

Approved for tabling

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REPUBLIC OF KENYA



NATIONAL ASSEMBLY



ELEVENTH PARLIAMENT – FOURTH SESSION

THE DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING & TRADE

REPORT ON THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL, 2016

CLERKS CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2016

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ABBREVIATIONS

PPP - Public Private Partnership

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings of the consideration of the Public-Private Partnership (Amendment) Bill, 2016 which was committed to the Committee on 20th July, 2016 pursuant to Standing Order 127.

The bill proposes to amend the public private Partnerships Act, 2013 to recognize county governments as distinct contracting authorities for public-private partnerships projects. The Bill also makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnership arrangements.

Further, the bill proposes to simplify the approvals process for public private partnership projects at both levels of Government, by reducing the number of actions necessary to be undertaken by contracting authorities and approvals required during the preparation and procurement stages.

The Committee notes that public private partnerships are an important avenue through which the government can raise funds required to meet its development agenda. PPPs help to bridge government's fiscal gap. The Constitution of Kenya creates two levels of government at which projects can be implemented: the National and County government. It is therefore paramount that all laws and regulations are aligned to this provision. For this reason, the Committee supports the bill as it will create a more conducive environment to enhance partnerships at all levels of government.

The bill also proposes among other things to eliminate bureaucracies in the PPP processes. This is important because it will enhance good governance, transparency and accountability in the whole process of PPPs.

In processing the Bill, the Committee invited comments from the public and stakeholders pursuant to Article 118 of the Constitution and met with the National Treasury to deliberate on the bill. However, the Committee did not receive any memorandums from the public or stakeholders on the bill.

On behalf of the Departmental Committee on Finance, Planning & Trade and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Public-Private Partnership (Amendment) Bill, 2016.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank the National Treasury for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

HON. BENJAMIN LANGAT, MP

EXECUTIVE SUMMARY

The Public-Private Partnership Bill, 2016 was published on 24th June, 2016 and read a first time on 19th July, 2016 and thereafter committed to the Departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127.

The Public-Private Partnership Bill, 2016 proposes to amend the Public Private Partnerships Act, 2013 to recognize county governments as distinct contracting authorities for public-private partnership projects. The Bill also makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnership arrangements.

The bill further proposes to simplify the approvals process for Public Private Partnership projects at both levels of Government, by reducing the number of actions necessary to be undertaken by contracting authorities and approvals required during the preparation and procurement stages. This will also reduce the bureaucracy associated with the public private partnership transactions without undermining the rigour required in project preparation and at the same time optimizing the use of public resources in project preparation.

In processing the Bill, the Committee invited comments from the stakeholders pursuant to Article 118 of the Constitution. However, the Committee did not receive any memorandums from the public or other stakeholders.

MANDATE OF THE COMMITTEE

The Committee on Finance, planning & Trade is one of the Departmental Committees of the National Assembly established under Standing Order 216 and mandated to:-

- (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- (b) study the programme and policy objectives of ministries and departments and the effectiveness of the implementation.
- (c) study and review all legislation referred to it;**
- (d) study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
- (e) investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary and as may be referred to them by the House;
- (f) vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*); and
- (g) Reports and makes recommendations to the House as often as possible, including recommendation of proposed legislation.

1.1.0 COMMITTEE MEMBERSHIP

| | |
|-------------------------|--|
| Chairperson | The Hon. Benjamin Langat, MP |
| Vice Chairperson | The Hon. Nelson Gaichuhie, MP |
| Members | The Hon. Dr. Oburu Oginga, MP |
| | The Hon. Eng. Shadrack Manga, MP |
| | The Hon. Jimmy Nuru Angwenyi, MP |
| | The Hon. Ahmed Shakeel Shabbir Ahmed, MP |
| | The Hon. Sammy Mwaita, MP |
| | The Hon. Jones M. Mlolwa, MP |
| | The Hon. Anyanga, Andrew Toboso, MP |
| | The Hon. Joash Olum, MP |
| | The Hon. Patrick Makau King'ola, MP |
| | The Hon. Abdullswamad Sheriff, MP |
| | The Hon. Sumra Irshadali, MP |
| | The Hon. Ogendo Rose Nyamunga, MP |
| | The Hon. Iringo Cyprian Kubai, MP |
| | The Hon. Dennis Waweru, MP |
| | The Hon. Tiras N. Ngahu, MP |
| | The Hon. Sakaja Johnson, MP |
| | The Hon. Ronald Tonui, MP |
| | The Hon. Mary Emase, MP |
| | The Hon. Joseph Limo, MP |
| | The Hon. Lati Lelelit, MP |
| | The Hon. Kirwa Stephen Bitok, MP |
| | The Hon. Daniel E. Nanok, MP |
| | The Hon. Abdul Rahim Dawood, MP |
| | The Hon. Sakwa John Bunyasi, MP |
| | The Hon. Alfred W. Sambu, MP |
| | The Hon. Sammy Koech, MP |
| | The Hon. Abdikadir Ore Ahmed, MP |

1.1.1. COMMITTEE SECRETARIAT

| | |
|-----------------------|------------------|
| First Clerk Assistant | Evans Oanda |
| Third Clerk Assistant | Nicodemus Maluki |
| Third Clerk Assistant | Fredrick Otieno |
| Legal Counsel II | Emma Esendi |
| Research Officer III | Erick Ososi |
| Research Officer III | Sharon Rotino |

1.1.2 CONSIDERATION OF THE BILL

The Public-Private Partnership Bill, 2016 was published on 24th June, 2016 and read a first time on 19th July, 2016 and thereafter committed to the Departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127.

The Public-Private Partnership Bill, 2016 proposes to amend the Public Private Partnerships Act, 2013 to recognize county governments as distinct contracting authorities for public-private partnership projects. The Bill also makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnership arrangements.

The bill further proposes to simplify the approvals process for Public Private Partnership projects at both levels of Government, by reducing the number of actions necessary to be undertaken by contracting authorities and approvals required during the preparation and procurement stages. This will also reduce the bureaucracy associated with the public private partnership transactions without undermining the rigour required in project preparation and at the same time optimizing the use of public resources in project preparation.

In processing the Bill, the Committee invited comments from the stakeholders pursuant to Article 118 of the Constitution. However, the Committee did not receive any memorandums from the public or other stakeholders.

1.0.BACKGROUND INFORMATION

The Public-Private Partnership Bill, 2016 was published on 24th June, 2016 and read a first time on 19th July, 2016 and thereafter committed to the Departmental Committee on Finance, Planning & Trade for consideration pursuant to Standing Order 127.

The Public-Private Partnership Bill, 2016 proposes to amend the public private Partnerships Act, 2013 to recognize county governments as distinct contracting authorities for public-private partnerships projects. The Bill also makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnership arrangements.

Further, the bill proposes to simplify the approvals process for Public Private Partnership projects at both levels of Government, by reducing the number of actions necessary to be undertaken by contracting authorities and approvals required during the preparation and procurement stages. This will also reduce the bureaucracy associated with the Public Private Partnership transactions without undermining the rigour required in project preparation, at the same time optimizing the use of public resources in project preparation.

The bill seeks to amend the Public Private Partnerships Act to harmonize its provisions with the Public Procurement and Asset Disposal Act, 2015. This amendment will aid contracting authorities in distinguishing which procurement regime they should apply to their project development initiatives.

The Bill also proposes to amend the Public Private Partnerships Act to increase the number of members for the Public Private Partnership Petition Committee in order to provide sufficient number of members in the committee with varying knowledge, skills and professions, and also remove institutional conflicts of interest. This will enhance the role standing of the Petition Committee as an independent and respected arbiter of Public Private Partnership procurement disputes.

In processing the Bill, the Committee invited comments from the stakeholders pursuant to Article 118 of the Constitution. However, the Committee did not receive any memorandums from the public.

2.0.CLAUSE ANALYSIS OF THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL, 2016

(i).Clause 2 amends Section 2 of the Principal Act on interpretation: an amendment is proposed under “contracting authority” to also include the county government and the county corporation in the public private partnerships framework.

Remark: this will imply that county governments and county corporations can now enter into the public private partnership arrangements under the Act. This, on one hand is good considering that some projects will be specific to counties and their respective agencies. However, this may lead to increased risks associated with contingent liabilities on the part of the national government.

(ii).Clause 3 amends Section 3 of the Act on application: The Act provides for what should be covered under the PPP framework as financing, construction, operation, equipping, management or maintenance of projects. This amendment proposes to include “design” as part of the PPP arrangement.

Remark: Whereas most mega projects that fall under the PPP framework require substantive resources even at the point of design, which might be informing its including as part of the framework, it is a considered opinion that perhaps a contracting authority needs to provide for the funding of this item as a sign of commitment to the project.

(iii).Clause 4 proposes to insert a new Section after Section 3 on application: the proposed inclusion seeks to exempt contracts under this Act from the application of the Public Procurement and Asset Disposal Act, 2015.

Remark: the PPP projects are unique in nature and some may even have some external participants and therefore, it is imperative to operate outside the country procurement arrangements.

(iv).Clause 5 amends Section 15 of the Act under rules for the framework of the unit: This Section provides for the collaboration framework between contracting authorities and the PPP unit. The proposed amendment intends to include county governments among the agencies under the collaboration fold.

Remark: This is in tandem with the proposed amendment in clause 2 which include counties in the PPP framework.

(v).Clause 6 intends to amend the Act by repealing Section 20 which provides for the sector diagnostic study and assessment: This Section provides for the contracting authority to conduct, prior

to entering into PPP arrangement, a sector diagnostic study and assessment that covers technical issues; regulatory and legal frameworks; institutional and capacity status and also commercial, financial and economic issues among others.

Remark: this Section is very crucial and its repeal would mean that projects under PPP arrangement may not need to provide such an elaborate conceptualization and analytical paradigm which essentially should be the bedrock of any PPP project. The provision of Section 33 on the requirement for the feasibility study does not capture all the major issues contained in Section 20. This clause may therefore be considered for deletion to retain the status quo.

(vi).Clause 7 amends Section 24 of the Act which provides for approval of PPP projects by the Committee and the Cabinet: this amendment intends to include the county priority list of projects as approved by the county government in the framework of the approval process.

Remark: this amendment is consistent with the one in clause 2 on inclusion of counties in the PPP framework. However, it is not elaborate as to the meaning of approval by the county government.

(vii).Clause 8 seeks to amend Section 31 of the Act on project identification, selection and prioritization: this amendment seems to clarify that the submission of project report by the contracting authority is to the Unit for approval and not to the Committee, to harmonize with subsection 4.

Remark: How about amending subsection 4 to reflect that the submission of such report is to the Committee since this is the organ that is mandated to make decisions regarding PPP projects.

(viii).Clause 9 amends Section 49 of the Act on evaluation of evaluation report: this amendment seeks to clarify that the PPP project evaluation report is to be submitted to the Unit and not the Committee.

Remark: same as clause 8.

Clause 10 amends Section 51 of the Act on non-compliance by the bidder: This proposed amendment provides an elaborate procedure for rejection of a non-complaint bid by specifying that such decision shall be done in writing by the accounting officer of the contracting authority and that no compensation shall be due to the non-compliant bidder. Eventually, the tender process will begin afresh.

Remark: This is a new provision that was missing in the original law.

(ix). Clause 11 seeks to amend Section 54 which provides for the submission of project memorandum to the Cabinet for approval: this amendment proposes to change the approval procedure from going through the Unit, Committee and eventually the Cabinet so as to end the approval process at the Committee level.

Remark: a public private Partnership project by its nature is one that requires high level intervention and involvement and therefore, the status quo of the ultimate approval to emanate from the Cabinet seems to be the most ideal.

(x). Clause 12 amends Section 54 by inserting a new provision to cater for county PPP projects: this introduces a detailed procedure to be followed in dealing with PPP projects by the counties.

Remark: the move is consistent with the need to include county governments and county corporations in the PPP framework.

(xi). Clause 13 proposes to amend Section 67 of the Act which provides for petitions: the amendment proposes to increase the membership of the Petitions Committee from the current 6 to between 8 and 10 as well as removing the Unit Director from this Committee.

Remark: It should be clarified as to whether it is the Unit or the Committee to be consulted by the Cabinet Secretary in appointment of the Petition Committee Members.

3.0.SUBMISSION BY THE NATIONAL TREASURY ON THE BILL

PROPOSED ADDITIONAL AMENDMENTS

The National Treasury submitted the following additional amendments:

(i).Section 2:

That the word “accession” in the definition of the term ‘transaction advisor’ be deleted.

That the words “including the preparation, accession and conclusion of a project agreement and the financial close” be deleted from the definition, so that the definition of the term “transaction advisor” would now read as follows:

“transaction advisor” means a person appointed in writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership;

(ii).Section 36

Section 36 (1) be amended to read *“The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act.”*

Section 36(2) be amended to read *“where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint, with the guidance and approval of the unit, a transaction advisor to assist the authority in the preparation =, procurement, contract negotiations and financial close phase of a project”*

(iii).Section 56

Section 56 (1)(2)(3) be amended by substituting the word ‘Committee’ for the words “Cabinet” and “parliament” together with all words incidental to the two terms as used in these contexts, so that the new section 56 reads as follows-

“56(1)The Committee shall, within a period of thirty days from the date of its decision approving the project and financial risk assessment report, inform the contracting authority of the decision”

(2) Where the Committee approves the undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project”

(3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project.

(iv).Section 57

Section 57 be amended to read "*57 the contracting authority shall, following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of the government contracts, execute the contract awarded to that bidder*"

4.0.COMMITTEE OBSERVATIONS

The Committee notes that public private partnerships are an important avenue through which the government can raise funds required to meet its development agenda. The Constitution of Kenya creates two levels of government at which projects can be implemented: the National and County government. It is therefore paramount that all laws and regulations are aligned to this provision. For this reason, the Committee supports the bill as it will create a more conducive environment to enhance partnerships at all levels of government.

The bill also proposes among other things to eliminate bureaucracies in the PPP processes. This is important because it will enhance good governance, transparency and accountability in the whole process of PPPs.

5.0.COMMITTEE RECOMMENDATIONS

Having considered the Bill with the National Treasury the Committee adopted the amendments as follows:-

| tion ct | Clause in Bill | Issue | Proposed Amendment |
|------------|-------------------|--|---|
| | - | <p>Definition of “transaction advisor” includes the term ‘accession’ which is not used anywhere in the Act. Its meaning is unclear in actual legal practice, and introduces uncertainty on what is intended. We believe this was a drafting error.</p> <p>It also provides a limited scope for the transaction advisor’s services, which in any event is a substantive matter better left to the primary section – section 36 of the Act.</p> | <p>It is proposed that the word “accession” in the definition of the term ‘transaction advisor’ be deleted.</p> <p>It is also proposed that the words “including the preparation, accession and conclusion of a project agreement and the financial close” be deleted from the definition, so that the definition of the term “transaction advisor” would now read as follows:</p> <p><i>“transaction advisor” means a person appointed in writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership;</i></p> |
| | - | <p>There are a number of issues surrounding the transaction advisory services in a PPP project development –</p> <ol style="list-style-type: none"> 1. First, the capacity of a contracting authority may be wanting in the entire PPP project value chain: preparation, development, procurement, contract negotiation, and even contract management. 2. Secondly, the scope of an advisor’s engagement under this section needs to be expanded to include preparation (which is feasibility studies), procurement (which includes preparation of tender documents, support with bidder queries, support with tender evaluations, and support with contract negotiations post-procurement). This will ensure that any contracting authority that engages a transaction advisor will be properly guided on such an advisor’s terms of reference. | <p>It is recommended that section 36(1) be amended by inclusion of the words ‘preparation, procurement, contract negotiation and management so that the new sub-section now reads –</p> <p><i>“36. (1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act.”</i></p> <p>To address the second problem, it is recommended that section 36(2) be amended by deletion of the words “procurement process” appearing at the end thereof, and substituting therefor the</p> |

| tion act | Clause in Bill | Issue | Proposed Amendment |
|-------------|-------------------|--|---|
| | | <p>3. Thirdly, contracting authorities need assistance in structuring a transaction advisory procurement framework and contract, and need the technical support and guidance of the Unit. In several instances where contracting authorities have done this on their own, they have experienced very poorly developed projects, that have all ended up in trouble during procurement, or are failing to close at negotiation. The solution is to create a role for the technical support of the Unit to be provided to contracting authorities in the recruitment and management of transaction advisors.</p> | <p>words “preparation, procurement, contract negotiations, and financial close phase of a project”.</p> <p>To address the third problem, it is recommended that the following words be introduced, after the word ‘appoint’ appearing in the section 36 subsection (2): “...with the guidance and approval of the unit,”</p> <p>The new section 36(2) will subsequently read as follows –</p> <p><i>“36. (2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint, with the guidance and approval of the unit, a transaction advisor to assist the authority in the preparation, procurement, contract negotiations, and financial close phase of a project.”</i></p> |
| - | | <p>Clause 11 of the PPP (Amendment) Bill, 2016 has removed Cabinet from the procurement process, by making the PPP Committee decision final – which is the correct position in practice. Section 56 retains reference to Cabinet decision under section 54(3) which has been deleted by clause 11. It is necessary to carry through the amendment philosophy from section 54 into sections 56 and 57, by deleting reference to the words “Cabinet” and “Parliament” and substituting therefor the word “Committee”.</p> <p>It is also important to note that the import of section 55, which requires Parliament to ratify a natural resource PPP agreement, in practice is a post-contracting activity: in other words, until a contract is executed, it is not a</p> | <p>It is recommended that section 56(1) (2) and (3) be amended by substituting the word ‘Committee’ for the words “Cabinet and “Parliament” together with all words incidental to the two terms as used in these contexts, so that the new section 56 reads as follows—</p> <p><i>“56. (1) The Committee shall, within a period of thirty days from the date of its decision approving the project and financial risk assessment report, inform the contracting authority of the decision.”</i></p> <p>(2) Where the Committee approves the</p> |

| tion ct | Clause in Bill | Issue | Proposed Amendment |
|------------|-------------------|--|--|
| | | <p>contract capable of statutory ratification. This means that Parliament can only receive a competent agreement under section 55 if it has been signed. What would usually happen is that one of the contract conditions would be that it would become effective only upon the ratification.</p> | <p>undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project.</p> <p>(3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project.”</p> |
| - | | <p>As a consequence of clause 11 of the PPP (Amendment) Bill, 2016, reference in section 57 to Cabinet and to Parliament is erroneous, and it is necessary to effect a consequential amendment to this section to make reference to the Committee. This is consistent with the amendment proposed for section 56 of the principal Act.</p> | <p>It is recommended that the words “where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act,” be deleted, and the following words be substituted therefor –</p> <p>“..., following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government contracts”</p> <p>So that the new section 57 properly reads as follows:</p> <p><i>“57. The contracting authority shall, following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder.”</i></p> |

SIGNED..........DATE.....4th Oct 2016.....

THE HON. NELSON GAICHUHIE, MP

VICE CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE, PLANNING AND TRADE

ANNEXES

ANNEX 1: MINUTES

**MINUTES OF THE 77TH SITTING OF THE DEPARTMENTAL
COMMITTEE ON FINANCE, PLANNING & TRADE HELD ON SATURDAY
24TH SEPTEMBER, 2016 IN THE CONFERENCE ROOM, 3RD FLOOR,
PINECONE HOTEL, KISUMU AT 10.00AM**

PRESENT

- | | |
|-----------------------------------|-------------------------|
| 1. Hon. Benjamin Langat, MP | Chairperson |
| 2. Hon. Nelson Gaichuhie, MP | Vice-Chairperson |
| 3. Hon. Jimmy Nuru Angwenyi, MP | |
| 4. Hon. Shakeel Shabbir, MP | |
| 5. Hon. Abdul Rahim Dawood, MP | |
| 6. Hon. Anyanga Andrew Toboso, MP | |
| 7. Hon. Daniel Epuyo Nanok, MP | |
| 8. Hon. Iringo Cyprian Kubai, MP | |
| 9. Hon. Joash Olum, MP | |
| 10. Hon. Jones Mlolwa, MP | |
| 11. Hon. Joseph Limo, MP | |
| 12. Hon. Kirwa Stephen Bitok, MP | |
| 13. Hon. Lati Lelelit, MP | |
| 14. Hon. Mary Emase, MP | |
| 15. Hon. Ogendo Rose Nyamunga, MP | |
| 16. Hon. Ronald Tonui, MP | |

APOLOGIES

1. Hon. Dr. Oburu Oginga, MP
2. Hon. Eng. Shadrack Manga, MP
3. Hon. Sammy Koech, MP
4. Hon. Alfred Sambu, MP
5. Hon. Abdikadir Ore Mohammed, MP
6. Hon. Abdullswamad Shariff, MP
7. Hon. Dennis Waweru, MP
8. Hon. Patrick Makau King'ola, MP
9. Hon. Sakaja Johnson, MP
10. Hon. Sakwa John Bunyasi, MP
11. Hon. Sammy Mwaita, MP
12. Hon. Sumra Irshadali, MP
13. Hon. Tiras Ngahu, MP

COMMITTEE SECRETARIAT

- | | | |
|---------------------|---|------------------|
| 1. Evans Oanda | - | Clerk Assisstant |
| 2. Fredrick otieno | - | Clerk Assistant |
| 3. Nicodemus Maluki | - | Clerk Assistant |
| 4. Benson Nzofu | - | Clerk Assistant |
| 5. Peter Mwaura | - | Legal Counsel |

- 6. Adams Onyanyo - Sergeant Art Arms
- 7. Sharon Cheronno - Research Officer
- 8. Eric Ososi - Research Officer
- 9. Josephat Motonu - Fiscal Analyst
- 10. Robert Nyaga - Fiscal Analyst

THE NATIONAL TREASURY

- 1. Henry Rotich - Cabinet Secretary for the National Treasury
- 2. Donald Murgor - PA to the CS
- 3. Solomon Kitungu - CEO of the Privatization Commission
- 4. Stephen Wangombe - CEO, Competition Authority
- 5. Alexia Waweru - Legal Officer, Competition Authority
- 6. Jackline Muindi - Legal Officer, Privatization Commission
- 7. Sammy Mukobe - Commissioner, IRA
- 8. Elias Omondi - Insurance Regulatory Authority
- 9. Jemimah Mwaniki - Insurance Regulatory Authority
- 10. Ronoh Tuimising, PHD - PPP Unit

MIN.NO. DCF/283 /2016: PRELIMINARIES

The ViceChairperson called the meeting to order at 10. 00am and prayed.

MIN.NO. DCF/284/2016: CONSIDERATION OF BILLS BEFORE THE COMMITTEE

A. The privatization (Amendment) Bill, 2016

The Cabinet Secretary, with the help of the officers from the privatization Commission informed the Committee as follows regarding the Bill:

- 1. The proposed amendments are geared towards hastening the privatization process by introducing a tribunal that will be hearing cases on privatization, and also removing parliamentary approval of commissioners during appointment.
- 2. The CS proposed the following further amendments:

| Section | Current provision | Amended provision | Rationale for amendment |
|---------|---|---|---|
| | “privatization” means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation; | “privatization “ means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation but excludes sale of new shares to existing | To clarify that sale of new shares through a rights issue is not a privatization as defined under the Act. To clarify the position on rights issue in view of provisions under the |

| Section | Current provision | Amended provision | Rationale for amendment |
|------------------------|---|--|--|
| | | shareholders through a rights issue or any balance sheet reorganization which may lead to dilution of the percentage of shares held by a public entity | <p>Companies Act and related laws with respect to which inclusion of rights issue under privatization would have no force.</p> <p>To clarify and encourage the use of rights issue as a source of financing for enterprises requiring urgent injection of financial resources.</p> |
| Section 37 | The Second Schedule shall apply with respect to objections and appeals relating to what has been determined, as published under section 36. | The Second Schedule shall apply with respect to objections and appeals relating to what has been determined and published under section 36 and any other objections and appeals relating to implementation of the privatization programme. | To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes. |
| Second Schedule | <p>Paragraph 2(1):</p> <p>A person may file, with Commission, an objection to what has been determined, as published under section 36.</p> <p>Paragraph 2 (2)</p> <p>An objection may not be filed later than five working days after the publication under section 36.</p> | <p>Paragraph 2(1):</p> <p>A person may file, with Commission, an objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme.</p> <p>Paragraph 2 (2)</p> <p>An objection to what has been determined and published under section 36 may not be filed later than five working days after the publication.</p> <p>Paragraph 2(3):</p> | <p>To broaden the mandate of the Privatization Appeals Tribunal to include other objections and appeals to preempt lengthy court processes.</p> |

| Section | Current provision | Amended provision | Rationale for amendment |
|-----------------------|---|---|---|
| | <p>Paragraph 2(3):</p> <p>The Commission shall make a decision with the respect to the objection and give a copy of its decision to the objector within five working days after receiving the objection.</p> | <p>The Commission shall make a decision with the respect to the objection to what has been determined and published under section 36 or any other objection relating to implementation of the privatization programme and give a copy of its decision to the objector within five working days after receiving the objection.</p> | |
| First Schedule | <p>Paragraph 3:</p> <p>A member described in section 5(1) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.</p> | <p>Paragraph 3:</p> <p>A member described in section 5(1) (b) and (c) may designate a representative to attend a meeting of the Commission or of a committee of the Commission in the member's absence.</p> | <p>To correct an earlier error in the Act. Allows the Attorney General and CS National Treasury to appoint alternate directors to represent them in the Commission's board.</p> |

The Committee agreed to all the proposed amendments. The Committee however noted that contrary to the assertion by the CS that parliament was responsible for delaying privatization process by not approving commissioners for appointment in time, the approval process is provided in law with clear timelines. Parliament has always adhered to the provided timelines.

B. The Competition (Amendment) Bill, 2016

After considering the proposed consolidated amendments to the Competition (Amendment) Bill, 2016 and their comments from the National Treasury, the following amendments were adopted:

1. Clause 2 be amended by deleting the definition of "undertaking and replacing therfor with the following definition: *"undertaking" be re-worded to read as follows, 'undertaking means any business intended to be carried on, or carried on, for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a Trade Association.'*
2. Clause 10

The power to set the threshold for a merger should remain within the powers of the Cabinet Secretary and it should be done in consultation with the Competition Authority as opposed to the proposal in the Bill to vest this power with the Competition Authority.

3. New proposal to amend section 48

Appeals to the Tribunal

Amend section 48 to allow a party to appeal once notified rather than waiting for the Gazette Notice given the delays experienced in waiting for the Notice

Section 48 provides that "not later than thirty days after notice is given by the Competition Authority in the Gazette in terms of the determination made by the Competition Authority in relation to a proposed merger, a party to the merger may apply to the Tribunal, in the form determined by the Tribunal, for review of the Competition Authority's decision;

once parties receive a written decision from the Authority, they should have the right to file an Appeal to the Tribunal. This is because there is often a significant time lag between the Authority issuing their written decision and the publication of the same in the Gazette

C. The Insurance (Amendment) Bill, 2016

After considering the proposed consolidated amendments to the Insurance (Amendment) Bill, 2016, the following amendments were adopted:

1. Clause 11 should be deleted.

Justification

It is good to retain ninety days. The proposed amendment does not take into account the practical issues which tend to arise when an insurer is handling a claim as some investigations involve many parties and take over thirty days to complete. If claims are settled hurriedly, it will encourage fraudulent claims and possible collapse of several underwriters, hence the need for caution to be exercised to ensure only genuine claims are settled.

The Committee held this clause in abeyance – for further discussion

2. The proposed section 19A be amended in subsection (1) by deleting the following words "**except where the person is exempted in accordance with this Act**".

Justification

Section 181 of the Insurance Act gives the Cabinet Secretary power to exempt any person from the provision of the Insurance Act. The exemption

contemplated under the proposed section is well taken care of under Section 181 and there may be no need for this repetition which may create an impression that the exemption is peculiar to *takaful*.

This is to give the correct meaning to the paragraph so as to allow the type of capital authorized for a new company as ordinary shares and preference shares which are irredeemable and non-cumulative in nature.

D. The Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2015

After considering the proposed consolidated amendments to the Proceeds of Crime and Anti- Money Laundering (Amendment) Bill, 2016, the following amendments were adopted:

Clause 4

1. Clause 4 of the Bill is amended in the proposed section 24B –

- (a) in subsection (1) –
 - (i) by deleting the words “on conviction to a fine” and substituting therefor the words “to a monetary penalty” in the proposed paragraphs (a) and (b);
 - (ii) by deleting the words “on conviction to an additional fine” and substituting therefor the words “to an additional monetary penalty in the proposed paragraph (c);
- (b) in subsection (2) –
 - (i) by deleting the word “fine” appearing immediately after the words “before imposing a” and substituting therefor the words “monetary penalty”;
 - (ii) by deleting the words “seven days” and replacing therefor with the words “fourteen days”
 - (iii) by deleting the word “fines” appearing immediately after the word “prescribed” and substituting therefor the words “monetary penalty”;
- (c) in subsection (3) –
 - (i) by deleting the word “fine” in the opening statement where it first appears and substituting therefor the words “monetary penalty”;
 - (ii) by deleting the word “fine” in the opening statement where it second appears and substituting therefor the word “penalty”;
 - (iii) by deleting the word “ten” in paragraph (b);
 - (iv) by deleting the word “fine” and substituting therefor the words “monetary penalty” in paragraph (c);
- (d) in subsection (4) –
 - (i) by deleting the word “fine” and substituting therefor the words “monetary penalty”;
 - (ii) by inserting the words “by proceedings in the name of the Centre” immediately after the word “jurisdiction”.

Justification

This proposal emanated from the FRC. In the original submissions made by the FRC in December 2015, FRC had proposed the introduction of Civil Monetary Penalties into the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA) as a means of further enhancing the FRC's powers to take action against persons found to be non-compliant with the provisions of POCAMLA. The ability by the Financial Intelligence Unit (in this case the FRC) to take proportionate and dissuasive sanctions against non-complaint institutions and persons is one of the requirements of the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation as set out by the Financial Action Task Force (FATF).

When the Proceeds of Crime and Anti-Money Laundering Bill, 2015 was however published, the sanctions were crafted as criminal sanctions requiring one to be first convicted. This was not the intention of the original proposal and the proposed amendments therefore seek to revert the amendments as contained in the Bill to civil monetary penalties as originally proposed.

The proposed penalties are serious and significant hence the need for extension of time from 7 days to 14 days in filing the notice to show cause response under clause 4(2).

2. Clause 4 of the Bill is amended in the proposed section 24C –
 - (a) inserting the word “or” immediately after the word “institution” in paragraph (a);
 - (b) inserting the words “instruction or” immediately before the word “direction in paragraph (b);
 - (c) inserting the words “or individuals” immediately after the word “individual” in paragraph (c);
 - (d) deleting paragraph (d) and substituting therefor the following new paragraph –

“(d) issue an order to a competent supervisory authority requesting the suspension or revocation of a licence, registration, permit or authorization of a specified reporting institution whether entirely or in a specified capacity or of any director, principal, officer, agent or employee of the reporting institution

Justification

It seeks to enhance the FRC's ability to take administrative action against persons for non-compliance with the provisions of POCAMLA. This proposal is also in line with international best practices requiring FIUs to be able to take proportional and dissuasive sanctions for non-compliance. When the FRC recently began taking actions against reporting institutions for non-compliance with POCAMLA, it was noted that the Act did not vest on the FRC sufficient powers to take action against errant persons. There is therefore need to enhance the powers of the FRC to enable it to take civil and administrative action against non-compliant persons and institutions.

The FRC has benchmarked with other FIUs in the region and beyond and notes that these FIUs are clothed with these powers.

However, when the Amendment Bill was published, certain elements of the administrative sanctions were omitted. The proposed amendments therefore seek to revert the amendments in the Bill to the form as originally proposed by the FRC.

New proposal within clause 24C

“(2) Before taking administrative action imposing against any person or reporting institution under this section, the Centre shall give not less than fourteen days’ notice in writing, requiring the person or reporting institution to show cause as to why the prescribed administrative action should not be taken.

Justification

Affords fair hearing to a reporting institution before issuing sanctions. The sanctions imposed are of a serious nature. However, there appears to be no provision for conducting a hearing with the reporting institution before imposing sanctions. This may be seen to be a breach of the right to natural justice and could result in administrative action against the FRC.

Clause 8

That clause 8 is amended by deleting paragraph (c) and substituting therefor with the following new paragraph:

“(c) taking all decisions of the Centre in the exercise, discharge and performance of the Centre’s objectives, powers, functions and duties”.

Justification

This clarifies that the Director-General is responsible for all decisions of the Centre. This is in line with the Financial Action Task Force (FATF) requirements and international best practice where the Centre is required to be operationally independent

Clause 11

That clause 11 be amended in 31(3) by inserting the words “specific act or” immediately before the word “function”

Justification

- (a) The amendment seeks to remove the role of the State Corporations Act over the operations of the Centre as this has the potential to interfere with the operational independence of the centre which is a key requirement and best practice for financial intelligence units;

- (b) The Cabinet Secretary, however, retains the role of approving the general terms and conditions of the Centre's staff.

E. The Uwezo Fund Bill, 2015

The Cabinet Secretary informed the Committee that the Government has initiated of consolidating most of the Funds established to one Fund. This will reduce their administration costs, avoid duplicity and ensure efficiency. Therefore the Uwezo Fund Bill should be pended. The Committee Concured.

F. Public Private Partnership (Amendment) Bill, 2016

The CS proposed the following further amendments to the Public Private Partnership (Amendment) 2016

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|---|
| 2 | - | <p>Definition of "transaction advisor" includes the term 'accession' which is not used anywhere in the Act. Its meaning is unclear in actual legal practice, and introduces uncertainty on what is intended. We believe this was a drafting error.</p> <p>It also provides a limited scope for the transaction advisor's services, which in any event is a substantive matter better left to the primary section – section 36 of the Act.</p> | <p>It is proposed that the word "accession" in the definition of the term 'transaction advisor' be deleted.</p> <p>It is also proposed that the words "including the preparation, accession and conclusion of a project agreement and the financial close" be deleted from the definition, so that the definition of the term "transaction advisor" would now read as follows:</p> <p><i>"transaction advisor" means a person appointed in writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership;</i></p> |
| 36 | - | <p>There are a number of issues surrounding the transaction advisory services in a PPP project development –</p> <ol style="list-style-type: none"> 1. First, the capacity of a contracting authority may be wanting in the entire | <p>It is recommended that section 36(1) be amended by inclusion of the words 'preparation, procurement, contract negotiation and management so that the new sub-</p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|--|
| | | <p>PPP project value chain: preparation, development, procurement, contract negotiation, and even contract management.</p> <p>2. Secondly, the scope of an advisor's engagement under this section needs to be expanded to include preparation (which is feasibility studies), procurement (which includes preparation of tender documents, support with bidder queries, support with tender evaluations, and support with contract negotiations post-procurement). This will ensure that any contracting authority that engages a transaction advisor will be properly guided on such an advisor's terms of reference.</p> <p>3. Thirdly, contracting authorities need assistance in structuring a transaction advisory procurement framework and contract, and need the technical support and guidance of the Unit. In several instances where contracting authorities have done this on their own, they have experienced very poorly developed projects, that have all ended up in trouble during procurement, or are failing to close at negotiation. The solution is to create a role for the technical support of the Unit to be provided to contracting authorities in the recruitment and management of transaction advisors.</p> | <p>section now reads –</p> <p><i>“36. (1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act.”</i></p> <p>To address the second problem, it is recommended that section 36(2) be amended by deletion of the words “procurement process” appearing at the end thereof, and substituting therefor the words “preparation, procurement, contract negotiations, and financial close phase of a project”.</p> <p>To address the third problem, it is recommended that the following words be introduced, after the word ‘appoint’ appearing in the fourth line of section 36(2): “...with the guidance and approval of the unit...”</p> <p>The new section 36(2) will now read as follows –</p> <p><i>“36. (2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint, with the guidance and approval of the unit, a transaction advisor to assist the authority in the preparation, procurement, contract negotiations, and financial close phase of a project.”</i></p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|---|---|
| 56 | - | <p>Clause 11 of the PPP (Amendment) Bill, 2016 has removed Cabinet from the procurement process, by making the PPP Committee decision final – which is the correct position in practice. Section 56 retains reference to Cabinet decision under section 54(3) which has been deleted by clause 11. It is necessary to carry through the amendment philosophy from section 54 into sections 56 and 57, by deleting reference to the words “Cabinet” and “Parliament” and substituting therefor the word “Committee”.</p> <p>It is also important to note that the import of section 55, which requires Parliament to ratify a natural resource PPP agreement, in practice is a post-contracting activity: in other words, until a contract is executed, it is not a contract capable of statutory ratification. This means that Parliament can only receive as competent an agreement under section 55 if it has been signed. What would usually happen is that one of the contract conditions would be that it would become effective only upon the ratification.</p> | <p>It is recommended that section 56(1), (2) and (3) be amended by substituting the word ‘Committee’ for the words “Cabinet and “Parliament” together with all words incidental to the two terms as used in these contexts, so that the new section 56 reads as follows –</p> <p>“56. (1) The Committee shall, within a period of thirty days from the date of its decision approving the project and financial risk assessment report, inform the contracting authority of the decision.”</p> <p>(2) Where the Committee approves the undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project.</p> <p>(3) The contracting authority shall communicate the decision of the Committee in writing, to all bidders who participated in the bidding of the project.”</p> |
| 57 | - | <p>As a consequence of clause 11 of the PPP (Amendment) Bill, 2016, reference in section 57 to Cabinet and to Parliament is erroneous, and it is necessary to effect a consequential amendment to this section to make reference to the Committee. This is consistent with the amendment proposed for section 56 of the principal Act.</p> | <p>It is recommended that the words “where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act,” be deleted, and the following words be substituted therefor –</p> <p>“..., following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government</p> |

| Section in Act | Clause in Bill | Issue | Proposed Amendment |
|----------------|----------------|-------|---|
| | | | <p>contracts,..."</p> <p>So that the new section 57 properly reads as follows:</p> <p><i>"57. The contracting authority shall, following its finalization of the project agreement and after all parties to the agreement have perfected all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder."</i></p> |

G. The County Industrial Development Bill, 2015 – Senate Bill

After the presentation from the Parliamentary Budget Office that the County Industrial Development Bill, 2016 had been certified as money Bill by the Budget and Appropriations Committee and therefore ought not to have originated from the Senate, the Committee concurred with the Budget and Appropriations Committee in rejecting enactment of the law on the basis of its origin. Processing it when it has already been rejected by the Busget and Appropriations Committee would be engaging in an exercise in futillity.

MIN.NO. DCF/285 /2016: ADJOURNMENT

The Vice Chairperson adjourned the meeting at 12.05pm

Signed.....

Chairperson

Date.....