



**MINISTRY OF LANDS, PUBLIC WORKS, HOUSING AND URBAN DEVELOPMENT**

**REGULATORY IMPACT STATEMENT**

**FOR**

**THE REVISED CONTRACTOR EVALUATION CRITERIA, 2023**

**MARCH, 2023**

**This Regulatory Impact Statement has been prepared by the Ministry of Lands, Housing,  
Public Works and Urban Development pursuant to Section 6 and 7 of the Statutory  
Instruments Act, No. 23 of 2013**

## TABLE OF CONTENTS

LIST OF ABBREVIATIONS .....	4
<b>1. INTRODUCTION.....</b>	<b>5</b>
<b>1.1 Regulatory-Making Authority and the Legal Mandate .....</b>	<b>5</b>
<b>1.2 Requirements of the Statutory Instruments Act, 2013 .....</b>	<b>6</b>
<b>1.3 What is a Regulatory Impact Assessment?.....</b>	<b>6</b>
<b>2. PURPOSE AND OBJECTS OF PROPOSED REVISED CONTRACTOR EVALUATION CRITERIA.....</b>	<b>7</b>
<b>2.1 Scope .....</b>	<b>7</b>
<b>2.2 Objective .....</b>	<b>7</b>
<i>2.2.1 Specific objectives.....</i>	<i>7</i>
<b>3. BACKGROUND AND CONTEXT .....</b>	<b>8</b>
<b>3.1 Policy and Legal Background.....</b>	<b>8</b>
<b>4. EVALUATION OF THE PROBLEM .....</b>	<b>8</b>
<b>5. LEGAL AND POLICY FRAMEWORK FOR THE PROPOSED REVISED CONTRACTOR EVALUATION CRITERIA .....</b>	<b>9</b>
<b>5.1 Constitutional Basis .....</b>	<b>10</b>
<i>5.1.1 Distribution of Public Works Function.....</i>	<i>11</i>
<b>5.2 National policy framework.....</b>	<b>11</b>
<i>5.2.1 The National Housing Policy Sessional Paper No. 3 of 2016 .....</i>	<i>11</i>
<i>5.2.2 Draft Construction Industry Policy .....</i>	<i>12</i>
<b>5.3 Statutory framework .....</b>	<b>12</b>
<i>5.3.1 National Construction Authority Act, 2011 .....</i>	<i>12</i>
<i>5.3.2 Physical and Land Use Planning Act, 2019 .....</i>	<i>13</i>
<i>5.3.3 Standards Act Cap 496.....</i>	<i>15</i>
<i>5.3.4 Occupational Safety and Health Act, 2007 .....</i>	<i>16</i>
<i>5.3.5 Urban Areas and Cities Act, 2011 .....</i>	<i>16</i>
<i>5.3.6 Occupiers' Liability Act, Cap 34.....</i>	<i>16</i>
<i>5.3.6 Public Procurement and Asset Disposal No. 33 of 2015 .....</i>	<i>16</i>
<i>5.3.7 Water Act No.43 of 2016 .....</i>	<i>17</i>
<i>5.3.8 Roads Act No.2 of 2007.....</i>	<i>17</i>
<i>5.3.9 Energy Act No.1 of 2019 .....</i>	<i>17</i>

5.3.10 Kenya Information and Communications Act, 1998 .....	18
<b>6. PUBLIC PARTICIPATION AND CONSULTATIONS.....</b>	<b>18</b>
<b>6.1 Legal Requirements Relating to Public Participation and Consultation.....</b>	<b>19</b>
<b>6.2 The Process of Public Participation and Consultations.....</b>	<b>20</b>
6.2.1 Stakeholder Mapping .....	20
6.2.2 Public Consultation Approach and Methodology .....	21
6.2.3 Report on Stakeholder Consultative Process .....	22
<b>7. AN OVERVIEW OF THE PROPOSED CONTRACTOR EVALUATION CRITERIA, 2023....</b>	<b>22</b>
7.2 Comparison of the Proposed Revised Contractor Evaluation Criteria with the current contractor evaluation criteria .....	23
<b>8. COST-BENEFIT ANALYSIS.....</b>	<b>24</b>
8.1 Costs and Benefits Generally .....	24
8.2 Financial Cost.....	24
<b>9. CONSIDERATION OF ALTERNATIVES TO THE REVISED CONTRACTOR EVALUATION CRITERIA .....</b>	<b>25</b>
9.1 Option One: Maintenance of the Status Quo.....	25
9.2 Option Two: Application of Administrative Measures .....	25
9.3 Option Three: Adopting a Revised Contractor Evaluation Criteria.....	26
9.4 Impact analysis of the Options.....	27
9.5 Preferred Option .....	29
<b>10. COMPLIANCE AND IMPLEMENTATION.....</b>	<b>29</b>
10.1 Conforming to legal requirements in developing the proposed Regulations.....	30
10.2 Recommendation.....	31
<b>ANNEXURES.....</b>	<b>31</b>
Annexure 1: The Draft Revised Contractor Evaluation Criteria, 2023.....	31
Annexure 2: Stakeholder Attendance Register.....	31
Annexure 3: Public Notice on Public Participation for the Revised Contractor Evaluation Criteria. ..	31
Annexure 4: Report on Stakeholder consultations.....	31

## **LIST OF ABBREVIATIONS**

AAK	ARCHITECTURAL ASSOCIATION OF KENYA
ACMK	ASSOCIATION OF CONSTRUCTION MANAGERS OF KENYA
BORAQS	BOARD OF REGISTRATION OF ARCHITECTS AND QUANTITY SURVEYORS
EBK	ENGINEERS BOARD OF KENYA
EPRA	ENERGY AND PETROLEUM REGULATORY AUTHORITY
ICPAK	INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA
ICPMK	INSTITUTE OF CONSTRUCTION MANAGERS OF KENYA
IEK	INSTITUTION OF ENGINEERS OF KENYA
IQSK	INSTITUTION OF QUANTITY SURVEYORS OF KENYA
ISK	INSTITUTION OF SURVEYORS OF KENYA
ISO	INTERNATIONAL ORGANIZATION FOR STANDARDIZATION
KABCEC	KENYA ASSOCIATION OF BUILDING AND CIVIL ENGINEERING CONTRACTORS
KEBS	KENYA BUREAU OF STANDARDS
KENHA	KENYA NATIONAL HIGHWAYS AUTHORITY
KEPSA	KENYA PRIVATE SECTOR ALLIANCE
KERRA	KENYA RURAL ROADS AUTHORITY
KETRB	KENYA ENGINEERING TECHNOLOGY REGISTRATION BOARD
KFMB	KENYA FEDERATION OF MASTER BUILDERS
KIP	KENYA INSTITUTE OF PLANNERS
KPDA	KENYA PROPERTY DEVELOPERS ASSOCIATION
KRB	KENYA ROADS BOARD
KURA	KENYA URBAN ROADS AUTHORITY
LSK	LAW SOCIETY OF KENYA
NCA	NATIONAL CONSTRUCTION AUTHORITY
NEMA	NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY
RACECA	ROADS AND CIVIL ENGINEERING CONTRACTORS ASSOCIATION

## **1. INTRODUCTION**

### **1.1 Regulatory-Making Authority and the Legal Mandate**

Section 42 of the National Construction Act, 2011 empowers the Cabinet Secretary responsible for public works in Consultation with the Board of the National Construction Authority (the Authority), to make regulations generally to give effect to the Act and in particular for the Contractor Evaluation Criteria in the construction industry.

Section 42 (2) of the Act provides that the Cabinet Secretary may make regulations on the following:-

- (a) the manner of payment of the levy imposed under section 31;
- (b) the Building Code in the construction industry;
- (c) the manner of conducting mandatory inspections by the Authority;
- (d) the manner of service of any notice required under Act;
- (e) the fees and charges to be paid in respect of any matter required for purposes of this Act;
- (f) the manner and forms of accreditation and certification of contractors, skilled construction workers and construction site supervisors;
- (g) the responsibilities and control of the officers and servants of the Authority;
- (h) the performance of the functions, the exercise of the powers and discharge of the duties of the Authority under this Act; and
- (i) any other matter to give effect to the provisions of this Act.

The Cabinet Secretary, in consultation with the Board of the Authority, therefore has the required legislative powers to propose the Contractor Evaluation Criteria. In exercise of the above powers, the Cabinet Secretary has drafted the Revised Contractor Evaluation Criteria, 2023 (the Evaluation Criteria).

This is a statutory instrument which seeks to significantly change the evaluation of contractors in the construction industry. It is likely to impose significant cost in the construction industry and the economic development as a whole. The Ministry now undertakes public consultations and prepares this Regulatory Impact Statement in partial fulfillment of the requirements of the Statutory Instruments Act, 2013.

## **1.2 Requirements of the Statutory Instruments Act, 2013**

The Statutory Instruments Act, No. 23 of 2013 is the legal framework governing the conduct of RIA in Kenya. Sections 6 and 7 require that *if a proposed statutory instrument is likely to impose significant costs on the community or a part of the community, the regulation-making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.* The Act further sets out contain certain key elements that must be contained in the RIA namely:

- (a) a statement of the objectives of the proposed legislation and the reasons;
- (b) a statement explaining the effect of the proposed legislation;
- (c) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
- (d) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
- (e) the reasons why the other means are not appropriate.

Section 5 of the Act requires that a regulation-making authority to conduct public consultations drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument and ensuring that persons likely to be affected by the proposed statutory instrument are given an adequate opportunity to comment on its proposed content.

## **1.3 What is a Regulatory Impact Assessment?**

Regulatory Impact Assessment (RIA) is a systematic policy tool used to examine and measure the likely benefits, costs and effects of new or existing regulation. A RIA is an analytical report to assist decision makers. As an aid to decision making RIA includes an evaluation of possible alternative regulatory and non-regulatory approaches with the overall aim of ensuring that the final selected regulatory approach provides the greatest net public benefit. Typically, the structure of a RIA should contain the following elements:

- (a) title of the proposal;
- (b) the objective and intended effect of the regulatory policy;
- (c) an evaluation of the policy problem;
- (d) consideration of alternative options;
- (e) assessment of all their impacts distribution;
- (f) results of public consultation;
- (g) compliance strategies; and

(h) processes for monitoring and evaluation<sup>1</sup>.

RIS is usually conducted before a new government regulation is introduced to provide a detailed and systematic appraisal of the potential impact of a new regulation in order to assess whether the regulation is likely to achieve the desired objectives. RIA promotes evidence-based policy-making as new regulations typically lead to numerous impacts that are often difficult to foresee.

From a societal viewpoint, RIA should confirm whether or not a proposed regulation is welfare-enhancing from, in that, the benefits will surpass costs. RIA therefore has objectives of improving understanding of the real-world impact of regulatory action, including both the benefits and the costs of action, integrating multiple policy objectives, improving transparency and consultation; and enhancing governmental accountability.

## **2. PURPOSE AND OBJECTS OF PROPOSED REVISED CONTRACTOR EVALUATION CRITERIA**

### **2.1 Scope**

The Authority is empowered to undertake registration of contractors under the provisions of section 5 (2) (d) of the National Construction Authority Act No 41 of 2011 to prescribe the qualifications or other attributes required for the registration of a contractor. To this extent the Authority has developed a contractors' evaluation criteria to provide a uniform, fair and open process of registration of contractors.

### **2.2 Objective**

To repeal the current evaluation criteria and prescribe a stakeholder driven Revised Contractor Evaluation Criteria that is reflective of best practices in the construction industry.

#### ***2.2.1 Specific objectives***

Specifically, the proposed contractor evaluation criteria seeks to:

- (i)** place more emphasis on experience-based evidence for registration whilst the previous criteria was document based. This will enable the Authority to validate the technical competencies of applicants.
- (ii)** revise the value limits of construction works to reflect the current status in the industry in all the sectors. The value limits of construction works under the building, roads and water works have been enhanced. Notably, the value limits of construction works for the electrical and mechanical engineering services have been adjusted downwards.
- (iii)** designate civil works to road works and water works to underscore the technical differences in the two sectors.

---

<sup>1</sup> Regulatory Policy Division Directorate for Public Governance and Territorial Development: Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers. OECD, 2008

- (iv) separate the currently grouped value limits in mechanical engineering services and electrical engineering services to provide a comprehensive overview of the industry.

### **3. BACKGROUND AND CONTEXT**

#### **3.1 Policy and Legal Background**

To provide a uniform, fair and open process of registration of contractors, the Authority developed the current contractors' evaluation criteria in the 2013/2014 financial year. In view of the developments in the construction industry, the Authority has drafted the Revised Contractor Evaluation Criteria cited as the National Construction Authority (Amendment) Regulations, 2023 to reflect current best practices, qualifications and standards.

The Authority mapped out the relevant industry stakeholders and conducted virtual forums in 2021 to collect stakeholder views on the draft revised contractor evaluation criteria. The forums were sector specific targeting players in the industry as well as the general public. The Authority has therefore adopted properly aligned parts, forms and schedules regarding the Revised Evaluation Criteria.

### **4. EVALUATION OF THE PROBLEM**

The current contractors' evaluation criteria was developed in 2013 to provide a uniform, fair and open process of registration of contractors. The purpose of the review of the Authority's current criteria is to replace it with a robust evaluation criteria framework reflective of best global practices, growth in the industry and prescription of required competencies to undertake increasingly complex construction works.

Due to the accelerated growth of the construction industry and attendant flagship infrastructure projects, the Revised Contractor Evaluation Criteria has been developed to inform the status of the country's infrastructure plan in line with the Kenya Vision 2030. Notwithstanding the partial adequacy of the current contractors' evaluation criteria, the following shortcomings abound:-

- (i) the current criteria does not cater for weighting for performance based experience as evidence of executed works.
- (ii) the current criteria is general on civil engineering works yet best practices require that they be classified into specific works.
- (iii) the current criteria has grouped electrical and mechanical engineering services into one band of value limit.



- (iv) the value limits for roads and water works are low and there is need to adjust them upwards to reflect the current status in the industry. This is due to the increase in scope and complexity of projects in the country.
- (v) the value limits for electrical and mechanical engineering services are high and there is need to adjust them downwards to reflect the current status in the industry.
- (vi) under the financial evaluation, the criteria gives more emphasis on the largest contract undertaken as opposed to considering working capital. The magnitude of a contract does not indicate the financial capacity of a contractor.
- (vii) it lacks a provision on an applicant's declaration to adhere to the code of conduct in line with the Act.

## **5. LEGAL AND POLICY FRAMEWORK FOR THE PROPOSED REVISED CONTRACTOR EVALUATION CRITERIA**

The National Construction Authority (NCA) is a state corporation established under the provisions of section 3 of the National Construction Authority Act No 41 of 2011 with an overall mandate to regulate the construction industry and coordinate its development. Section 5(2)(d) of the Act grants powers to the Authority to prescribe the qualifications or other attributes required for registration as a contractor under this Act.

In exercise of the executive authority granted under Article 131 (1)(b) of the Constitution, the President is responsible for the organization of the Government. This is communicated to the public through Executive Orders and other instruments under the law. Through Executive Order No. 1 of 2023, the President established the structure of Government including the various Ministries and State Departments. The National Construction Authority falls under the State Department for Public Works in the Ministry of Lands, Public Works, Housing, and Urban Development.

In exercise of the powers conferred by section 42(1) of the National Construction Authority Act, the Cabinet Secretary responsible for Public Works, in consultation with the Board of the National Construction Authority, is required to make Regulations generally to give effect to the Act. Section 5(2)(d) of the NCA Act requires the Authority to prescribe the qualifications and other attributes required for registration as a contractor under the Act. To achieve this, an evaluation criteria was developed and made part of the NCA Regulations 2014. However, over time it has become necessary to review specifically the second schedule of the regulations in order to address the emerging industry challenges and identified weaknesses in the current criteria. The Cabinet Secretary, in consultation with the Board of the National Construction Authority, therefore has the requisite legislative authority to propose the revision of the Contractor's evaluation criteria. In exercise of the above powers, therefore, the Cabinet Secretary of the Ministry of Lands, Public Works, Housing and Urban Development has drafted the Revised Evaluation Criteria cited as the

National Construction Authority (Amendment) Regulations 2023 to reflect current best practices, qualifications and standards. The purpose of the Amendment Regulations is to prescribe a stakeholder driven Revised Contractors' Evaluation Criteria that is reflective of best practices in the construction industry.

## **5.1 Constitutional Basis**

The Constitution under Article 46 as read together with Article 66 provides for consumer rights and regulation of land use and property.

Consumer rights

- (1) Consumers have the right—
  - (a) to goods and services of reasonable quality;
  - (b) to the information necessary for them to gain full benefit from goods and services;
  - (c) to the protection of their health, safety, and economic interests; and
  - (d) to compensation for loss or injury arising from defects in goods or services.
- (2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.
- (3) This Article applies to goods and services offered by public entities or private persons.

Article 66 provides for Regulation of land use and property

- (1) The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.
- (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

Article 46 of the Constitution of Kenya provides consumers rights and requires that Parliament enact legislation that provides for consumer protection. Further, Article 46 makes it unequivocal that consumer rights have to be observed by both Public and Private entities.

Article 66 makes it law that land investments (meaning commercial use of lands, often by non-customary land occupants) must benefit local communities, and that large concessions affecting natural resources will be made subject to Parliamentary approval.

Contractors play an important role in providing construction services to both the public and private sectors. The revised evaluation criteria is premised on the above constitutional provisions as it provides for categorization and classes to be fulfilled by qualified contractors for registration. In furtherance to the constitutional provisions that require consumer protection by the state and land

use planning, an effective evaluation criterion should be put in place to ensure proper classification and categorization.

### ***5.1.1 Distribution of Public Works Function***

The legislative and policy formulation process is the role of government and it is an important first step towards securing the rights of every citizen in Kenya, including their right to a clean and healthy environment. The Constitution grants powers to the executive and parliament to formulate policies and make laws respectively.

The Fourth Schedule to the Constitution declares that the National Public Works, Housing Policy, Health Policy, Disaster Management and the general principles of land planning and coordination of planning by counties shall be functions of the national government. Article 191 of the Constitution further provides that national legislation prevails over county legislation if the national legislation applies uniformly throughout Kenya and provides for a matter that cannot be regulated effectively by the counties or requires uniformity across the nation and provides for national standards and policies.

The National Construction Authority Act 2011 is premised on the above constitutional division of functions as it provides for the registration of contractors.

## **5.2 National policy framework**

### ***5.2.1 The National Housing Policy Sessional Paper No. 3 of 2016***

This policy is expected to realize progressive realization of the right to accessible and adequate housing and reasonable standards of sanitation for every person as per Article 43 of the Constitution. It also intends to arrest the deteriorating housing conditions countrywide and bridge the shortfall in housing stock arising from demand that far surpasses supply particularly for low-income housing in urban areas.

The Policy aims at:

- (a) promoting and funding of collaborative research on the development of low cost building materials and construction technologies;
- (b) enabling the low income households to access housing, basic services and infrastructure necessary for a healthy living environment especially in urban and peri-urban; and
- (c) encouraging integrated, participatory approaches to slum upgrading and improvement, including income generating activities that effectively combat poverty, among other objectives.

Therefore, adopting the revised evaluation criteria will provide a stakeholder driven Revised Contractor Evaluation Criteria that is reflective of best practices in the construction industry.

## ***5.2.2 Draft Construction Industry Policy***

This policy seeks to create a well-coordinated and developed construction industry, address the needs of the industry and contribute to sustainable socio-economic development.

Specifically, its aims include, to:

- (a) create an enabling environment for the growth and development of the industry;
- (b) promote development of the human resource capacity;
- (c) improve quality management;
- (d) promote research, innovation and development;
- (e) enhance coordination for better management of the industry;
- (f) promote access and use of data and information in decision making;
- (g) improve ease of doing business;
- (h) reduce challenges related to land management and physical planning;
- (i) promote environmental integrity and conserve heritage in the industry;
- (j) protect workers and the general public from any risks associated with construction and boost risk and disaster management strategies;
- (k) mainstream cross cutting and emerging issues; and
- (l) to strengthen institutions, resource mobilization, implementation of plans and coordination within the industry.

Although this policy is yet to be adopted, it provides a proposed framework within which a functional construction industry should operate of which affects the qualification and registration of contractors

## **5.3 Statutory framework**

### ***5.3.1 National Construction Authority Act, 2011***

#### ***5.3.1.1 Power to undertake Registration of Contractors***

The Authority is empowered to undertake registration of contractors under the provisions of section 5 (2) (d) of the National Construction Act No 41 of 2011 to prescribe the qualifications or other attributes required for the registration of a contractor. To this extent the Authority has developed a contractor's evaluation criteria to provide a uniform, fair and open process of registration of contractors.

As stated under Section 5(2) of the Act as read together with the National Construction Authority Regulations 2014, the Revised Contractor Evaluation Criteria will implement the functions and powers of the Authority with regard to the following;

- (a) prescribe the qualifications or other attributes required for registration as a contractor under the Act;
- (b) Accredite and register contractors and regulate their professional undertakings.

Further, Section 17(1) provides for the application for registration of contractors.

### ***5.3.2 Physical and Land Use Planning Act, 2019***

This Act provides for planning, use, regulation and development of land.

#### ***5.3.2.1 Development control and development permission***

The Act seeks to:

- (a) ensure orderly physical and land use development;
- (b) ensure optimal land use;
- (c) ensure the proper execution and implementation of approved physical and land use development plans;
- (d) protect and conserve the environment;
- (e) promote public safety and health;
- (f) promote public participation in physical and land use development decision-making;
- (g) ensure orderly and planned building development, planning, design, construction, operation and maintenance; and
- (h) promote the safeguarding of national security.

#### ***5.3.2.2 Development involving erection of Buildings***

The Act provides that where the development involves the erection of a building, the county government will consider the following—

- (a) the use of the building;
- (b) the sitting of the building within the plot;
- (c) the elevations of the building, plinth area, canopies and height of buildings;
- (d) the design, shape, civic design and facade and appearance of the building;
- (e) the set back and the building line;
- (f) access to and parking on land which the building is to be erected;
- (g) loading bay;
- (h) density;
- (i) plot coverage;
- (j) provision for rainwater harvesting facilities and water storage tanks in every building;
- (k) landscaping;
- (l) ventilation and lighting;
- (m) infrastructure adequacy;
- (n) environmental, health and cultural considerations; and
- (o) any other matter that a county government considers necessary for purposes of planning.

The Act further provides that where building plans submitted to a county government do not meet the required standard, a county government shall communicate the areas of improvement to the applicant who shall amend the buildings plans or drawings accordingly and resubmit to the county government.

The building plans or drawings to be submitted include:

- (a) development plan and drawings;
- (b) architectural drawings and specifications;
- (c) civil and structural engineer's drawings and specifications;
- (d) electrical engineer's drawings and specifications; and
- (e) mechanical engineer's drawings and specifications.

### ***5.3.2.3 Powers of county governments in development control***

The Act vests the power to undertake development control and grant development permission to the county governments which have the power within their areas of jurisdiction to—

- (a) prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;
- (b) control or prohibit the subdivision of land;
- (c) consider and approve all development applications and grant all development permissions;
- (d) ensure the proper execution and implementation of approved physical and land use development plans;
- (e) formulate by-laws to regulate zoning in respect of use and density of development;
- (f) reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical and land use development plans; and
- (g) consider and determine development planning applications made in respect of land adjoining or within reasonable vicinity of safeguarding areas.

Other key features of the Act include the following:

- (a) it is illegal for a person to carry out development within a county without a development permission granted by the respective county executive committee member.
- (b) a development permission may be revoked if the applicant contravenes any provision of the Act or conditions imposed on it.
- (c) a person applying for development permission shall also notify the public of the development project being proposed and invite the members of the public to submit any objections on the proposed development project to the relevant county executive committee member for consideration.
- (d) a person applying for development permission shall ensure that any documents, plans and particulars that are provided to the respective county executive committee member

- while applying for development permission have been prepared by the relevant qualified, registered and licensed professionals.
- (e) before issuance of the development permission, the county executive committee member shall give a copy of the application to the relevant authorities or agencies to review and comment on all relevant matters including land survey, roads and transport, agriculture and livestock, health, public works and utilities, environment and natural resources, urban development, national security in respect of land adjoining or within reasonable vicinity of safeguarding areas and any other relevant authority.
  - (f) when considering an application for development permission, a county executive committee member—
    - (i) shall be bound by the relevant approved national, county, local, city, urban, town and special areas plans;
    - (ii) shall take into consideration the provision of community facilities, environmental, and other social amenities in the area where development permission is being sought;
    - (iii) shall take into consideration the comments made on the application for development permission by other relevant authorities in the area where development permission is being sought;
    - (iv) shall take into consideration the comments made by the members of the public on the application for development permission made by the person seeking to undertake development in a certain area; and
    - (v) in the case of a leasehold property, shall take into consideration any special conditions stipulated in the lease.
  - (h) an applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee with a further appeal to the Environment and Land Court.
  - (i) each county executive committee member shall maintain a register, open for public scrutiny, of documents submitted by applicants for development permission and the details of the proposed project for which development permission has been applied for.
  - (j) it is an offence for a public officer to grant development permission or comments on an application for development permission contrary to the Act or any other law.

Development control provisions do not apply to development by or on behalf of the Kenya Defence Forces and other national security installations, preservation of heritage sites.

### ***5.3.3 Standards Act Cap 496***

This Act provides for standardization and specification of commodities and codes of practice. The Act establishes the Kenya Bureau of Standards managed by the National Standards Council which is responsible for governing and maintaining the standards and practices of metrology in Kenya.

KEBS is a member of the International Organization for Standardization (ISO). The main functions of KEBS are as follows:

- (a) promote standardization in industry and commerce
- (b) provide facilities for examination and testing commodities manufactured in Kenya
- (c) test goods destined for exports for purposes of certification
- (d) prepare, frame or amend specification and codes of practice.

It has developed standards for numerous products in the market including building materials, piping and electric wiring.

Pursuant to section 5 (2) (g) of the Act the Authority in furtherance of its mandate promotes and ensures quality assurance in the construction industry. The construction industry provides for different codes of practice for construction works for application by contractors.

#### ***5.3.4 Occupational Safety and Health Act, 2007***

This Act provides for the safety, health and welfare of workers and all persons lawfully present at workplaces. It also establishes the National Council for Occupational Safety and Health.

The Act also provides for the safety of employees from other undertakings, including contractors engaged in works at the occupier's workplace, to receive appropriate instructions regarding safety and health risks including emergency procedures at the workplace.

#### ***5.3.5 Urban Areas and Cities Act, 2011***

This Act provides for the classification, governance and management of urban areas and cities and crates linkages integrated planning and development control.

#### ***5.3.6 Occupiers' Liability Act, Cap 34***

This Act provides that an occupier of premises owes the common duty of care to all the visitors which requires him to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. This includes circumstances where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier.

#### ***5.3.6 Public Procurement and Asset Disposal No. 33 of 2015***

The Act applies to the procurement of goods and services for public entities. Contractors who tender for services in Kenya must be registered to undertake construction services as premised under the Public Procurement and Asset Disposal Act.



### **5.3.7 Water Act No.43 of 2016**

This Act provides for the regulation, management and development of water resources, water and sewerage services. Contractors are required to comply with Regulations made under the Act on construction, extension and improvement of dams and the licensing of persons carrying out business as dam contractors. The Act also establishes the Water Resources Authority which formulates and enforces standards, procedures and Regulations for the management of water resources.

### **5.3.8 Roads Act No.2 of 2007**

This Act provides for the establishment of the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority. It also provides for the powers and functions of these authorities.

The Kenya National Highways Authority is responsible for the management, development, rehabilitation and maintenance of national roads. The Kenya Urban Roads Authority has the responsibility for the management, development, rehabilitation and maintenance of all public roads in the cities and municipalities except where those roads are national roads. The Kenya Rural Roads Authority has the responsibility for the management, development, rehabilitation and maintenance of rural roads.

### **5.3.9 Energy Act No.1 of 2019**

This Act consolidates the laws relating to energy, provides for National and County Government functions in relation to energy, provides for the establishment, powers and functions of the energy sector entities; fosters the promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms.

The Act establishes the Energy and Petroleum Regulatory Authority (EPRA) which has functions including to;-

- (a) assess tail-end production and cessation of upstream petroleum operations and oversee decommissioning by a contractor;
- (b) verify the measurements of petroleum production to allow for estimation and assessment of royalties and profits of oil and gas due to the National Government;
- (c) verify the recoverable cost of oil and gas due to the parties to a petroleum agreement;
- (d) audit contractors for cost recovery;
- (e) monitor in consultation with the Competition Authority conditions of contractors' operations and their trade practices;
- (f) set, review and approve contracts, tariffs and charges for common user upstream petroleum facilities;

- (g) regulate contracts on upstream petroleum operations not specifically provided for under the law relating to petroleum;
- (h) advise the Cabinet Secretary responsible for matters relating to petroleum in the evaluation of the bids and applications made for upstream petroleum blocks; and
- (i) ensure that contractors uphold the relevant laws, regulations and petroleum agreement terms;

Section 148 of the Act requires any person wishing to carry out electrical installation work to be licensed as an electrical contractor by the Authority. To be licensed as an electrical contractor, a person must—

- (a) be a certified electrical worker; or
- (b) have in his employment a certified electrical worker.

Section 149 of the Act requires that person who wishes to be certified as an electrical worker in accordance with section 148 must make an application to the Authority in the form and manner prescribed. Section 150 provides that a person who wishes to be licensed as an electrical contractor shall make an application to the Authority in the form and manner prescribed. Section 151 of the Act provides that it shall be the duty of any person planning, building, operating or maintaining a transmission or distribution system to ensure that such works are carried out only by electrical contractors and electrical workers duly authorized by the Authority.

Under Section 163 of the act all contracts for the sale of electrical energy as well as provision of transmission and distribution network services, between and among licensees, and between licensees and retailers and eligible consumers must be submitted to the Authority for approval before execution.

### ***5.3.10 Kenya Information and Communications Act, 1998***

This Act provides for the establishment of the Communications Commission of Kenya, facilitates the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce, provides for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya.

Contractors are required to comply with Regulations under the Act on the issuance, variation and withdrawal of approvals in respect of contractors for relevant operations in connection with any telecommunication system and the maintenance of registers of such contractors.

## **6. PUBLIC PARTICIPATION AND CONSULTATIONS**

An evaluation of the public consultation process is necessary to ascertain whether all parties who are likely to be affected by the Evaluation Criteria had the opportunity to present their views.

Statutory instruments should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses, interest groups and other government ministries, departments and agencies.

## **6.1 Legal Requirements Relating to Public Participation and Consultation**

Participation of the people, inclusivity, transparency, and accountability are constitutional requirements whenever the State or public officer applies the Constitution, enacts any law, or makes or implements a public policy<sup>2</sup>. This requirement is premised on the sovereignty principle<sup>3</sup> which vests all sovereign power to the people of Kenya. This power entitles the people to unfettered access to the process of making public decisions through their involvement.

Transparency of public finances and performance is ensured through rules, mechanisms, and capacities for sharing information on government programs, budgets, expenditures, and results with citizens.<sup>4</sup> Participation mechanisms enable citizens to participate in setting budget priorities and monitor expenditures and assess service delivery performance. They also include feedback systems, which provide citizens with the opportunity to provide comments and grievances.<sup>5</sup> Accountability mechanisms include both direct and indirect relationships, where service providers are sanctioned if they fail to meet an established standard.<sup>6</sup>

The objects of devolution<sup>7</sup> give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them and recognize the rights of communities to manage their own affairs and to further their development. The values and principles of public service<sup>8</sup> require the involvement of the people in the process of policymaking and include transparency and provision to the public of timely and accurate information.

Regarding the subsidiary legislation making process, the Statutory Instruments Act<sup>9</sup> requires that the regulatory making authority shall undertake public consultations before making statutory instruments (in this case, the Evaluation Criteria), and particularly, where the proposed Regulations are likely to have a direct or a substantial indirect effect on business or restrict competition.

---

<sup>2</sup> Constitution of Kenya, 2010: Article 10.

<sup>3</sup> *Ibid*, Article 1.

<sup>4</sup> Constitution of Kenya, 2010: Articles 35, 201 and 132; County Governments Act, 2012: Sections 94, 95 and 96; Public Finance Management Act, 2012, Section 207.

<sup>5</sup> Constitution of Kenya, 2010: Articles 174, 201 and 232; County Governments Act, 2012: Sections 47, 91, 99 and 100; Public Finance Management Act, 2012: Sections 125, 128, 131 and 137; Urban Areas and Cities Act, 2011: Sections 21 and 22.

<sup>6</sup> Constitution of Kenya, 2010: Articles 174 and 201; County Governments Act, 2012: Section 89.

<sup>7</sup> Constitution of Kenya, 2010: Article 174(c).

<sup>8</sup> *Ibid*, Article 232 (1).

<sup>9</sup>No. 23 of 2013.

The Act provides that in determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to all relevant matters, including the extent to which the consultation: drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.

The Statutory Instruments Act further requires that the persons to be consulted should either directly or by advertisement through representative organizations be invited to make submissions by a specified date, which should not be lesser than fourteen days or be invited to participate in public hearings concerning the proposed instrument.

## **6.2 The Process of Public Participation and Consultations**

The Authority is empowered to undertake registration of contractors under the provisions of section 5 (2) (d) of the Act and to prescribe the qualifications or other attributes required for the registration of a contractor. There is need to prescribe a stakeholder driven contractor evaluation criteria that is reflective of the best practices in the construction industry.

To achieve this, the Authority developed a contractor's evaluation criteria to provide a uniform, fair and open process of registration of contractors.

Pursuant to section 5 of the Statutory Instruments Act<sup>10</sup>, the Ministry identified specific stakeholders whom it engaged in a consultative process. These include the main professional and specialist institutions and individuals who will be directly or indirectly affected by the proposed statutory instrument.

### **6.2.1 Stakeholder Mapping**

The stakeholders identified for purposes of developing the proposed Evaluation Criteria included:

- (a) contractors in civil works (roads, water).
- (b) contractors in buildings sector.
- (c) contractors in mechanical works sector.
- (d) contractors in electrical sector.
- (e) contractors in electronic sector.

---

<sup>10</sup> Institutions from where there can be drawn knowledge of persons having expertise in fields relevant to the proposed statutory instrument and persons likely to be affected by the proposed statutory instrument.

- (f) contractors in the communications sector.
- (g) professional bodies e.g IEK, AAK, IQSK, ISK, LSK, ICPMK, ICPAK,
- (h) regulatory bodies e.g EPRA, KRB, BORAQS, EBK, NEMA, NRA, CA, WASREB
- (i) private associations e.g KEPSA, KPDA, ACMK, KIP, HFC, KAM
- (j) contractors associations – RACECA; KFMB; KABCEC;
- (k) implementing agencies e.g KERRA, KURA, KENHA, KPLC, KETRACO, NuPEA, KR, KWS, NHC,
- (l) the general public.

### 6.2.2 Public Consultation Approach and Methodology

The Ministry adopted the following methodology for purposes of public participation and inclusivity:

- (a) the draft Evaluation Criteria, 2023 and the Regulatory Impact Statement were posted onto the Ministry’s website inviting representations generally and specifically from the identified stakeholders;
- (b) the stakeholders were notified of the Regulation-making process and invited to give submissions on the draft Evaluation Criteria within a specified reasonable period;
- (c) a *Gazette* notice and a newspaper advert were published inviting all persons to submit their views; and
- (d) physical and virtual meetings with select stakeholders were held to discuss the draft.

Based on the above approach, a total of 7 no. meetings were held between the Ministry and key stakeholders. The Ministry also received written representations. The following is the full list of persons and institutions consulted on various dates in 2021.

*Table 1: Meetings with Contractor Evaluation Criteria Industry Stakeholders*

No	Targeted Stakeholders	Number of Participants	Dates
1.	Contractors in Electrical, Electronic & Communication and Mechanical Engineering Sector	23	4 <sup>th</sup> May, 2021
2.	Roads Sector	23	7 <sup>th</sup> May 2021

3.	Contractors in the Water Sector	24	11 <sup>th</sup> May, 2021
4.	Building Sector	16	18 <sup>th</sup> May 2021
5.	Professional Associations /Boards	78	21 <sup>st</sup> May 2021
6.	Contractor associations	26	25 <sup>th</sup> May 2021
7.	All Contractors and the general public	43	28 <sup>th</sup> May 2021

N/B: Attached to this Regulatory Impact Statement is a Report on Stakeholder Consultations.

### **6.2.3 Report on Stakeholder Consultative Process**

A report on the stakeholder consultative sessions containing an analysis of comments and how they were considered and incorporated into the draft Evaluation Criteria was prepared. The report also explains how the consultative process was conducted. The report is annexed to this statement as a separate document.

## **7. AN OVERVIEW OF THE PROPOSED CONTRACTOR EVALUATION CRITERIA, 2023**

The proposed contractor evaluation criteria has the following salient features:

- (i) minimum mandatory requirements for all contractor applications have been clearly defined;
- (ii) minimum academic qualifications for technical directors under each category have been defined;
- (iii) minimum score requirement in roads and water works for NCA-1, NCA-2 and NCA-3 under evaluation of firms' experience have been defined;
- (iv) a standard local and foreign contractor application form has been developed indicating all requirements for all classes of works;
- (v) each class of work is applied for separately;
- (vi) value of construction works for different classes of works has been adjusted to reflect the current status in the industry;
- (vii) number of categories under electrical and mechanical engineering services have been reduced due to the adjustment of the values of construction works in both classes of works;
- (viii) definition of terms in the revised evaluation criteria not currently defined in the Act and regulations have been provided;

- (ix) provides additional marks for evaluation of technical directors and staff registered by professional and/or regulatory bodies to promote professionalism in the industry;
- (x) provision of proof of NCA accreditation for listed staff with trade test and certificate to encourage compliance in the construction industry;
- (xi) the description of plant and equipment has been substantially expanded to include items of construction equipment to be evaluated;
- (xii) provision of NCA project registration as proof of experience to encourage compliance in all construction projects;
- (xiii) evaluation of the largest contract has been removed under financial evaluation, with the marks being redistributed to annual turnover and working capital;
- (xiv) proof of registration with the relevant regulatory bodies for applicants seeking registration for electrical, electronic and communication engineering works;
- (xv) a declaration to be signed/accepted by an applicant.

## **7.2 Comparison of the Proposed Revised Contractor Evaluation Criteria with the current contractor evaluation criteria**

<b>S/No.</b>	<b>Issue</b>	<b>Provision of the Revised Contractor Evaluation Criteria</b>	<b>Current contractor evaluation criteria</b>
1.	Basis for registration	Experience-based evidence for registration.	Document-based evidence for registration.
2.	Classes of works	The electrical engineering services have been grouped into five main sub-classes.	The electrical engineering services were grouped in two sub-classes.
3.	Value limits	The value limits have been amended to reflect the current situation in the industry in all sectors. The value limits under the building, roads and water works have been increased. The value limits for the electrical and mechanical engineering services have been adjusted downwards.	The value limits for all classes of works are not congruent with industry realities.
4.	Categories	The categories for electrical and mechanical engineering services have been collapsed to NCA 1-5	The categories for electrical and mechanical engineering services are grouped from NCA 1-8

The proposed Revised Contractor Evaluation Criteria is clear, consistent, comprehensible, and comprehensive enough to address the identified policy issue.

## **8. COST-BENEFIT ANALYSIS**

### **8.1 Costs and Benefits Generally**

The analysis of the expected costs and benefits of the proposed Evaluation Criteria contained in this Part seeks to answer the question whether the benefits justify the costs. This would enable the Regulator to estimate the total expected cost and benefit of every aspect of the Revised Contractor Evaluation Criteria. This will in turn inform the decision makers since the cost of government action should be justified by its benefits before action is taken.

The approval of the proposed Revised Contractor Evaluation Criteria is deemed to have the following benefits:

- (a) **Performance based evaluation:** the evaluation of contractors will be based on feedback from the employer for projects registered by the Authority that will assist in providing a score for technical and financial competence in project. This will promote excellence and delivery of quality projects.
- (b) **Uniformity in Contractor Evaluation:** The Formulation of the Revised Contractor Evaluation Criteria provides for a uniform, fair and open process of registration of contractors.
- (c) **Stakeholder centric evaluation:** The Revised Contractor Evaluation Criteria provides an evaluation that is stakeholder driven and is reflective of best practices in the construction industry.
- (d) **Kenya Vision 2030:** It provides a Contractor Evaluation Criteria that puts in place an evaluation criteria that inform the status of the country's infrastructure plan in line with the Kenya Vision 2030.
- (e) **Growth in the industry:** It provides a Contractor Evaluation Criteria that reflects the current growth in the industry and prescribes the required competencies to undertake the increasingly complex construction works.

### **8.2 Financial Cost**

Implementation of the Revised Contractor Evaluation Criteria will not involve the reorganization of offices either in terms of physical space and staff. It will however require capacity building of personnel to take up new criteria and attendant administrative roles. This is expected cost approximately **Ksh.41,000,000**. This is a cost payable by the Ministry and does not implicate the user in any manner.



## **9. CONSIDERATION OF ALTERNATIVES TO THE REVISED CONTRACTOR EVALUATION CRITERIA**

This Part considers the question whether the proposed Evaluation Criteria is the best form of government action. The Statutory Instruments Act requires a regulator to carry out, early in the regulatory making process, an informed comparison of a variety of regulatory and non-regulatory policy measures, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

Regulation should be the last resort in realizing policy objectives. There are alternatives, which could come in handy in dealing with certain aspects of the construction industry.

The options considered under this part are the following:

### ***9.1 Option One: Maintenance of the Status Quo***

Maintaining the status quo means retaining the current contractor evaluation criteria with all its attendant inadequacies. The evaluation criteria does not prescribe a stakeholder driven contractor evaluation that is reflective of best practices in the construction industry. It does not inform the status of the country's infrastructure plan in line with Vision 2030 Kenya.

These inadequacies have occasioned the following challenges:

- (a) lack of uniformity in the in the process of registration of contractors;
- (b) absence of stakeholder input in the contractor evaluation;
- (c) absence of criteria to inform the status of the country's infrastructure plan;
- (d) inability of the criteria to keep up with the growth of the industry;
- (e) inadequate competencies for some class of works especially the complex construction works;
- (f) poor quality of works as a result of lack of required competencies;
- (g) low completion rates of construction projects;
- (h) poor practices in safety and health management
- (i) unethical conduct and unfair business practices; and
- (j) inadequate skilled and competent workforce.

### ***9.2 Option Two: Application of Administrative Measures***

The second option that may be used to implement the Act is through administrative measures. This usually takes the form of issuance of ministerial orders and circulars prescribing guidelines and administrative measures to address the identified challenges. The issuance of such measures is not only cheap but also time saving. However, the implementation of administrative measures is dependent on the good will of the concerned public officers and may not be sustainable since they do not have the force of law.

This presents a major risk in terms of enforcement and the possibility of not getting implemented at all. The non-binding nature of administrative measures suggests that it cannot be a reliable avenue to give full effect to the salient provisions contained in the Constitution and the Act of Parliament.

### ***9.3 Option Three: Adopting a Revised Contractor Evaluation Criteria***

Given the shortcomings of the current contractor evaluation criteria which continues to be applied, there is need to propose a Revised Contractor Evaluation criteria to address the challenges posed by the current one.

As noted throughout this RIS, the current Contractor Evaluation Criteria has weaknesses which the Revised Evaluation Criteria seeks to address. Among the salient features of the Revised Evaluation Criteria are the following:

- (a) it places more emphasis on experience-based evidence for registration. This will enable the Authority to validate the technical competencies of applicants.
- (b) it caters for weighting for performance based experience as evidence of executed works.
- (c) due to the increase in the scope and value of construction works in the country, the Revised Evaluation Criteria has amended the value limits to reflect the current status quo in the industry in all the sectors.
- (d) it requires that civil engineering works are classified into specific works in accordance with best practices.
- (e) it enhances the value limits for civil engineering works to reflect the current status in the industry. This properly responds to the increase in scope and complexity of projects in the country.
- (f) it separates the sub-classes of mechanical and electrical installation works thereby providing a more comprehensive outline of the industry.
- (g) it adjusts downwards the value limits for electrical and mechanical engineering services to reflect the current status in the industry.
- (h) it gives emphasis to working capital as opposed to the largest contract as an indicator of financial capacity of a contractor.
- (i) it provides for an applicant's declaration to adhere to the code of conduct in line with the Act.
- (j) it splits, in accordance with best practices, the water works from road works to underscore the technical differences in the two sectors.

## 9.4 Impact analysis of the Options

*Table 3: Regulatory and Non-regulatory Options*

Impact on sectors	Option one: Maintaining the Status Quo	Option Two: Application of Administrative Measures	Option Three: Adoption of a Revised Contractor Evaluation Criteria
	This entails doing nothing and retaining the current state of affairs.	This entails issuance of ministerial orders and circulars prescribing guidelines and administrative measures to address the identified challenges.	This entails adopting the Revised Contractor Evaluation Criteria.
Impact on public sector	<ul style="list-style-type: none"> <li>● Lack of a uniform process of registration of contractors.</li> <li>● Poor quality of works due to lack of experienced-based evidence for registration of contractors.</li> <li>● Disharmony with the international best practices.</li> </ul>	<ul style="list-style-type: none"> <li>● Risk of consumer abuse through monopolistic tendencies.</li> </ul>	<ul style="list-style-type: none"> <li>● Provides a uniform process of registration of contractors.</li> <li>● Improved quality of works as a result of employment of experienced-based evidence for registration of contractors.</li> <li>● Improved harmony with international best practices.</li> </ul>
Economic Impact	<ul style="list-style-type: none"> <li>● Lack of uniformity in the process of registration of contractors.</li> <li>● Lack of capacity to implement projects.</li> </ul>	<ul style="list-style-type: none"> <li>● Non-compliance with the required standards.</li> </ul>	<ul style="list-style-type: none"> <li>● Improved confidence in the quality of construction works.</li> <li>● Increased competitiveness in the industry.</li> </ul>

<b>Impact on sectors</b>	<b>Option one: Maintaining the Status Quo</b>	<b>Option Two: Application of Administrative Measures</b>	<b>Option Three: Adoption of a Revised Contractor Evaluation Criteria</b>
	<b>This entails doing nothing and retaining the current state of affairs.</b>	<b>This entails issuance of ministerial orders and circulars prescribing guidelines and administrative measures to address the identified challenges.</b>	<b>This entails adopting the Revised Contractor Evaluation Criteria.</b>
	<ul style="list-style-type: none"> <li>● Stalled projects, poor quality of works.</li> </ul>		<ul style="list-style-type: none"> <li>● Improved quality of construction works.</li> </ul>
<b>Social Impact</b>	<ul style="list-style-type: none"> <li>● Lack of confidence in the competence of the contractors.</li> <li>● Lack of confidence in the quality of public works;</li> <li>● Poorly controlled industry.</li> <li>● Insecure, and poor quality public works.</li> </ul>	<ul style="list-style-type: none"> <li>● Risk of cartel formations and other unfair practices</li> </ul>	<ul style="list-style-type: none"> <li>● Increased confidence in the competence of the contractors.</li> <li>● Increased confidence in the quality of public works;</li> <li>● Well controlled industry.</li> <li>● Safe, secure and durable public works.</li> </ul>
<b>Impact on business</b>	<ul style="list-style-type: none"> <li>● Current state where there is no uniform fair and open process of registration of contractors will continue.</li> </ul>	<ul style="list-style-type: none"> <li>● Possibility of increased unscrupulous business activity owing to safeguarded interests</li> <li>● Increased business irregularities and fraud.</li> </ul>	<ul style="list-style-type: none"> <li>● Encourage more experience contractors in the industry.</li> <li>● Contributes to ease of doing business at international level by providing for uniform and standardized contractor evaluation.</li> </ul>

<b>Impact on sectors</b>	<b>Option one: Maintaining the Status Quo</b>	<b>Option Two: Application of Administrative Measures</b>	<b>Option Three: Adoption of a Revised Contractor Evaluation Criteria</b>
	<b>This entails doing nothing and retaining the current state of affairs.</b>	<b>This entails issuance of ministerial orders and circulars prescribing guidelines and administrative measures to address the identified challenges.</b>	<b>This entails adopting the Revised Contractor Evaluation Criteria.</b>
Impact on existing legal framework	<ul style="list-style-type: none"> <li>• The existing legal gaps will not be addressed</li> <li>• The existing contractor evaluation criteria will continue to be implemented despite its shortcomings.</li> </ul>	<ul style="list-style-type: none"> <li>• The contractor evaluation concerns may not be effectively addressed as the administrative measures will rely on the goodwill of implementing officers while some may lack force of law.</li> </ul>	<ul style="list-style-type: none"> <li>• Addresses all the identified gaps</li> <li>• The Revised Contractor Evaluation Criteria to replace the current Contractor Evaluation Criteria.</li> <li>• Harmonizes contractor evaluation with international best practices.</li> </ul>

**9.5 Preferred Option**

Based on the above analysis it is clear that the third option (adopting a Revised Contractor Evaluation Criteria) is the most ideal option to address the challenges facing this industry. It is clear that the benefits and impact of revising the Contractor Evaluation Criteria by far outweigh any estimated cost of its implementation. The other two options have little or no impact in addressing the problem.

**10. COMPLIANCE AND IMPLEMENTATION**

As different aspects of the proposed criteria is evaluated and analysed, it is important to determine how compliance and implementation of the actual provisions will be achieved. It is the duty of the regulator to assess the adequacy of the institutional framework and other incentives through which the regulation will take effect, and design responsive implementation strategies that make the best use of them.

The implementation and enforcement of the Revised Contractor Evaluation Criteria will be undertaken through the existing legal and institutional framework at the national level by the Authority through the Executive Director /Registrar of Contractors.

### **10.1 Conforming to legal requirements in developing the proposed Regulations**

Based on the above analysis, the following matters are apparent:

- (a) Regulatory-Making Authority and the legal mandate: Section 42 of the National Construction Act empowers the Cabinet Secretary in Consultation with the Board of the Authority to make regulations generally to give effect to the Act and in particular for the Contractor Evaluation Criteria.
- (b) Requirements of the Statutory Instruments Act: Section 5 requires that a regulation-making authority to conduct public consultations and to drawing on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and to ensure that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content. Sections 6 and 7 require that a RIA be prepared where a statutory instrument is likely to impose significant costs on the community. The RIA must contain certain key elements namely:
  - (i) a statement of the objectives of the proposed legislation and the reasons,
  - (ii) a statement explaining the effect of the proposed legislation,
  - (iii) a statement of other practicable means of achieving those objectives, including other regulatory as well as non-regulatory options;
  - (iv) an assessment of the costs and benefits of the proposed statutory rule and of any other practicable means of achieving the same objectives; and
  - (v) the reasons why the other means are not appropriate.

The public consultation and RIA structure requirements have been fully met.

- (c) Other existing legal frameworks: The Revised Contractor Evaluation Criteria proposes to replace the current Contractor Evaluation Criteria.
- (d) The draft Revised Contractor Evaluation Criteria: The draft Revised Contractor Evaluation Criteria as drafted is clear, consistent, comprehensible and comprehensive enough to cover all matters.

## **10.2 Recommendation**

In view of the above conclusions, it is recommended that the Revised Contractor Evaluation Criteria, 2023 be adopted.

### **ANNEXURES**

*Annexure 1: The Draft Revised Contractor Evaluation Criteria, 2023*

*Annexure 2: Stakeholder Attendance Register.*

*Annexure 3: Public Notice on Public Participation for the Revised Contractor Evaluation Criteria.*

*Annexure 4: Report on Stakeholder consultations.*