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process for table
CWA 21/11/13

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MOLHUD/ADM.1/56

18th November 2013

Mr. Justin Bundi
Clerk of the National Assembly
Parliament Building
NAIROBI



Ms. Mungai
What is the fate
of these regulations?
Mungai

Dear Mr. Bundi,

NATIONAL CONSTRUCTION AUTHORITY REGULATIONS, 2013

Reference is made to the above mentioned Regulations to operationalize the National Construction Authority Act, 2011. The Regulations were submitted to your office during the 10th Parliament, but were not adopted due to a procedural technicality. Your office had directed that the Regulations were to be resubmitted for action by the current Parliament.

My office has since engaged with the office of the Attorney General and necessary revisions have been carried out on the Regulations.

I am therefore re-submitting the Draft Regulations, 2013 for your further action towards their expedited adoption by the National Assembly.

Meanwhile, I am pleased to confirm to you that the National Construction Authority has executed some of its objectives with commendable success in registration of contractors and other activities. Indeed everything possible should be done to enable the Authority discharge its full mandate as I am confident that the National Construction Authority's leadership and management have the required passion and focus to develop the construction industry.

Yours sincerely

Hon Charity Kaluki Ngilu, EGH
Cabinet Secretary

Encl

② D. Kagame
In view of our discussion
with SPA on such regulation,
and the Statutory Instruments Act,
please advise in this regard
we proceed in this regard
of process. 21/11

LEGAL NOTICE NO.....

THE NATIONAL CONSTRUCTION AUTHORITY ACT, 2011
(No. 41 of 2011)

IN EXERCISE of the powers conferred by section 42 of the National Construction Authority Act, 2011 the Minister for Public Works makes the following regulations –

THE NATIONAL CONSTRUCTION AUTHORITY REGULATIONS, 2013

PART I-PRELIMINARY

Citation and
Commencement.

1. These regulations may be cited as National Construction Authority Regulations, 2013.

Interpretation.

2. In these Regulations, unless the context otherwise requires–

"authorized officer" means an employee of the Authority authorized by the Board to carry out its functions under the Act;

"Appeals Board" means the Appeals Board established under section 27 of the Act.

"certificate of registration" means a certificate of registration issued under regulation 5(1);

"code of conduct" means the code of conduct developed and published in accordance with section 5(2)(m) of the Act;

"construction procurement" means procurement in the construction industry, including the invitation, award and management of contracts;

"construction worker" means a natural person who is qualified to carry out any of the works described in the Third Schedule to the Act;

"contract sum" means the tender value, tendered price, contract value or project value as agreed and signed between the contractor and the owner;

"owner" means a person, body of persons or organ of state who enters into a main contract with a contractor for the provision of construction works;

"investigating committee" means a committee of the Board mandated to investigate matters of misconduct or otherwise under the Act;

“investigating officer” means a person appointed as such under section 23 of the Act;

“joint venture” means a grouping of two or more contractors or financial institutions with contractors who jointly undertake to perform construction works;

“net asset value” means the sum of a person’s equity, retained income and shareholders or members loans;

“practical completion certificate” means a certificate issued in respect of building works contract by the owner, signifying that the work as tendered is ready for occupation or use for the purposes intended;

“taking-over certificate” means a certificate issued in respect of a construction works by the owner, signifying that the scope of works as tendered are ready for occupation or use for the purposes intended;

“main contract” means a contract of construction works that do not form part of the scope of work of another contract;

“main contractor” means a person registered under section 15 of the Act to whom construction work is tendered under the Act;

“sub-contractor” means a person whose contract works forms part of the main contractor’s works;

“principal” means a natural person who is a partner in a partnership, a sole proprietor or a director in a company;

“programme” means a series of activities aimed collectively at a predefined outcome;

“qualified person” means a person who is duly qualified under the Act to undertake construction works in any of the categories specified in the Third Schedule to the Act;

“skills assessment” means an assessment conducted by or on behalf of the Authority of the skills in the class of works of a skilled construction worker or a construction site supervisor who applies for accreditation;

“test” means a test conducted by or on behalf of the Authority to test the skills of a construction site supervisor or a construction worker.

PART II - REGISTRATION OF CONTRACTORS

Application for
registration as
contractor

3. (1) An application for registration as a contractor shall be made in prescribed form shall be accompanied by -

- (a) certified copies of certificates and other relevant documents as are necessary to prove qualification for registration;
- (b) certified copies of the shareholders' certificates of the company; and
- (c) in the case of a trust, a copy of trust deed;
- (d) a complete financial statements of the person or firm for the three financial years immediately preceding the application, or proof of existence of a bank account in the name of the construction company.

(2) The Board may call for further particulars of the person or firm, including but not limited to-

- (a) certified copies of the identity documents of the principal or principals of the firm;
- (b) where there are more than twenty principals, certified copies of the identity documents of twenty principals;
- (c) in the case of a foreign contractor
 - (i) proof of current registration status from their country of domicile or origin, in addition to complying with section 18 of the Act; and
 - (ii) sufficient proof of financial capability of the contractor;
- (d) proof of registration with an association of contractors;
- (e) proof of employment of qualified persons by the contractor; and
- (f) in the case of an application relating to specialized works, a certified copy of the current license issued by the relevant statutory regulatory Authority or organization.

(3) If an application in relation to this regulation is made electronically, the supporting documents referred to in sub-regulation (3) shall be submitted to the Authority by registered mail or by hand delivery.

(4) An application shall not be considered duly completed for purposes of in this regulation, unless all documents are received by the Authority.

(5) The Authority shall make a decision on an application by a person or firm within sixty days of receiving such application including rejection if such person does not fully comply with requirements set by the Authority, and shall inform the applicant accordingly giving reasons for such rejection.

(6) The application for registration shall be in English.

(7) A register of registered contractors shall be kept in accordance with section 19 of the Act.

Evaluation of Application.

4. (1) The Authority shall assess every application received for the mandatory requirements set out in Parts I, II and III of Form 1 set out in the Schedule.

(2) In making its evaluation under paragraph (1) the Authority shall award marks to the applicant in accordance with Part IV of Form 1 cited therein, and shall classify the applicant in accordance with Part IV B of Form 1 set out in the out in the Schedule, which shall depend on the scope and costs of the work involved.

(3) The scope and cost of works referred to in paragraph (2) shall be as specified by the Authority from time to time.

Certificate of Registration.

5. (1) A person who qualifies for registration shall be issued with a Certificate of Registration by the Authority.

(2) Notwithstanding any other provision of these Regulations, the Board may where it deems it appropriate register an applicant for a category of works other than that applied for.

Exemption from registration for local contractors.

6. Any skilled construction worker or construction site supervisor carrying out construction works specified in the proviso to section 16(1) of the Act shall be exempted from registration as a contractor.

Renewal of registration.

7. A person or firm shall submit an application for renewal of the certificate of registration to the Authority in the prescribed form accompanied by the prescribed fee, and the Authority shall process the application in accordance with the provisions of regulation 4.

8. (1) A person who is aggrieved by the decision of the Board in relation to the category of registration under regulation 4(2) may submit a written petition indicating the reasons of such grievance, sufficient to justify review of the assessment by Authority.

(2) The Authority shall within sixty days of receiving a petition under paragraph (1) notify the person of the Board's decision on both applications.

(3) A person aggrieved by the decision of the Board may prefer an application to the Appeals Board within thirty days from the date of notification of the Board's decision, with a further appeal to court.

Application for upgrading.

9. (1) A contractor may make an application for upgrading to the Authority in a form to be prescribed by the Authority accompanied by the prescribed fee, and the Authority shall process the application in accordance with the provisions of Regulation 3.

(2) An application under paragraph (1) shall be submitted together with proof of the construction works on the basis of which it is made.

Transfer of records.

10. (1) The Authority may transfer the records in its custody in respect of one contractor to another contractor and treat them as if they were the same entity for the purpose of assessment in the event where-

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(a) the first contractor, being a sole proprietor, partnership or trust, establishes a company as under the Companies Act;

(b) the name of the contractor is changed in accordance with the relevant law;

(c) the company is re-organized; or

(d) companies are amalgamated or taken over.

(2) The previous records of a contractor shall be reflected in any future application made by such contractor for the purpose of determining the category of registration of the contractor.

Registration of foreign Contractors.

11. (1) Subject to section 18 of the Act, a foreign person or firm shall be eligible for registration as a contractor on application to the Authority and payment of the prescribed fees.

(2) Where a foreign firm applies under this regulation to undertake construction works or project under category NCA 1, such firm shall demonstrate to the Authority its capacity for such works.

(3) The application under paragraph (1) shall be for a temporary registration for specified work and shall be accompanied by-

- (a) the applicant's financial statements as at the date of the application;
- (b) detailed information on the value of construction works or projects done and completed in other jurisdictions;
- (c) proof of plant, equipment and machines holding;
- (d) an undertaking in writing that the foreign person or firm-
 - (i) shall subcontract to a local person or local firm not less than thirty percent of the value of the contract work for which temporary registration is sought;
 - (ii) shall transfer technical skills not available locally to a local person or firm in such manner as the Authority may determine from time to time;
 - (iii) shall not source for any other construction works contract or project during the period of existence of the contract for the construction works or project of the given works; and
- (e) any other requirement that the Board may determine from time to time.

(4) A registration under this regulation shall-

- (a) be valid for the period of the construction works contract or project in question;
- (b) be renewable every calendar year, failure to which the registration shall stand cancelled by the Board.

(5) Application for renewal of the licence shall be submitted to the Authority in writing sixty days before the expiry of such licence.

PART III – JOINT VENTURES

12. (1) The Authority may register joint ventures on application made in writing by the persons intending to enter into joint venture agreements.

Registration of Joint ventures.

(2) A foreign firm seeking to undertake construction works other than those falling under category NCA 1 shall only be registered to operate in Kenya under the Act if it operates through a joint venture with a locally registered company.

(3) Applications under this regulation shall be made to the Authority in the prescribed form and on payment of the prescribed fee and shall indicate-

- (a) the sum of the annual turnover of all the members to the joint venture;
- (b) the sum of the available capital of all the members to the joint venture;
- (c) the total number of equivalent full-time qualified employees;
- (d) the category in which the joint venture wishes to be registered; and
- (e) the Plant, equipment and machine holding of the joint ventures.

13. (1) The ratio of ownership of a joint venture for construction works between a local firm and a foreign firm shall be at least thirty percent for the local firm, except in cases where there is a mutual agreement between the Government of Kenya and a development partner.

(2) The profits of the construction works shall be shared in line with the arrangements set out in paragraph (1).

(3) The employees of the joint venture to which this regulation applies shall be competitively recruited from the local labour market, and recruitment or employment of foreign technical or skilled workers on such contract shall only be done with the approval of the Authority where such skills are not available locally.

(4) The Authority may give such exemption on this regulation as the Board may deem appropriate.

PART IV - IDENTIFICATION AND REPORTING OF CONSTRUCTION WORKS CONTRACTS OR PROJECTS BY OWNER

Registration of
construction works.

14. (1) All construction works, contracts or projects either in the public or private sector shall be registered with the Authority in accordance with the Act.

(2) An owner shall make an application for registration of a

project to the Authority in writing within thirty days from the date on which a tender for construction works, contract or project is awarded to a contractor registered under this Act.

(3) The application under this regulation shall be in the prescribed form and shall be made before the commencement of the construction works contract or project together with such fee as the Board may prescribe.

(4) An application under paragraphs (2), shall indicate-

- (a) whether the project being registered relates to a project that consists of a series of contracts, to a joint venture;
- (b) the nature of funding, whether by Government, or donors co-funded by the Government and donors or other persons;
- (c) the programme, if any, to which the project relates;
- (d) whether the project relates to a public-private partnership; and
- (e) that the applicant acts on behalf of a client;

(5) An owner shall ensure that the tender for construction works, contract or projects is awarded to a person, firm or contractor registered under this Act.

(6) The Authority shall, within thirty days from receipt of the duly completed application in terms of paragraphs 10(2) and (3) register the construction works contract or project and issue a compliance certificate.

(7) The owner shall in relation to construction works registered in accordance with this regulation submit to the Authority in a prescribed form, within thirty days of such registration, information relating to-

- (a) the issuance of a completion certificate;
- (b) whether the contract is renewed or the contract period extended;
- (c) whether the contract is cancelled or terminated; and
- (d) whether all payments owing to the contractor have been settled.

(8) An owner shall notify the Authority of any arbitration entered into or litigation proceedings initiated in relation to construction works registered under this Act within thirty days from the date of commencement of the proceedings.

Representative of the Owner.

15. (1) The owner shall submit information to the Authority identifying the person of the owner's choice to act as a contact person to liaise with the Authority on the construction works.

(2) Where a person identified under paragraph (1) ceases to act for the owner, the owner shall notify the Authority accordingly in writing within thirty days from such cessation.

(3) Any owner who fails to notify the Authority as required under paragraph (2), in respect of any construction contract, commits an offence and shall on conviction be liable for a fine not exceeding one million shillings.

PART V - CERTIFICATION AND ACCREDITATION OF SKILLED CONSTRUCTION WORKERS AND CONSTRUCTION SITE SUPERVISORS.

Class of accreditation of construction workers and site supervisors.

16. The Authority shall accredit and certify all construction workers and construction site supervisors in accordance with the Act.

Classes of skilled construction workers.

17. (1) The Authority shall register skilled construction workers under one or more of the classes of works provided in the Third Schedule to the Act.

(2) A construction worker referred to in paragraph (1) shall be registered to carry out, or undertake to carry out construction works for or on behalf of another person, for a fixed sum, percentage, value, consideration, wages or other reward.

Classes of construction site supervisor.

18. A construction site supervisor shall be accredited in accordance with the Act in one or more of the classes of works provided in the Third Schedule thereof to undertake supervision and co-ordination of construction workers or other persons undertaking the same class of work for or on behalf of another person for a fixed sum, percentage, or valuable consideration, wages or other reward.

Eligibility for Accreditation

19. (1) The Authority shall accredit a person under this Part if the person-

(a) possesses the qualifications set by the Authority for the class of contract works set out in the Third Schedule to

the Act, in respect of which the application is made; or

- (b) possesses such other qualifications as, in the opinion of the Authority, are equivalent to the qualifications specified in paragraph (a), and has the practical experience to the satisfaction of the Board, whether in Kenya or elsewhere, to complement such qualifications; or
- (c) has otherwise satisfied the Authority that he possesses such practical experience, so as to render him competent to be accredited as a construction worker or site supervisor at the discretion of the Authority; or
- (d) has successfully undergone such skills assessment as the Authority may conduct for this purpose.

(2) A person shall be eligible for accreditation or renewal of accreditation as a construction site worker if the person-

- (a) has successfully completed such bridging course as may be conducted by or on behalf of the Authority;
- (b) possesses such experience whether in Kenya or elsewhere as, in the opinion of the Authority, complements the required qualifications; or
- (c) has otherwise satisfied the Authority that he possesses such other qualifications or experience, knowledge and skills as, in the opinion of the Authority are equivalent to those prescribed in respect of the class applied for.

(3) The Authority shall consider the conduct of an applicant while making a decision on the accreditation of the applicant and may make inquiries and conduct investigations which are reasonable and appropriate in the circumstances of each case so as to be satisfied of the knowledge, skills and experience of such applicant.

(4) The Authority may conduct skills assessments and referee checks while making decision to accredit or renew the accreditation of an applicant.

(5) A person accredited as a construction site supervisor in respect of any the classes of construction works shall be deemed to have been accredited as a construction worker for the same class.

Validity of permit.

20. Every accreditation of a construction worker or construction site supervisor under these regulations shall be valid for a period of three years and may be renewed for a similar period.

Rejection of application.

21. (1) The Authority may reject an application under these regulations if the applicant-

- (a) presents false documents for accreditation;
- (b) knowingly makes use of any document of accreditation that is false; or
- (c) impersonates any other person named in any certificate of accreditation.

(2) A person who presents false documents under the paragraph (1) commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or imprisonment for two months or to both.

(3) Subject to paragraph (1), the Authority may suspend or cancel or refuse to accredit any construction worker or site supervisor if-

- (a) the applicant has knowingly allowed details of such accreditation to be included in the manpower programme for more than one construction works contract or projects carried out at the same time;
- (b) such applicant is convicted of any offence under this Act;
- (c) it is in the public interest or national security to do so; or
- (d) for other reason the Board may determine from time to time.

(4) The Board shall not exercise its powers under sub-regulation (3) unless an opportunity of being heard has been given to such applicant against whom the Authority intends to exercise such powers.

(5) An applicant whose accreditation as a construction worker or construction site supervisor is suspended or cancelled under this regulation shall, within fourteen days after **notification** by the Authority of such cancellation, surrender to an authorized officer certificate of accreditation, failing which the applicant shall be guilty of an offence under the Act.

(6) The Authority shall cancel the accreditation of every deceased construction worker or construction site supervisor upon notification to the Authority or on the Authority's own volition.

PART VI - COLLECTION AND PAYMENT OF THE CONSTRUCTION LEVY

Imposition of levy.

22. (1) There shall be payable a construction levy of not more than 0.5 per cent of the value of the contract in respect of any construction works whose value exceeds five million shillings.

(2) The levy shall be paid to the Authority by the owner of the works stipulated in paragraph (1).

Owner to report.

23. (1) Every owner shall notify and submit to the Authority in a prescribed form the details of any contract or project which it has awarded to a contractor whose sum or value exceeds five million shillings for the purpose of payment of the construction levy provided under section 31 of the Act.

(2) The Authority shall notify the owner of the amount of levy to be paid in respect of the contract in paragraph (1) within fourteen days of receipt of the notification and the levy shall be paid before the commencement of the contract works.

(3) The levy shall be paid to the Authority or its authorized agents at such office or place as may be determined in writing or press notification by the Authority.

(4) Notwithstanding any other provision of these regulations, the Authority may consider the final value of the completed works and assess the amount of levy afresh, and may thereafter, depending on the result of the assessment, request the owner to add on to the amount originally paid by the owner or refund any amount found to be in excess of the corrected final contract amount.

(5) Any owner who fails to pay the amount of the construction levy in respect of any construction works contract within the period stated under paragraph (2) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term of six months or both.

(6) Notwithstanding subregulation (5), any amount of construction levy which remains unpaid after a period of three months from the date on which it falls due shall be summarily recoverable from the contractor as a civil debt.

(7) The Authority may suspend, cancel or revoke the registration of a contractor, who commences construction works for which the owner has not paid the amount of the construction levy as provided in this regulation.

(8) Where more than one contractor are employed to undertake

a construction project, it shall be the responsibility of the main contractor ensure that the owner has paid the whole amount of the construction levy to the Authority.

(9) No levy shall be payable in respect of sub-contracted works which constitute part of a main contract for which a construction levy has already been imposed.

PART VII - ENFORCEMENT

Suspension.

24. (1) The Authority may suspend the registration of a contractor who remains in arrears in respect of the payment of annual fees until the contractor pays such arrears in full or enter into an arrangement for such payment with the Authority to its satisfaction.

(2) The registration of a contractor whose conduct is under investigation by the Authority shall be suspended until finalization of the investigation.

(3) An investigation committee may make recommendation with respect to the contractor, including revocation of the licence.

(4) Any contractor whose licence is suspended shall not enter into any new contract until the suspension has been lifted.

(5) The Authority shall inform the owner of works of any suspension of a contractor working with him.

(6) The Authority may stop the execution of any contract works where it is in the public interest to do so.

Deregistration.

25.(1) The Authority may remove the name of a contractor from the register of contractors if the contractor-

- (a) has debarred from participating in a procurement process under any legislation;
- (b) has been found guilty of non-compliance with the Code of Conduct published under the Act;
- (c) fails to comply with the provisions of Regulation 29 with regard to the payment of the annual fee;
- (d) is declared bankrupt; or
- (e) is in a company which ceases to exist as a legal entity

(2) The Authority shall publish the name of any contractor who has been deregistered in at least two newspapers of National circulation and shall direct that all construction contracts being executed by that

contractor be terminated within thirty days of the publication.

Fees

26. There shall be payable to the Authority such fees for its services as the Authority may, with the approval of the Cabinet Secretary, determine.

Investigation of
complaint or suspicion.

27. (1) The Authority may upon receipt of a complaint from any person who is aggrieved by an action taken under the terms of the code of conduct or an omission take such action, or where it has reasonable grounds to suspect that a person has acted contrary to, or has omitted to act in terms of the code of conduct, the Authority shall appoint an investigating sub committee carry out an investigation into such complaint or suspicion.

(2) Where the complaint or the suspicion implicates a person who is employed by a state organ or a body established under any written law other than the Authority, the Authority shall refer that complaint or suspicion to the accounting officer or accounting authority or any other supervisory person or body having control over that person for the purpose of dealing with the complaint according to the applicable disciplinary procedure, and submit a copy of the referral to the Audit Committee of the organ of state concerned and the Auditor-General.

(3) The investigating sub committee shall conduct the investigation within the time stipulated by the Authority and submit its report and recommendation including recommendation for sanctions where appropriate.

(4) A person subject to investigation under this regulation shall be entitled to appear before the subcommittee in person or through an advocate.

Liability of principals
and Employers

28. An employer or a principal shall be liable for the actions of his employee or agent, as the case may be, unless such employer or principal proves that he had no reason to believe that the employee or agent had failed to discharge their duties.

SCHEDULE

EVALUATION CRITERIA

FORM NCA - 1

(1.4)

EVALUATION SHEET (FOR OFFICIAL USE)
ALL WRITING TO BE IN CAPITAL LETTERS/UPPERCASE

*Evaluation of this application in all successive stages depends on 100% provision of all the mandatory requirements
 IN STAGE 1, 2&3*

PART I: Mandatory requirements in the various sections

SECTION I: COMPANY PROFILE		FOR OFFICIAL USE
Company name and Address		
Certificate of Incorporation		
Current Business License		
Valid work Permits for foreign staff		
Referees		
Tax Compliance Certificate		
Declaration		

PART II: Recognition Qualifications for the Construction Industry

TECHNICAL AND PROFESSIONAL QUALIFICATIONS		FOR OFFICIAL USE
Degree in construction related field.		
Diploma in construction related field.		
Diploma in construction related field.		
Certificate in construction related Field		
Trade test in a Construction Trade		