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THE MINING ACT

(No. 12 of 2016)

THE MINING (USE OF LOCAL GOODS AND SERVICES)
REGULATIONS, 2017

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THE MINING ACT

(No. 12 of 2016)

IN EXERCISE of the powers conferred by section 223(1) of the Mining Act, 2016, the Cabinet Secretary for Mining makes the following Regulations:—

THE MINING (USE OF LOCAL GOODS AND SERVICES) REGULATIONS, 2017

1. These Regulations may be cited as the Mining (Use of Local Goods and Services) Regulations, 2017. Citation.
2. In these Regulations, unless the context otherwise requires— Interpretation.
 - “Act” means the Mining Act, 2016;
 - “Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to mining; No. 12 of 2016
 - “holder” has the meaning assigned to it in the Act;
 - “Kenyan content” means the quantum of composite value added to or created in the Kenya economy by a systematic development of capacity and capabilities through the deliberate utilization of Kenyan human and material resources and services rendered in the mining industry value chain;
 - “Kenyan goods” means goods including but not limited to plant, machinery and equipment, manufactured, produced or assembled by Kenyans or companies incorporated in Kenya for such purpose;
 - “Kenyan services” means services offered by a Kenyan, Kenyan professionals, a company incorporated in Kenya or owned or controlled by Kenyans;
 - “mine support services” has the meaning assigned to it in the Act;
 - “mineral activities” means any activity or operations to be conducted under a licence to establish a refinery or a smelter or the reconnaissance, prospecting and mining of minerals;

“mining industry value chain” means the processes involved in the mining industry which include but are not limited to exploration, development, production, refining, smelting, polishing and marketing of minerals;

“mining operations” has the meaning assigned to it in the Act;

“Ministry” means the Ministry for the time being responsible for matters relating to mining; and

“procurement plan” means a procurement plan for goods and services submitted in compliance with any provisions of the Act and these Regulations.

3. The purpose of these Regulations is to—

Purpose of the Regulations.

- (a) promote job creation through the use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country;
- (b) achieve the minimum local level and in-country spend for the provision of the goods and services in the mining industry value chain;
- (c) increase the capability and international competitiveness of domestic businesses;
- (d) create mining and mineral related support industries that will provide jobs and sustain economic development;
- (e) achieve and maintain a degree of participation for Kenyans or companies incorporated in Kenya for the supply of goods and the provision of services; and
- (f) provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services.

4. These Regulations shall apply to—

Application of the Regulations.

- (a) all applicants and holders of any licence for –
 - (i) the reconnaissance, prospecting and mining of a mineral;
 - (ii) the cutting, polishing, processing, refining and smelting of a mineral; and
 - (iii) mine support services;
- (b) all operators, contractors and other entities involved in any project, operation or activity connected or related to mine support services, mineral activity or operation in Kenya.

5. The holder of a licence, its contractors and sub-contractors shall, to the maximum extent possible, when purchasing goods and procuring services required with respect to operations or any activity to be conducted under a licence, give first priority to—

Use of Kenyan goods and services.

- (a) materials and goods made in Kenya; and
- (b) services provided by citizens of Kenya or entities incorporated and operating in Kenya or owned and controlled by Kenyans:

Provided that such goods and services are equal in quality, quantity and price to, or better than, goods and services obtainable outside of Kenya.

6. (1) Except as otherwise provided in the Act or under these Regulations, an application for a licence shall not be granted unless the applicant has submitted a procurement plan for the purchase of goods and services in Kenya to the Cabinet Secretary.

Requirement of a procurement plan.

(2) Without limiting the scope of sub regulation (1), the plan shall ensure priority is given to citizens of Kenya or companies incorporated in Kenya and shall include—

- (a) the particulars of the goods and services the applicant intends to procure in Kenya to undertake its operations or activity;
- (b) the proposed expenditure that will be incurred under the plan;
- (c) particulars on gender; and
- (d) a timeframe for the plan.

(3) The plan if approved, shall form part of the conditions or obligations under the licence.

7. (1) Every holder of any mineral right which is valid after the coming into force of the Act shall, within ninety days of the coming into force of these Regulations, submit to the Cabinet Secretary a procurement plan for local goods and services.

Procurement requirements for a holder of a pre-existing mineral right.

(2) For the purposes of sub regulation (1), the procurement plan shall include—

- (a) targets for local procurement including at least the items specified in the procurement list as provided or made available by the Director of Mines; and
- (b) specific support to local providers or suppliers as well as other measures to develop the supply of local goods and services including broadening access to opportunities and technical support.

8. (1) When calling for tenders from contractors and suppliers, the holder of a mining licence or mine support services licence shall invite tenders from companies incorporated in Kenya, of majority ownership by Kenyans, where to the best of the holder's knowledge—

Call for tenders.

- (a) the company or contractors have proven ability and reputation in—

- (i) performing work of a similar nature and quality to that required by the holder;
 - (ii) completing such work within the specified time period; and
- (b) the suppliers are established, recognised and reputable suppliers of materials, equipment or services and have previously marketed or distributed such materials, equipment or services as applicable.

(2) Nothing contained in this regulation shall operate so as to require the holder of a mining licence, mining permit or mine support services in any way, to incur any greater cost, accept an inferior standard of work, accept a delay in supply or otherwise suffer any prejudice.

9. (1) The Director of Mines shall establish and maintain a register of local businesses and service providers for the mining industry.

Register of local business.

(2) The Director of Mines shall ensure the dissemination of the information on the register through the website of the Ministry, the local media and such other effective means as may be available from time to time.

(3) The holder of a mining licence shall encourage and support the establishment of businesses within Kenya with a particular emphasis on businesses directly owned by Kenyans or companies incorporated in Kenya to provide goods and services required for mineral activities and mining related activities or operations.

(4) The holder of a mining licence shall on an annual basis provide the Director of Mines with a list of companies incorporated in Kenya with majority ownership by citizens of Kenya that provide the holder with services, goods, materials and equipment for mineral activities and mining activities or operations, which the Director shall check against and add to the register.

10. The procurement of goods, materials, equipment and services by a holder of a mineral right or mine support services licence may be tendered for and procured internationally without restriction, provided that—

International procurement.

- (a) where such materials, equipment and services are procurable within Kenya, such businesses shall have the opportunity to tender and, if the initial tender submission from such businesses meets the specifications of the invitation to tender and such businesses are demonstrably capable of supplying the particular materials, equipment or services which are the subject of the tender, such businesses shall not be discriminated against in comparison with international suppliers;
- (b) in the event of parity between the initial tender submissions from businesses registered pursuant to regulation 8 (1) and

from international businesses, including consideration of the matters referred to in regulation 8 (1) (a), the holder shall be obliged to award the tender to the business registered pursuant to regulation 8 (1).

11. (1) The holder of a licence shall, within thirty days of the end of a half year, submit to the Director of Mines a listing of all contracts and purchase orders exceeding 100, 000, 000 Kenya Shillings or such other limit as the Director of Mines may determine, awarded in the previous half year.

Procurement
report.

(2) This listing shall include—

- (a) list of all items and services;
- (b) value of contract or purchase order;
- (c) name of successful contractor or vendor;
- (d) a primary location of work;
- (e) estimates of Kenyan content;
- (f) commencement and completion date; and
- (g) any other information required by the Director of Mines for the purposes of implementing the provisions of these Regulations.

12. Subject to section 221 of the Act, the Cabinet Secretary may from time to time, publish and disseminate Guidelines in relation to the content level for all goods and services that shall be procured in Kenya.

Power to
publish
Guidelines.

13. (1) Subject to sub regulations (2) and (3), engineering services shall be rendered by Kenyan engineering companies registered with the relevant regulatory bodies.

Professional
services for
engineering.

(2) Foreign engineering consultants, firms or companies shall only be engaged when the required services are rendered in collaboration with firms or companies licensed to provide such engineering services in Kenya.

(3) Notwithstanding the provisions of sub regulation (2), where there is inadequacy or no capacity for any Kenyan consultant or company to undertake a particular engineering service, the Cabinet Secretary in consultation with the relevant professional body, may permit the holder to engage an expatriate or foreign company subject to such terms and conditions as the Cabinet Secretary may prescribe.

14. (1) A holder of a licence and its contractors, sub-contractors or any company engaged in any form of business, operations or contract in the mining industry shall insure all insurable risks related to its mining business or operations with companies licensed by the Insurance Regulatory Authority of Kenya for such purposes.

Professional services for insurance and reinsurance.

(2) Where there is a reasonable need for a holder to engage the services of an offshore insurance or Reinsurance company, prior consent of the Insurance Regulatory Authority shall be obtained which shall ensure that Kenyan local capacity has been fully exhausted.

(3) The holder shall, not later than thirty days after the end of the licence year, submit a report to the Director of Mines on all companies through which insurance or reinsurance coverage was obtained, the classes of cover obtained and the premiums paid for such coverage.

(4) No insurance in the mining industry shall be placed offshore without the written approval of the Insurance Regulatory Authority which shall ensure that Kenyan local capacity has been fully exhausted.

15. (1) An applicant for or holder of a licence shall only engage the services of lawyers, certified accountants or any such firm or company that are licensed to practice in Kenya.

Professional services for accounting and legal.

(2) Foreign firms, companies or consultants for legal or accounting services shall only be engaged when the required services are rendered in collaboration with individuals, firms or companies that are licenced or certified to practice or work in Kenya.

16. (1) A holder of a licence shall, not later than thirty days after the beginning of each licence year, submit to the Director of Mines an annual report on Kenyan content.

Reporting requirements.

(2) The report in sub regulation (1), shall include other reports required under regulations 9(4), 11 and 14.

(3) For all projects, contracts and purchase orders in excess of 10,000,000 Kenya Shillings, the holder shall provide to the Director of Mines all advertisements, pre-qualification criteria, technical bid documents, technical evaluation criteria and the proposed bidders' lists.

(4) The holder shall include sufficient information with the notifications to enable the Director of Mines assess the subject matter and to be satisfied that the requirements for Kenya content regarding the use of local goods and services have been complied with by the holder and its contractors, sub-contractors or any other entity working for the holder.

(5) The Director of Mines shall review the amount stated in sub regulation (3) from time to time.

17. (1) The Director of Mines shall, within thirty days after receipt of the report on Kenyan content, assess and review the report to ensure compliance with the Mining Act and these Regulations.

Assessment of
performance
report.

(2) For the purposes of assessment and verification of the report, a holder of a licence shall allow the Director of Mines or any authorised officer access to their facilities, documents and information as the Director of Mines may request.

Dated the 9th May, 2017.

DAN KAZUNGU,
Cabinet Secretary for Mining.