



**REVISED  
MEMORANDUM OF UNDERSTANDING**

**BETWEEN**

**THE COMPETITION AUTHORITY OF  
KENYA**

**AND**

**PUBLIC PROCUREMENT REGULATORY  
AUTHORITY**

*Section 5(3) and 9(m) of the Competition Act 2010; and Section  
9 of the Public Procurement and Asset Disposal Act 2015*

## MEMORANDUM OF UNDERSTANDING (MOU)

This MEMORANDUM OF UNDERSTANDING (MOU) (hereinafter referred to as the "MOU") made and entered into on 20<sup>th</sup> day of June, 2018 and revised on 11<sup>th</sup> March, 2019 between

The Competition Authority of Kenya (CAK), a State Corporation established under the Competition Act, No. 12 of P.O. Box 36265-00200 Nairobi of the one part;

And

The Public Procurement Regulatory Authority (PPRA), a State Corporation established under the Public Procurement and Asset Disposal Act, 2015 of P.O. Box 58535-00200 Nairobi of the second part.

### 1. PREAMBLE

This MOU is entered into in order to establish a framework for co-operation between CAK and PPRA concerning their statutory mandates so as to effectively address competition concerns in the public procurement sector, including the Parties' concurrent mandates for the investigation, evaluation and analysis of specified matters arising or incidental to both the Competition Act and the Public Procurement and Asset Disposal Act. This MOU is entered into on the basis of mutual respect, in the spirit of goodwill and does not affect the independence of the two regulators to undertake their respective statutory mandates.

### 2. OBJECTIVE

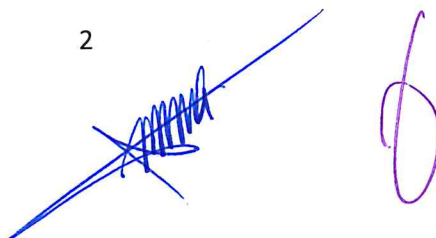
This memorandum of understanding ("MOU") sets out a framework of co-operation between the Competition Authority of Kenya ("CAK") and Public Procurement Regulatory Authority ("PPRA"), individually referred to as "the Party", and collectively referred to as "the Parties", in their common pursuit to promote a fair, competitive, efficient and sound public procurement environment in Kenya.

### 3. REPRESENTATIVES

This MOU is entered into by the duly authorized representatives of the CAK and the PPRA.

### 4. ESTABLISHMENT AND RESPONSIBILITIES

#### 4.1 The Competition Authority of Kenya

The page contains two handwritten signatures. The first is a blue ink signature that is heavily scribbled and difficult to decipher. The second is a purple ink signature that is a simple, stylized loop.

The Competition Authority of Kenya (“CAK”) is a State Corporation established by Section 7 of the Competition Act No.12 of 2010. CAK is mandated to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct.

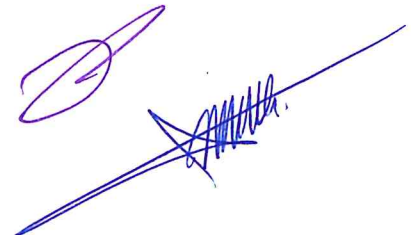
In terms of section 3 of Competition Act, the ultimate objective is to enhance consumer welfare, for example, through:

- a. increased efficiency in the production, distribution and supply of goods and services;
- b. higher innovation rate; and
- c. the efficient allocation of resources;
- d. Protect consumers; and
- e. Promote the competitiveness of national undertakings in world markets.

The CAK is mandated by Section 5(3) of the Competition Act to negotiate MOUs with any regulatory body according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector in order to: identify and establish procedures for management of concurrent jurisdiction; promote cooperation ; provide for exchange of information and protection of confidential information; and ensure consistent application of competition principles enshrined in the Competition Act. Section 9(m) of the Competition Act grants the CAK power to liaise with regulatory and public bodies in matters relating to competition and consumer welfare.

#### **4.2 Public Procurement Regulatory Authority**

The Public Procurement Regulatory Authority (“PPRA”) is established as a body corporate under Section 9 of the Public Procurement and Asset Disposal Act. The purpose of the Act is to give effect to Article 227 of the Constitution to provide for procedures for efficient public procurement and asset disposal by public entities. The functions of the Authority are to inter alia monitor compliance to the Act; monitor the overall performance of the procurement system; investigate and act on complaints received; and enforce the standards developed under the Act. The overall objective being to have a public procurement system that is fair, transparent, competitive and cost effective.



Under section 9 (q) of the Public Procurement and Asset Disposal Act, PPRA is mandated while undertaking its functions, to co-operate with state and non-state actors with a view to obtaining recommendations on how public procurement and asset disposal can be improved.

## 5. PURPOSE

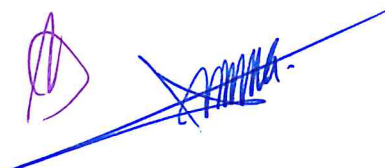
This MOU may:

- a) Facilitate co-operation between the Parties in the performance of their respective functions in so far as they relate to issues of competition between undertakings in the public procurement sector;
- b) Avoid duplication of activities by the Parties, being activities involving the determination of the effects on competition of any act done, or proposed to be done, in the public procurement sector;
- c) Establish a joint working committee to manage and facilitate cooperation and consultation between the Parties in respect of matters relating to competition in the public procurement sector;
- d) Ensure, as far as practicable, consistency between decisions made or other steps taken by the Parties in so far as any part of those decisions or steps consists of or relates to a determination of any issue of competition between undertakings in the public procurement sector;
- e) Facilitate Cooperation between the Parties in creating awareness regarding competition and public procurement at national and county levels, by holding joint forums and cooperating in the funding of budgets for the said forums.

## 6. CONCURRENT MANDATES FOR SAFEGUARDING COMPETITION IN PUBLIC PROCUREMENT

### 6.1 CAK Mandate

The Competition Act applies to all persons including Government, State Corporations and local authorities, and mandates CAK to promote and safeguard competition in the national economy. Specifically, Parts III – VI empower CAK to regulate restrictive trade practices including bid-rigging and collusive tendering. The Competition Act provides CAK with powers to investigate, review, and sanction agreements, decisions or practices that may affect competition in the



national economy. The Competition Act establishes the Competition Tribunal to review appeals of decisions made by the CAK.

## 6.2 PPRA Mandate

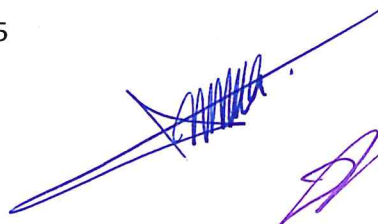
PPRA is mandated with the regulation of public procurement and asset disposal. Specifically, Part II of the Public Procurement and Asset Disposal Act (PPAD Act) gives powers to the PPRA to ensure that the procurement standards established under the PPAD Act are complied with; to monitor the public procurement system and to investigate and act on complaints received on procurement and asset disposal proceedings.

Part IV extends to PPRA powers to investigate procurement and asset disposal proceedings for the purpose of determining whether there has been a breach of the PPAD Act or the regulations made thereunder. Such breaches include: collusion, obstructive, coercive, fraudulent and corrupt practices, or conflict of interest by any person in the public procurement and asset disposal proceedings. PPRA is also empowered to make appropriate orders to rectify the contraventions or prepare and submit a summary of the investigator's findings and recommendations to relevant authorities for action.

## 7. COMMON INTERESTS

The CAK and the PPRA are both committed to conduct their regulatory responsibilities in the public interest. They recognize the importance of mutual consultation and cooperation across a wide range of issues relevant to competition in the public procurement system. The CAK and PPRA agree that public procurement system should be competitive, efficient and economically sustainable. In entering into this MOU, the CAK and the PPRA give due recognition to the need to:

- a) Promote procedural co-operation and coordination between the CAK and the PPRA when dealing with cases of anti-competitive behavior in the public procurement sector where they have overlapping powers;
- b) Facilitate the treatment of cases of anti-competitive behavior within the public procurement sector;
- c) Promote cooperation and coordination between the CAK and the PPRA when dealing with consumer protection issues in the public procurement sector;



- d) Work together to identify and address bottlenecks that restrict entry, investment and competition in the public procurement sector;
- e) Collaborate in the preparation of legislative proposals and regulations that are likely to affect the level of competition in the public procurement system;
- f) Improve understanding of the respective roles of CAK and PPRA by stakeholders in the focus sectors;
- g) Share information relevant to the exercise of their functions;
- h) Minimize the duplication of activities, wherever possible;
- i) Ensure that a consistent and coordinated approach is taken by the Parties in dealing with competition the public procurement sector; and
- j) Improve understanding of the respective roles of CAK and PPRA by stakeholders in the public procurement sector.

## 8. SCOPE

This MOU may apply to restrictive trade practices including anti-competitive agreements such as bid-rigging/collusion within the public procurement sector; and creation of awareness at the national and county levels.

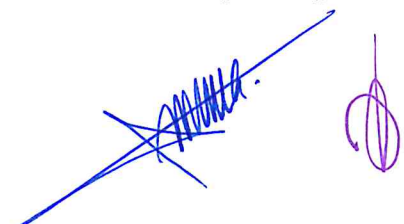
## 9. STATUS OF THE PARTIES

- 9.1 Neither Party nor its personnel may be considered as an official, agent, employee or representative of the other Party. Neither Party may enter into any contract or commitment on behalf of the other Party.
- 9.2 Each Party may carry out its own responsibilities and obligations under this MOU in accordance with the national and international laws, regulations and treaties applicable to it and unless separately agreed in writing, bear its own costs in relation to implementation of this MOU.

## 10. THE PARTIES RIGHTS

Within reason, each Party has a right to:

- a) Make submissions/provide the other Party with comments or expert reports;



- b) Participate in the other Party's hearings related to competition and public procurement cases; and
- c) Ask for/receive optional/mandatory referrals from the other Party related to competition in the public procurement matters.

## 11. MANNER OF COOPERATION IN AREAS OF CONCURRENT JURISDICTION

### 11.1 Consultation

In any circumstance in which both Parties are considering an issue or issues of competition in the public procurement sector, which is or are identical to one another, each Party may consult with the other before performing any function involving the determination of such issues.

### 11.2 Cases invoking concurrent jurisdiction

11.2.1 Where a notification, application or complaint is lodged about anti-bid-rigging/collusion in the public procurement sector; or where a Party initiates an investigation into allegations of the same; or where either party requires the other's expertise to facilitate an investigation and or determination of a matter, the following procedures may apply:

- a) The Party that receives the notification/application/complaint or takes cognizance of the concern through other means may notify the other Party of the notification/application/complaint or breach warranting investigation within 7 working days of receiving the notification;
- b) Where the recipient Party does not intend to investigate, it may notify the other party of its intention and forward the file upon consultation and agreement that the other party take up the matter.
- c) Where the recipient Party expresses the intention to investigate the notification/application/complaint, the parties may agree through the Joint working committee on which party may conduct the investigations.

11.2.2 The Parties undertake to expedite consultation to avoid delays in resolution of any complaints and or conclusion of investigations in which both Parties have concurrent jurisdiction.

### 11.3 Forbearance to Act

11.3.1 Where one Party is satisfied that the other Party is performing functions in relation to any particular matter, the first Party may agree to forbear to

perform any of its functions in relation to that same matter.

11.3.2 Where a Party intends to forbear to perform its functions in the manner described in sub-section 11.3.1 of this Article, it may first discuss the issue with the other Party, inform it of its intention to apply forbearance, and give the other Party an opportunity to respond.

11.3.3 Either Party may request the other to exercise forbearance in any particular case. The other Party may accede to such request where it is satisfied that the requesting Party is performing functions in relation to that matter.

11.3.4 Where one Party has agreed to forbear to perform its functions in any particular matter, it may so inform any relevant third Parties as it sees fit.

11.3.5 Notwithstanding the forbearance, progress reports and the final outcome of the performance of the function may be shared with the party exercising forbearance.

## **12. MANNER OF COOPERATION IN AREAS OF EXCLUSIVE JURISDICTION**

12.1 Where only one Party has jurisdiction to investigate a notification/application/complaint, the other Party undertakes to facilitate the investigation by availing any information in its custody, subject to Sections 13 and 14 of this MOU.

12.2 Both Parties endeavor to take into account and as much as possible be guided by international best practice in competition matters in handling matters under this MOU in order to ensure consistency in determination of cases.

## **13. ESTABLISHMENT OF JOINT WORKING COMMITTEE**

13.1 The Parties may establish a Joint Working Committee ("the Committee") within six (6) months of signing this MOU. The Committee will be comprised of three (3) representatives each of CAK and PPRA as nominated by the authorities respectively, pursuant to this MOU and may function on an on-going basis.

13.2 The functions of the Committee may include:

13.2.1 Management and facilitation of cooperation and consultation in respect of matters relating to competition in the public procurement sector;

13.2.2 Proposals, where necessary, for amendment or supplementation to this MOU; and,



13.2.3 Advising the management of CAK and PPRA on issues affecting competition in the public procurement sector. Such advice may include, but not be limited to, the following:

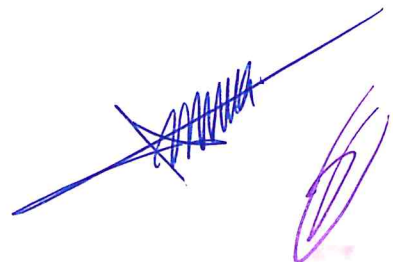
- a) Cooperation and collaboration in conducting joint market studies in the public procurement sector;
- b) Mutual consultation on matters involving competition and consumer protection in the public procurement sector, including drafting of new legislation and regulations;
- c) Amendments to the relevant or applicable statutes that may be necessary from time to time;
- d) International approaches to addressing issues of competition in the public procurement sector;
- e) Providing updates and sharing information on recent developments in the sector;
- f) Exchange of staff between authorities; and,
- g) Conducting joint training and workshops in areas of concurrent jurisdiction or mutual benefit to interest.

#### 14. INFORMATION SHARING

14.1 The CAK and the PPRA may exchange such information as may be necessary to actualize this MOU subject to the limitations imposed by legal and regulatory frameworks the Parties are subject to including the Competition Act and The Public Procurement and Asset Disposal Act.

14.2 The Parties recognize the intrinsic value of the information they each hold and the potential efficiencies that can be gained from sharing the said information with each other. The Parties therefore undertake to:

- a) Promote free access to and exchange of information in an efficient and expedient manner;
- b) Use the information exchanged under this MOU solely for the purpose for which the relevant information was sought and or disclosed;
- c) Keep strictly confidential all information and materials exchanged pursuant to this MOU. Neither party may release any such information and/or



materials to third Parties without prior express written consent of the other party except as may be required by law.

14.3 Each party agrees that it will, upon written request, where it agrees that the request is reasonable, provide to the other Party any information in its possession of a kind specified in the request. The request may state that the information is required by the Requesting Party for the purpose of the performance of its functions, and may describe the particular functions for which the information is required.

14.4 Requests for information must be made in writing (for the avoidance of doubt, "writing" includes electronic mail). In cases of urgency, requests for information may at first instance be made orally, and their responses given orally, provided that both requests and responses are subsequently confirmed in writing.

14.5 In the case of information supplied pursuant to this MOU, the provisions of any enactment concerning the disclosure of information by the Respondent Party may apply to the Requesting Party.

14.6 The Requesting Party may ask that the request itself be considered of a confidential nature.

14.7 The Parties hereby commit themselves to use the information solely for the purposes described in the Request.

14.8 Should the Requesting Party wish to use the shared information for any purpose other than the purposes expressed in the Request it must first obtain the written approval of the Respondent Party.

## 15. CONFIDENTIALITY

15.1 When exchanging confidential information, the Parties acknowledge the confidentiality provisions of the laws under which they operate. Each party may respect the confidentiality of information exchanged which has been obtained as a result of the other party's statutory powers or other legal obligations and relates to the affairs of any individual, business or undertaking.

15.2 Each party agrees not to disclose any confidential information obtained pursuant to this MOU to a third party unless it has obtained prior consent of the party which has provided the confidential information. Each party shall comply with any non-disclosure obligations that are binding on the other, in particular those set out in Section 20 of the Competition Act and section 67 of The Public

Procurement and Disposal Act.

15.3 Each party agrees to take reasonable steps to ensure that access to the confidential information obtained pursuant to this MOU is limited internally to only those staff members who require the information.

15.4 In no event shall any party disclose any information which is protected as confidential under either the Competition Act or the Public Procurement and Asset Disposal Act except as may be allowed by any other statute.

#### 14. FOCAL CONTACTS

Each Party may nominate a focal contact to liaise, communicate and respond to requests for information from the other Party for the purposes of this MOU.

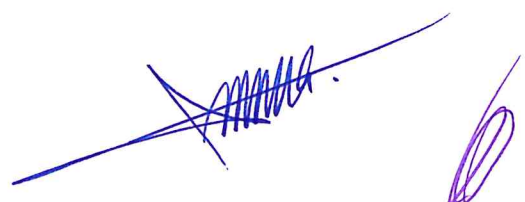
#### 15. SETTLEMENT OF DISPUTES

Both Parties may adhere to the above procedures and may continuously engage in consultations, exchange of information and review of processes of the mechanisms in order to avoid disputes. Parties undertake to use their best efforts to settle any disputes, controversy or claims arising out of this MOU or the breach, termination or invalidity thereof. In the event that amicable settlement of the dispute, controversy or claim fails the Boards of the respective Parties to this MOU may constitute a joint panel to resolve the dispute.

#### 16. DURATION, AMENDMENT AND TERMINATION

This MOU may only be amended by mutual written agreement of the Parties. Either party may only terminate the MOU upon issuance of a sixty day (60) notice in writing to the other party. The initiation of any dispute resolution mechanism pursuant to the provisions of this MOU may not in itself be deemed as termination of this MOU or a ground for its termination. This MOU may enter into force upon signature by both Parties and may remain in force unless terminated.

The termination of this MOU by any of the parties will not affect any programs, activities or agreements established in terms of this MOU that will still be in operation at the time of such termination, unless otherwise mutually agreed by the parties in writing.

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## 16. PARTICIPATION IN SIMILAR ACTIVITIES

This MOU in no way restricts the Parties from participating in similar activities with other public or private organizations, agencies and individuals.

## 17. LEGAL STATUS OF MOU

This MOU is not intended to and does not create any legally binding obligations on either Party and where the Parties intend to create such legally binding obligations they will negotiate and conclude such formal legal agreements as applicable.

## 18. NOTICE

Any and all correspondence, approvals, consents made or notices to be sent or required to be made under this MOU shall be in writing, signed by the Party giving such notice (claim or demand) and shall be delivered personally, or by registered mail, to the other Parties as its address set forth herein below or at such other addresses as such other Parties may subsequently notify. All notices shall be deemed given when delivered, which includes facsimile transmissions.

### **Competition Authority of Kenya**

Telephone No: 254-20-2628233

Email: [info@cak.go.ke](mailto:info@cak.go.ke)

Address: P.O. Box 36265-00200, Nairobi

Attention: Mr. Wang'ombe Kariuki, MBS

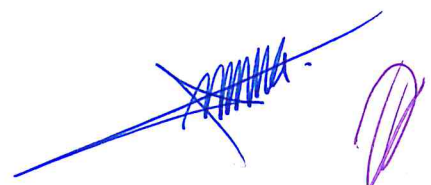
### **Public Procurement Regulatory Authority**

Telephone No: +254-020-3244000

Email: [info@ppoa.go.ke](mailto:info@ppoa.go.ke)

Address: P.O Box 58535-00200, Nairobi

Attention: Mr. M.J.O Juma, MBS



**19. EFFECTIVE DATE OF THE MOU**

The MOU may come into force on the date on which it is signed by persons authorized to act on behalf of the two Parties. This revised MoU executed on 11<sup>th</sup> March,2019 overrides the earlier one executed on 20<sup>th</sup> June,2019.

**18. PUBLIC DOCUMENT**

This MOU may be a public document.

**IN WITNESS WHEREOF, the duly authorized representatives of the Parties affix their signatures below.**

**THIS MEMORANDUM OF UNDERSTANDING (MOU) is made on the 11<sup>th</sup> day of March Two Thousand and Nineteen.**

For: The Competition Authority of Kenya

For: Public Procurement Regulatory Authority

.....  
**Mr. Wang'ombe Kariuki, MBS**  
Director-General  
The Competition Authority of Kenya  
P.O. Box 36265-00100  
Nairobi

.....  
**Mr. M.J.O Juma, MBS**  
Director-General  
Public Procurement and Regulatory Authority  
P.O. Box 58535- 00200  
Nairobi

