT) ACT, 2020.**

Please refer to your letter of 11th June 2020 (ref: FAD 79/228/01) where you identified the shortcomings of the Public Procurement and Disposal of Public Assets (Amendment) Act, 2020 and requested for technical guidance on these to enable you advise H.E the President on whether or not he should assent to the Act.

The issues for which you sought technical guidance are:

- 1) The renaming of the PPDA Authority to the Public Procurement Regulatory Authority without providing for the transfer of the liabilities and obligations of the PPDA Authority to the Public Procurement Regulatory Authority.
- 2) The omission by Parliament to repeal section 90 of the Act which is similar to section 89.
- 3) The amendment to Part VIIA of the Act on the PPDA Tribunal which is in most cases contradictory.
- 4) The transitional provision on the contract of the Executive Director of the PPDA Authority which is not clear.

I now advise as follows -

- a) The renaming of the PPDA Authority to the Public Procurement Regulatory Authority without providing for the transfer of the liabilities and obligations of the PPDA Authority to the Public Procurement Regulatory Authority will cause a lacuna in the law. The contracts of employment and the contracts entered into with service providers, the pending court cases and all other contractual obligations should have been transferred to the Regulatory Authority to avoid any uncertainties. Section 5 of the Act establishing the PPDA Authority should therefore be retained.

- b) Parliament did not repeal section 90 of the Act as had been proposed in clause 37 of the Bill. Clause 37 of the Bill had repealed both section 90 and 91, however Parliament only repealed section 91. Section 91 provided for administrative review by the Authority which was removed from the process on the instruction of Cabinet. With the removal of the Authority from the process, sections 89 and 90 were merged because section 89 applied to both sections 90 and 91. The retention of section 90 alongside section 89 will therefore cause conflict within the Act especially where the provision of section 90 differs from the provisions of section 89 as amended. Section 90 should therefore be repealed.
- c) Parliament effected several amendments to Part VIIA of the PPDA Act which establishes the PPDA Tribunal. The changes by Parliament on the membership of the Tribunal, the functions, procedures and powers need to be reconsidered to enable the effective operation of the Tribunal.
- d) The term of office of the Executive Director was extended from three to five years in clause 12 of the Bill. However, by the time the Bill was tabled in Parliament, the office was vacant and therefore there was no transitional provision in the Bill regarding the contract of the Executive Director. In your letter you state that the Executive Director currently in office was appointed after the Bill was tabled, and Parliament therefore introduced section 53 (3) of the Amendment Act to save his contract. However, section 53 (3) affects the contract of the Executive Director beyond the amendment and should therefore be redrafted for clarity and certainty.

In addition to the shortcomings you identified in your letter, I realise that there are other provisions in the Public Procurement and Disposal of Public Assets (Amendment) Act, 2020 which have a bearing on the interpretation and application of the PPDA Act which should be reconsidered by Parliament.

Attached for your consideration, is a matrix of the issues you raised and the other issues that have a bearing on the interpretation and application of the PPDA Act.

In view of the issues identified, I advise that H. E. the President, should not accent to the Act but should return the Act to Parliament under article 91(3)(b) of the Constitution for reconsideration



William Byaruhanga SC
ATTORNEY GENERAL

- c.c. The Permanent Secretary/Secretary to Treasury
- c.c. The Accountant General
- c.c. The Executive Director, Public Procurement and Disposal of Public Assets

**COMMENTS ON THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS
(AMENDMENT) ACT, 2020**

NO.	SECTION IN AMENDMENT ACT, 2020/ CORRESPONDING CLAUSE IN PPDA BILL, 2020	COMMENT ON PROVISION IN AMENDMENT ACT, 2020	PROPOSAL
1.	Section 3 <i>(Amending section 3 of the principal Act)</i>	The section redefines the Authority as the “Public Procurement Regulatory Authority”.	Please refer to comment no.2. Based on the comment, the definition of the term “Authority” should be deleted.
2.	Section 5 <i>(Amending section 5 (1) of the principal Act)</i>	The provision has replaced section 5 (1) of the principal Act which established the PPDA Authority. However, the provision does not present the Public Procurement Regulatory Authority as a successor to the PPDA Authority and establishes the Regulatory Authority without providing for the transfer of the liabilities and obligations of the PPDA Authority to the Regulatory Authority. According to the Amendment Act, 2020, the PPDA Authority currently in existence will cease to exist when the Amendment Act commences. This means that all the contracts, agreements, charges and obligations entered into or which bind the PPDA Authority including employment contracts and	The provision should be deleted.

		<p>the retirement benefits of the staff will be affected.</p> <p>The amendment by replacing the PPDA Authority with the Regulatory Authority, without providing for succession of the obligations of PPDA or a transfer of its contracts and agreements will annul all the actions of the PPDA and causes a lacuna in the PPDA Act.</p>	
3.	<p>Section 7 (<i>Clause 6 of the Bill, amending section 8 (1) (b)</i>)</p>	<p>The provision gives the Authority power to investigate procurement and disposal proceedings. However “proceedings” are reviews by the Tribunal and furthermore the Act defines “procurement process” and “disposal process”.</p> <p>In the Bill, the provision was limited to the “<i>exercise of functions under section 7 (j)</i>” and did not apply to the other functions of the Authority in section 7.</p> <p>According to the provision, the parties who may make complaints to the Authority include the procuring and disposing entities whereas the complaints to the Authority are against procuring and disposal entities.</p>	<p>1. The provision should be replaced as follows –</p> <p>“(1) In the exercise of its regulatory functions, the Authority shall have power to –</p> <p>(a)</p> <p>(b) investigate and act on complaints received on a procurement or disposal processes from members of the public, that are not subject to administrative review or review by the Tribunal;”.</p> <p>2. Section 8 (1) (e) should be repealed as was proposed in the Bill since the Authority will not undertake administrative review and section has</p>

		<p>The parties who may make complaints to the Authority also include bidders and contractors. This is contrary to Parts VII and VIIA of the Act which indicate how these may make complaints.</p> <p>The provision excludes complains that are under administrative review but does not exclude complaints before the Tribunal.</p> <p>The provision has omitted the clause in the Bill that had repealed section 8 (1) (e).</p>	<p>been repealed by section 34 of the Amendment Act, 2020.</p>
4.	<p>Section 22 (<i>Clause 22 (2c) and (2d) of the Bill</i>)</p>	<p>Section 58 (2c) and (2d) provide for guidelines to be made for the procurement of aggregated requirements. The provisions are silent on who is mandated to make the guidelines. In the Bill, the power to make guidelines had been removed from the Authority and given to the Minister in clause 48 of the Bill. The proposal was dropped by Parliament and the Authority has been left to make guidelines. However, for aggregated procurements and multi year procurements in section 58, the Public Finance Management Act has to be applied because of the financial and budgetary implications of aggregated procurements and multi year procurements.</p>	<p>The mandate to issue guidelines under subsections (2c) and (2d) should be reconsidered.</p>

5.	Clause 35 of the Bill (<i>Repealing section 88L of principal Act</i>)	Section 88L of the PPDA Act 2003 was amended by the Public Private Partnership Act. The arrangements that involve private sector resources e.g BOO, BOT, BOOT and PPP in section 88L were all removed from the PPDA Act and transferred to the Public Private Partnership Act. The provision in the PPDA Act is therefore redundant.	Clause 35 of the Bill that repealed section 88L of the Act should be reconsidered.
6.	Section 33 (<i>Clause 36 of the Bill, amending section 89 of the principal Act</i>)	<p>Subsections (7) and (8) are not clear on what the ten day period in both cases apply to.</p> <p>Subsection (11) the conjunction “and” is misleading and should be changed to “or”.</p>	<p>The subsections should be replaced as follows –</p> <p>“(7) The Accounting Officer shall, within ten days of receipt of a complaint, make and communicate a decision, in writing, addressed to the bidder who makes the complaint and which shall indicate the reasons for the decision taken and the corrective measure to be taken, if any.</p> <p>(8) Where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), or where a bidder is not satisfied</p> <p>The word “and” and the end of subsection (11) should be replaced</p>

			with the word “or” to make the three situations in (i), (ii) and (iii) independent of each other.
7.	Section 34 (<i>Clause 37 of the Bill, amending section 90 of the principal Act</i>)	Clause 37 of the Bill repealed sections 90 and 91 of the Act. However, the Amendment Act only repealed section 91 and not section 90. The provisions of section 90 of the Act are similar to the provisions of section 33 of the Amendment Act (which amends section 89 of the principal Act). Therefore section 90 as retained in the Act is redundant and may in some instances contradict section 89.	Section 90 of the principal Act should be repealed.
8.	Section 35 (<i>Amending section 91B of principal Act</i>)	Paragraph (b) amends section 91B (3) to include to the membership of the Tribunal “ <i>any other relevant profession</i> ”. However, since the Tribunal hears complaints on all procurement and disposal processes and the appointment is permanent for a period of four years and not on a case by case basis, determining “ <i>a relevant profession</i> ” may not be possible. The Amendment Act has inserted a new paragraph (3a) which requires a third of the members to be women, which is ambiguous.	The provision should state the profession or the word “relevant” should be deleted. The number of members to be women should be stated numerically and not as a fraction to avoid any ambiguities.

9.	<p>Section 37 <i>(Inserting a new section 91CA)</i></p>	<p>The section lists the functions of the Tribunal. The functions in (a), (b) and (d) are stated in section 89 as part of the procedure to of hearing applications by the Tribunal. For comment on paragraph (c) please refer to no. 13 of matrix.</p> <p>Part VIIA of the Act provides the functions of the Tribunal as the process to be adopted by the Tribunal in hearing applications, for example section 89 (8) and (9) and in section 91 I (1).</p> <p>Spelling out the functions of the Tribunal as such, limits the Tribunal on what it can or e.g. for the issues that are not spelt out as functions in the Act e.g. section 89 (9).</p> <p>In all cases all tribunals are established to hear applications and hearing applications includes the processes involved e.g. calling witnesses examining documents and writing decisions which may be considered as functions.</p> <p>The Tribunal has the inherent power to determine whether a matter before the Tribunal qualifies to be handled by the Tribunal and where a matter qualifies, the Tribunal uses its powers to determine how to handle a matter.</p>	<p>Section 37 should be deleted from the Act.</p>
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		Paragraph (a) refers to “administrative review” however, the Tribunal does not hear applications for administrative review this is the function of the Accounting Officer.	
10.	Section 39 (<i>Clause 39 of the Bill, amending section 91I</i>)	<p>Subsection (1) allows persons to file applications under section 89 (2). However, section 89 (2) (<i>section 33 of the Amendment Act</i>) is a continuation of section 89 (1) and under section 89 (2) a person who is aggrieved uses the procedure in section 89 (3) and (4) and only resorts to the Tribunal where the Accounting Officer has failed. The provision should be amended.</p> <p>Furthermore section 91I (1) only allows bidders who are aggrieved to make applications to the Tribunal and does not include other persons who may be aggrieved by a decision of the Accounting Officer as indicated in section 89 (9). Section 91I (1) should be amended to include persons other than bidders to make applications to the Tribunal and to allow a bidder who believes that an Accounting Officers has conflict of interest in a particular matter.</p> <p>Subsection (2) is not clear. It should be recast.</p>	<p>Section 91I (1) should be replaced as follows -</p> <p>“(1) The following may apply to the Tribunal for review of a decision of a procuring and disposing entity –</p> <p>(a) <u>a bidder</u> who is aggrieved, as specified in section 89 (7) or (8);</p> <p>(b) <u>a person</u> whose rights are adversely affected by a decision made by the Accounting Officer; or</p> <p>(c) <u>a bidder</u> who believes that the Accounting Officer has a conflict of interest as specified in section 89 (9).”</p>

		<p>Subsection (3) has omitted the proposal in clause 41 of the Bill and as a result repealed some provisions in section 91L of the Act. (<i>Discussed in number 10 below</i>)</p> <p>Subsection (4) requires the Registrar of the Tribunal to ask the Accounting Officer to suspend procurement or disposal proceedings till the application for review is completed. The subsection refers to “proceeding” instead of “process” but more importantly the provision contradicts section 89 (5) and (11) (a). The provision may be interpreted to mean that the suspension is lifted when the Accounting</p>	<p>Section 91I (2) should be replaced as follows - “(2) The application shall be made— (a) for section 89 (7), within ten working days from the date of receipt of the decision of the Accounting Officer; (b) for section 89 (8), within ten days from the date of expiry of the period specified in the section; (c) for section 89 (9), within ten days from the date when the omission or breach by the procuring and disposing entity is alleged to have taken place.</p> <p>For subsection (3), please see comment on number 11 below.</p> <p>For clarify and to avoid any possible interruption in the suspension, subsection (4) should be deleted and clause 41 of the Bill inserted instead.</p>
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		<p>Officer make a decision and that the suspension may only resume when the Registrar communicates to the Accounting Officer, which is not the intention of the Act and which may cause an interruption in the suspension process. The intention is to ensure that the suspension in not interrupted from section 89 (5) until the process is completed in section 89 (11).</p> <p>Subsection (5) (a) is in conflict with the other provisions in the Act on suspension of procurement or disposal processes.</p> <p>Subsection (5) (b) is a final decision of the Tribunal and not an interim provision. The final provisions are provided for in subsection (6).</p> <p>Subsection (6) has with modifications merged section 91I (5) and (6) of the principal Act. In so doing the powers of the Tribunal in section 91I (5) have been equated to the options available to the Tribunal when making decisions which are in 91I (6).</p> <p>Furthermore, the provisions of subsection (6) (a) and (b) are distinguishable from the provisions of subsection (6) (c) to (j).</p>	<p>Subsection (5) should be deleted to avoid any ambiguities.</p> <p>Consequentially, in section 42 of the Amendment Act, (<i>Amending clause 42 (4) of the Bill</i>), 91I (4) should be changed to 91L (4).</p> <p>Subsection (6) should be deleted to avoid any ambiguities.</p>
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		<p>Subsection (6) (a) and (b) are the action the Tribunal may take after consideration of an application. On the other hand, subsection (6) (c) to (j) are the types of decisions the Tribunal may make it varies or sets aside the decision of an Accounting Officer.</p> <p>Furthermore paragraphs (c) and (e) are similar, paragraphs (d), (f) and (h) are also similar. Paragraph (j) recommends for disciplinary action against the Accounting Officer whereas the Accounting Officer is not a party to the proceedings before the Tribunal.</p> <p>Subsection (8) lists the persons who may be parties to proceedings before the Tribunal. However, section 39 of the Amendment Act (amending section 91I (1)) clearly spells out who make an application and against who the application may be made.</p>	
11.	Section 41 (<i>Clause 41 of the Bill, repealing section 91L of the principal Act</i>)	The Act has repealed section 91L whereas the Bill had amended the section. The Amendment Act has for example repealed reference to prescribed form in subsection (a) and repealed subsection (b) which provisions are required.	Subsection (8) should be deleted to avoid any ambiguities.

12.	Section 42 <i>(Amending clause 42 (4) of the Bill)</i>	Section 42 (4) makes reference to section 91I (4), however suspension of processes is under section 91L (4) and not 91I (4).	Consequential to the amendment in no. 11 of the matrix, “91I (4)” appearing in subsection (4) should be changed to “91L (4)”.
13.	Section 45 (amending section 94 of the principal Act)	<p>The amendment allows a suspended provider to appeal the decision of the Authority to the Tribunal. However, a review of section 94 indicates that the suspension by PPDA is in most cases based on a decision by other bodies (e.g. paragraphs (b), (c), and (f) of section 94 of the principal Act) and that the Authority does not act independently. And in paragraph (d) a provider is suspended if the provider is convicted by a court of law which court ranks higher than the Tribunal.</p> <p>Since the High Court has unlimited jurisdiction over all matters, a suspended provider has a right to petition the High Court.</p> <p>Furthermore, section 94 of the principal Act should be read with section 95 (1c), (1d), (1e) (1f) and (1g) and allowing the Tribunal to hear matters of suspension may render section 95 (1c), (1d), (1e) (1f) and (1g) redundant.</p>	The provision and all the other references to review by the Tribunal of suspension of providers in the Act should be deleted.

14.	Section 46 <i>(Amending section 95 of the principal Act)</i>	<p>Paragraph (f) uses the phrase “without justifiable cause” which is subjective and makes reference to prescribed time period for awarding contracts whereas there is no time period prescribed within which contracts should be awarded.</p> <p>Paragraph (g) uses the phrase “without justifiable cause” which is subjective.</p> <p>Paragraph (h) makes reference to “public assets” which term is defined but the provision omits “public funds” which may be more relevant to procurement processes. The provision should cater for public funds.</p> <p>Paragraph (i) makes it an offence to contravene recommendations of the Authority. However, recommendations are not binding. Section 9 (1) (b) and (2), (3) and (4) of the PPDA Act 2003 indicates how the recommendations of the Authority are to be dealt with.</p>	<p>Paragraph (f) should be recast as follows – “(f) delays, contrary to the requirements of the Act, the opening of bids or the evaluation of bids;”</p> <p>The phrase “without justifiable cause” at the end of paragraph (g) should be replaced with “contrary to the requirements of the Act;”.</p> <p>Paragraph (h) should be replaced with the following – “(h) cause loss of public funds or public assets as a result of negligence, in the implementation of this Act;”</p> <p>Paragraph (i) should be replaced with the following – (i) fails to comply with the decision of the Tribunal.”</p>
15.	Section 52 (<i>Clause 51 of the Bill</i>)	Section 55 of the Amendment Act makes an amendment to Schedule 2 of the principal Act. The amendment should be inserted at section 52 of the Amendment Act because the numbering of the Schedules is changed by the Amendment Act.	Paragraph (b) should be recast as inserting at the end of the paragraph the following –

		<p>The miscellaneous amendment to substitute “Authority” with “Accounting Officer” was omitted in the Amendment Act (<i>Clause 51 (f) of the Bill</i>).</p>	<p>“and by inserting immediately after paragraph 6 of the Schedule the following –</p> <p>“7. The Institute of Procurement Professionals on Uganda.”</p> <p>Paragraph (g) should be inserted after paragraph (f) as follows -</p> <p>“(g) substituting for the word “Authority” appearing in the title of Part VILA, section 91I (6) and section 91L, the term, “Accounting Officer”.</p>
16.	Section 53	<p>Section 53 (3) inserts a transitional provision to preserve the contract of the Executive Director in office at the commencement of the Act. The provision however, is not definite but “deems” a transfer of the contract of employment and mentions “similar or better terms” whereas the amendment was with respect to only the duration of the contract and not terms of service.</p> <p>The provision should be amended to revise the tenure of the Executive Director to five years and to provide for renewal of the contract but without mention of the other terms of the contract which</p>	<p>Subsection (3) should be replaced with the following –</p> <p>“(3) The contract of the Executive Director appointed under section 17 of the principal Act and in office at the commencement of this Act shall be for five years from the date of commencement of the contract and the contract may be renewed for the period specified in section 12 of this Act.”</p>

		were not amended by section 12 of the Amendment Act.	
17.	Section 55	<p>The provision may be interpreted to mean that there are two distinct bodies i.e. the Supply Chain and the Institute of Procurement Professionals of Uganda whereas it is only the Institute of Procurement Professionals of Uganda that is currently in existence.</p> <p>Furthermore the Schedule at which the provision is to be inserted was repealed by section 52 of the Amendment Act.</p>	Please see proposal on number 15 above.