

# Globalisation, a Dilemma to Local Contractors: An Analysis on Legislations

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## ABSTRACT

In the twenty first century, one of the most vigorous trends that is obviously seen in the world economy is globalisation. The advancement in information technology and communication in general, together with the principles of World Trade Organization, International Monetary Fund and some big Multinational Companies, on the embrace of market based reforms, have changed business practices throughout the world making markets that were once insulated open to competition from around the world.

In such a case it is imperative for local contractors to become globally competitive. In order to survive and succeed in global construction market, local contractors must participate in the development and implementation of international standards and quality management system. They should learn how to compete and adopt strategies that give them market shares that are no longer geographically limited.

*It is no longer a case of preparing our local contractors for globalization but rather how best they can take advantages of the available opportunities to compete. As such this paper examines some legislations that impact on contractors to see if they are good enough to enable contractors to harvest the opportunities created by globalization or compete with foreign contractors in procurement, investment etc.*

Key words: international standard, information technology, market share, globally competitive, investment, procurement

## LEGISLATIONS IMPACTING ON CONTRACTORS

### 1. THE CONSTITUTION

The constitution of the United Republic of Tanzania 1977, as amended from time to time, (hereinafter referred to as the constitution) is the basic or fundamental law of the state. All other laws in the country derive their validity from it. Any law will not be valid if it is inconsistent with the constitution.

A constitution comprise of basic rules that govern a country. In part II the constitution provides for fundamental objects and directive principles of state policy. Under article 9(g) it imposes an obligation to the state authority and all its agencies to direct their policies and programmes towards ensuring "that the government and all its agents provide equal opportunities to all citizens, men and women alike without regard to their colour, tribe, religion, or station in life"

It is a cardinal principle of law that all laws should conform to the constitution. As such all contractors who are citizens of Tanzania should be given equal opportunities by the law, policy and programmes emanating from the government or its agents. A local contractor should not,

particularly at this era of globalization, be discriminated by any law, policy or programme from utilizing the opportunities which are created in this country by globalization.

## **2. THE PUBLIC PROCUREMENT ACT, 2001 (Act No 3 of 2001)**

The Public Procurement Act 2001 (hereinafter referred to as the Procurement Act 2001) defines a contractor under s. 3(1) to mean:

“a company, corporation, organisation, partnership or individual persons engaged in civil, electrical or mechanical engineering or in construction or building work of any kind including repairs and renovation, and who is, according to the context a potential party or the party to a procurement contract with the procuring entity.”

The same section defines the term procurement to mean: “buying, purchasing, renting, leasing or otherwise acquiring any goods or services by a procuring entity spending public fund on behalf of the ministry, department or regional administration of the government.”

The phrase procurement entity in the context of the Procurement Act 2001, it means the ministry, government department, agency, parastatal organization, or a regional or local authority as the case may be.

### **Qualifications for Contractors to Participate in Procurement Proceeding**

In order for contractors to participate in procurement proceeding, they have to qualify first by meeting appropriate criteria set out by the procuring entity and where appropriate by the approving authority for those particular procurement proceedings.

Any contractor who qualifies shall be eligible to take part in the procurement proceeding regardless of his nationality except where this is limited by national preferences. Regulation 15 of the Procurement of Goods and Works Regulations, 2001 (hereinafter to be referred to as the Procurement Regulations 2001) provides that contractors are required to qualify by meeting such of the following criteria as the procuring entity considers appropriate in the particular procurement proceeding:

- (a) That they possess the necessary professional and technical qualification and competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience and reputation, and the personnel to perform the procurement contract
- (b) That they have the legal capacity to enter into procurement contract
- (c) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or judicial officer, their business activities have not been suspended, and they are not the subject of legal proceeding for any of the foregoing
- (d) That they have fulfilled their obligation to pay taxes and social security contributions in Tanzania, where required
- (e) That they have not, and their directors or officers have not been convicted of any criminal offence related to their profession, offences related to their professional conduct or making of false statement or misrepresentations as to their qualification to enter into a procurement contract within a period of ten years preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or disbarment proceedings.

For local contractors who wish to participate in any procurement proceeding are obliged under section 20(2) of the Procurement Act, 2001 to satisfy all relevant requirement for registration with appropriate current professional body.

For foreign contractors who wish to participate in any procurement proceedings, the provisions of section 20(3) of the Procurement Act, 2001, exempt them from the obligation to satisfy all relevant requirements for registration with appropriate current professional body. However, the exemption is waived where a foreign contractor is selected as having submitted the lowest evaluated responsive tender or best ranked proposal. In such a case the selected contractor shall register with the appropriate professional body and shall be required to submit evidence of registration as an appropriate contractor in Tanzania.

Any qualification criteria set by procuring entity must be made known and must apply equally to all contractors. A procuring entity is not allowed to impose discriminatory criteria, requirement or procedure with respect to the qualification of any contractor. [s. 20(4)]

The procuring entity is allowed to engage in pre-qualification proceedings with a view of identifying contractors either before inviting tenders for the procurement of works or after taking part in the procurement proceedings.

The term work is defined under section 3(1) to mean

- (i) All works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure, road or airfield
- (ii) Any other civil works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing
- (iii) Services which are tendered and contracted on the basis of performance of a measurable physical output such as drilling, mapping, satellite photography or seismic investigation;

Provided that, contracts which include the provision of services shall be regarded as works contracts if the total value of the work is greater than the value of services covered by the contract.

### **National Preferences**

The participation of contractors in the procurement proceeding need not be influenced by their nationality. As stated earlier, contractors should participate freely without any form of discrimination criteria. However, where the procuring entity has limited participation in the procurement proceedings on the basis of nationality in accordance with the Procurement Act, 2001, The Procurement Regulations 2001 or any other provision of any written law, it may make provisions for national preferences.

*The procuring entity is allowed under section 22(2) of the Procurement Act 2001, if it states clearly in the tender document, when procuring works by means of international tendering, or when evaluating and comparing tenders, grant a margin of preference for the benefit of tenders for certain goods manufactured, mined, extracted, grown in the United Republic, for works by Tanzanian contractors.*

According to regulation 6(7) of the Procurement Regulations 2001, a procuring entity may limit participation to Tanzanian contractors in cases where:

- (a) The method of procurement is to be by competitive quotation, by national or international shopping or by single source procurement.

- (b) Works are being tendered with a value not exceeding the equivalent of Tshs 200,000,000/= where foreign contractors are not expected to be interested.

### Observation

Part (b) above, cannot positively be commended as giving national preference. This is due to the fact that the procuring entity is influenced by the fact that foreign contractors will not be interested. As such the procuring entity will remaining with only one option i.e. Tanzanian contractors. I am convinced to believe that if foreign contractors are interested in such procurement proceedings their interest will override national preference to Tanzanian contractors.

### Eligibility for National Preferences

Not all contractors are eligible for the margin preference. In order to be eligible, contractors are required to meet the following criteria as set out under section 22(3) of the Procurement Act:

#### (a) For Individual Companies

- (i) They are incorporated or registered in the United Republic of Tanzania
- (ii) At least fifty percent (50%) of the authorized capital of the company is owned either by the government or by citizens of Tanzania. According to the Tanzania Citizenship Act, 1995 a person can be a citizen of Tanzania by birth, or by descent. See also *Attorney General and Two others v. Aman Walid Kabourou* (1996) TLR 154 (CA). Or a person may become a citizen of Tanzania by naturalization.
- (iii) The majority of the members in the board of directors are citizens of Tanzania.
- (iv) Not less than fifty percent (50%) of the key personnel are citizens of Tanzania.
- (v) Company is held by citizens of Tanzania
- (vi) If they do not subcontract more than ten percent (10%) of the contract price, excluding provisional sums to foreign contractors provided that the domestic company is qualified to carry out the contract in accordance with the qualification criteria, including any services provided by the domestic company and fees and expenses paid to the domestic company
- (vii) There is no arrangement where by any major part of net profits or other tangible benefits of the domestic company will accrue or be paid to persons not citizen of Tanzania or to companies which would not be eligible under section 23 of the Procurement Act 2001.

#### (b) For joint ventures of local companies

- (i) Individual member companies are incorporated and registered in the United Republic of Tanzania
- (ii) At least fifty percent (50%) of the ownership of individual companies are held by citizens in Tanzania
- (iii) The joint venture itself is registered in Tanzania
- (iv) Do not sub contract more than ten percent (10%) of the contract price, excluding provisional sum, to foreign firms, provided that the domestic partner or partners are qualified to carry out a contract in accordance with the qualification criteria, including any services provided by the partners and fees and expenses paid to the partners.

- (v) Do not have any arrangement whereby any major part of the net profit will accrue or be paid to persons not citizens of Tanzania or to companies which would not be eligible to marginal preference.
- (c) For partners or individual persons trading as contractors
- (i) The majority of capital shares are held by citizens of Tanzania
  - (ii) Not less than fifty percent (50%) of the key personnel are citizens of Tanzania
  - (iii) The partners or individual persons are citizens of Tanzania
  - (iv) The partners or individual persons shall not subcontract more than ten percent (10%) of the contact price, excluding provisional sums, to foreign firms, partners or individual persons.

The maximum margin of preference of ten percent (10%), according to section 22(4) of the Procurement Act 2001, may be granted by the procuring entities to domestic contractors. This preference can be given to domestic contractors in contracts for works to be awarded on the basis of international competitive tendering.

Regulation 109(1) (b) of the Procurement Regulations 2001 provides that a margin of preference may be provided in the evaluation of tenders for works when comparing tenders from eligible Tanzanian contractors with those from foreign firms where such preference has been stated clearly in the tender document.

In order to ensure that foreign contractors are not discriminated, the Procurement Act 2001 requires that if foreign contractors have expressed interest in the procurement proceeding they should not be excluded from consideration.

### **Observation**

Though it may appear that national preference gives protection and advantages to local contractors against foreign contractors, the preference leaves much to be desired. The law does not make it a must or an obligation for any procuring entity to give preference to local contractors. This is left exclusively to the discretion of the procuring entity. This puts local contractors in dilemma; the competition on the same footing with large foreign contractors will make the local contractors stand a big chance of losing in procurement proceedings. As markets are no longer insulated and the world increasingly resembles a global market place, it is inevitable that the local contractors need to learn how to compete in order to survive along side the big foreign contractors. Small construction firms find themselves in insecure situation. This is due to the fact that it is almost impossible to formulate and implement strategies used by large firms to create and sustain market position as they require large investment. This paper does not advocate for local contractors to be given any work which they do not qualify. It only highlights the need to protect our local contractors who qualify against giant contracting firms from abroad. But the protection should not be to the extent of distorting or preventing fair competition as provided for in the Fair Competition Act 2003.

### **Exclusive Preference to Local Contractors**

Section 23(1) of the Procurement Act 2001 provides that where Tanzanian public body exclusively provides financial sources, each procurement of works that has a value not exceeding a threshold specified in the Regulations shall be reserved exclusively for local persons or firms and shall be set aside unless the procuring entity determines that there is no reasonable

expectation of obtaining offers from three or more responsible local persons or firms that are competitive in terms of market prices, quality and delivery.

The threshold is provided for under regulation 27(1) of the Procurement Regulation 2001. For the sake of clarity let me reproduce the regulation:

*"Where financial resources are exclusively provided by a Tanzanian public body, each procurement of works or goods that has value not exceeding Tshs 200,000,000 shall be reserved exclusively for local persons or firms, if they meet the requirement of Regulation 26(3) of these Regulations, and shall be set aside unless the procuring entity determines that there is not a reasonable expectation of obtaining offers from five or more responsible local persons or firms that are competitive in terms of market prices, quality and delivery." (Emphasis supplied)*

*In this respect local contractors are protected against competition from foreign contractors, provided they qualify to undertake the work. Three issues need to be examined critically.*

- ❖ First is whether a threshold of Tshs 200,000,000 set by the Procurement Regulations 2001 gives any substantive protection to local contractors putting in mind the nature of works undertaken by the contractors.
- ❖ Second is the inconsistency that exists on the number of local persons or firms from whom the procuring entity has to expect to obtain offers. The Procurement Act 2001 mentions three or more persons or firms while the Regulations mentions five or more. In case of inconsistency at it is the case here, the provisions of the parent Act i.e. the Procurement Act 2001 will prevail.
- ❖ Third is a test as to whether the procuring entity will receive offers from local persons or firm is too subjective. The good practice could have been for the procuring entity to set a time limit to receive offers from local persons or firms, and on expiration of such specified time, then the procuring entity could be entitled to judge that there is no local persons or firms that are competitive to undertake the procurement contract.

It should be remembered that such a protection is available only when a Tanzania public body exclusively provides financial sources. Where there is donor funding for procurement i.e. the public authority or government enter into any agreement with another government, an agent of another government or an international financing institution for a loan, credit or grant of funds for procurement purpose, that agreement may specify rules and procedure to be followed in such procurement.

Where there is donor funding, the procuring entity is required to follow the provision of the Procuring Act unless there is a conflict between the provisions of the Act and the requirement of the agreement. In cases of conflict, according to regulation 14(4) of the Procurement Regulations, the content of the agreement shall take precedence. It is obvious therefore, that if the agreement provides something contrary to exclusive preference, the procuring entity cannot give that preference to local contractors.

Apart from the weaknesses that appear on the national and exclusive preferences, the Procurement Act gives room for local contractor to harvest the opportunities created by globalization. Further more it does not hinder local contractors form competing with foreign contractors rather it puts local contractors in a good position where the procurement fund is provided exclusively by public body. It is therefore for local contractors to put themselves in a position to compete with foreigners in procurement proceedings.

### 3. THE TANZANIA INVESTMENT ACT, 1997 (Act No 26 of 1997)

This legislation was enacted to make provisions for investment in Tanzania, to provide for more favourable conditions for investors and other related mater. In this paper unless stated otherwise, this statute will be referred to as the Investment At 1997.

Under the Investment Act 1997 any business enterprise which meets the following qualification enjoy the benefit and protection provided in it:

- (i) If wholly owned by a foreign investor or if a joint venture, a minimum investment capital is not less than Tanzanian shillings equivalent of US dollars three hundred thousand (US \$ 300,000)
- (ii) If locally owned, the minimum investment capital is not less than Tanzanian shillings equivalent of US dollars one hundred thousand (US \$ 100,000)

It should be noted from the outset that any undertaking or project to construct a pipeline under the Petroleum (Exploration and Production) Act 1980 does not enjoy the benefit and protection under the Investment Act 1997. This is expressly stated under section 2(1)(b).

The phrase business enterprise is defined under section 2(1) to mean:

“Any industry, project, undertaking or business to which this Act applies or an expansion, restructuring, rehabilitation or technical improvement of the industry, project, undertaking, or business or any part of the business, provided that the business enterprise is profit motivated and operated on commercial principles.”

The Act further defines investment under section 2(1) to mean: “The creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise.”

#### **Investment Application and Registration**

*Any legal or natural person may register a business enterprise with the Tanzania Investment Center subject to complying with the requirements of the Investment Act 1997.*

All applications for registration shall be made in the form No. TIC-1 (see Annex I at the end of this paper) and delivered to the executive Director for registration. On registration of the investment, the Executive Director is required, under regulation 44 of the Investment Regulations 2002, to issue a certificate of incentives under the seal of the Center. The certificate issued shall be conclusive evidence that all the requirements of the Investment Act and Investment Regulations in respect of registration and of matters precedent and incidental thereto have been complied with.

Where the application is for new investment it must contain the following information:

- (a) The name and addresses for the proposed business enterprise, its legal form, its bankers, the name and address of each director or partner and the name, address, nationality and shareholding of each shareholder.
- (b) The qualifications, experience and other relevant particulars of the project management.

- (c) The nature of the proposed business activity and the proposed location where that activity is to be carried on.
- (d) The proposed capital structure or the amount of investment and the projected growth over the next five years.
- (e) How the investment will be financed.
- (f) Evidence of sufficient capital available for investment
- (g) An understanding that the project shall be implemented as indicated in the projection project.

Where an application is to rehabilitate or expand an existing enterprise or both, it should contain the following information:

- (a) The name of the existing enterprise, its Articles and Memorandum of association or partnership agreement
- (b) The qualification of the project management
- (c) A statement of audited accounts for the previous three years
- (d) The nature of rehabilitation or expansion
- (e) The capital expenditure and projected growth over the next five years
- (f) Financing rehabilitation or expansion project together with evidence of availability of finances
- (g) An undertaking that the expansion or rehabilitation shall be implemented as indicated in the projection.

A business enterprise which is issued with the certificate of incentives is entitled to the benefits specified by, among other laws, the Income Tax Act, 1973. In the second schedule, the Act provides Investment deductions where an Investor:

- ❖ Incurs capital expenditure on the construction of Industrial building
- ❖ Incurs capital expenditure on machinery
- ❖ Incurs capital expenditure on
  - construction or extension of a building subsequently used as an hotel and such building or extension is certified by the ministry
  - the purchase of machinery which has been installed and is used solely in the hotel

In respect of buildings and machinery, paragraph 24 of the second schedule provides for an investment deduction of 20% of the capital expenditure incurred by the investor in respect of either the qualifying industrial building or machinery or both, as the case may be. However, the minister, may under paragraph 31 increase the quantum of deduction, but he has no power to decrease such quantum.

The Investment Act provides for favourable conditions for Investors, both local and foreigners. The Act and the Regulations made thereto create opportunities for investors to compete. The Investor is chosen on merit.



#### 4. CONTRACTORS REGISTRATION ACT 1997 (Act No 17 of 1997)

The term contractor is given two meanings under section 2. It means either:

- (a) Any person who for a reward or other valuable consideration undertakes the construction, installation or erection, for any other person, of any structure situate below, on or above the ground..., where such person undertakes to do any such work-
  - (i) himself supplies the material necessary for the work or is authorized to exercise control over the type, quality or the use of materials supplied by any other person
  - (ii) himself supplies the labour necessary for the work or is authorized, on behalf of the person for whom the work is undertaken or any other person, to employ or select for employment workmen to assist him in the execution of the work: Or
- (b) Any person who himself as a developer or investor, undertakes the construction, erection, installation or alteration of any structure... where such person undertakes to do any such work
  - (i) himself supplies labour necessary for the work or is authorized to exercise control over the type, quality or the use of material supplied by any other person or
  - (ii) himself is authorized on behalf of the person for whom the work is undertaken or any other person to employ or select for employment workmen to assist him in the execution of the work.

#### Registration

Any person or firm that want to trade or carry on business as a contractor must register with the Contractors Registration Board. The Registrar to the Board is required to keep and maintain registers of contractors of different types, categories and classes.

After registration, the Registrar is required to publish in the Gazette, the names, postal addresses, premises, registration number, type, category and class registered in and the names and qualification of partners or directors of the registered contractor. The publication is prima facie evidence that the persons name in the register is registered under the Contractors Registration Act, 1997.

#### Qualification for Registration

In order for a person to qualify for registration as a contractor, he must establish, as required by section 10(1), to the satisfaction of the Board:

- (a) that he has the minimum technical qualifications and skills prescribed by the Board for the category, type, and class of contractors the registration of which is being sought
- (b) that he has the necessary experience as prescribed by the Board in works involving construction, erection, installation, alteration or any other activity which is connected with them
- (c) hat his professional and general conduct has been such as, in the opinion of the Board, makes him a fit and proper person to be registered
- (d) he has the necessary plants and equipment for the work or works intended to be carried on.

A person other than a citizen of the United Republic of Tanzania is not allowed to form a local contracting firm. Such a person can only do so if and only if the majority of the firm's shares are

owned by the citizens of the United Republic, otherwise the firm or company shall be registered as a foreign firm or company.

## **5.0 CONCLUSION**

Looking at the legislations discussed above one can rightly argue that the survival of the local contractors in this era of globalization requires them to build capacity by utilizing efficiently and effectively the existing opportunities. The legislations do not insulate markets in this country; the geographic boundaries are no longer barriers when doing business. All avenues are open for both local and foreign contractors to compete be it in public procurement proceedings or in investment opportunities. The national preference and exclusive preference given to local contractors seem to be easy to be eroded. The wordings of the provisions providing for these preferences are vague in such a way that they can easily be bypassed by any procuring entity.

Small construction firms with poor financial base, insufficient plant and machinery poor entrepreneurial ability and skills are in very precarious situation. They find themselves in a dilemma, as they cannot either cope with the strategies used by large firms to create and sustain market position or formulate their own strategies that will enable them to compete with large firms, as the result their market shares are being marginalized day by day. Competition in global market requires large investments, creativity and meeting international standards.

Local contractors need to form big and strong associations be it in forms of companies, joint ventures or firms in order to utilize the opportunities created by globalization in this country and elsewhere other wise they will be swept away. The global force on opening markets for competition worldwide is so immense in such a way that the government cannot block it by legislations. Local contractors need to consolidate their resources in order to be able to compete with foreign contractors in a global market place.

Annex I

THE UNITED REPUBLIC OF TANZANIA  
THE TANZANIA INVESTMENT ACT  
(No 26 OF 1997)  
APPLICATION FOR REGISTRATION

(Made under Regulation 42)

To: The Executive Director,  
Tanzania Investment Centre,  
P.O.Box 938  
Dar es salaam  
Tanzania

1. I/We.....A  
director/directors/agent of  
.....(name of business  
enterprise) apply for registration of.....under  
section 17 of the Act and part IV of the Investment Regulations, 2002.

2. The registered office of the company will be situated at .....

Copies of the following documents are attached to this application:

- (i) The Memorandum and Articles of Association/ or partnership agreement
- (ii) Certificate of incorporation/ Registration
- (iii) A copy of the project profile or Feasibility study showing the implementation period, programme of implementation and operative date.

3. The head office of the company will be situated at.....

4. The principal of the company are.....

5. Auditors of the company are.....

6. The authorized share capital of the company is T.shs/US\$.....

7. The intended capital investment of the company in terms of section 2(2) of the Act is  
T.shs/US\$.....  
.....

8. The month and day of the financial year end is.....

**Note:** Failure to provide all the required information will result in the return of the application by the center.  
I/We enclose a cheque made payable to the Tanzania Investment Centre for T.shs/US\$.  
.....being the registration fees. In the  
event this application is unsuccessful we understand that this fee will not be refunded.

I, .....of Post Office Box  
Number..... Dar es salaam, do solemnly and sincerely that I am a  
Director/Dully authorized agent of ...

AND that all the requirements of the Tanzania Investment Act , 1977 in respect of  
matters precedent to the registration of the business enterprise under the Act and  
Incidental there to have been complied with, AND I make this solemn declaration  
conscientiously believing that the same is true.

Declared at Dar es salaam }  
The.....day of.....2004 } Applicant

Before me;  
.....  
Commissioner for Oaths

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### Statutes

The Constitution of the United Republic of Tanzania

The Public Procurement Act, 2001

The Procurement of Goods and Works Regulation, 2001

The Tanzania Investment Act, 1997

The Investment Regulations, 2002

The Contractors Registration Act, 1997

The Occupational Health and Occupational Act, 2003

The Fair Competition Act, 2003

The Tanzania Citizenship Act, 1995

The Income Tax Act, 1973