

LEGAL NOTICE NO. 171

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2014

(No. 15 of 2013)

THE PUBLIC PRIVATE PARTNERSHIPS REGULATIONS, 2014

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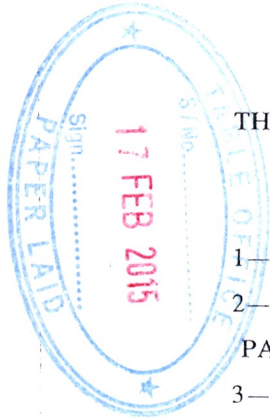
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THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2014

(No. 15 of 2013)

IN EXERCISE of the powers conferred by section 71(1) of the Public Private Partnerships Act, 2013, the Cabinet Secretary for the National Treasury makes the following Regulations—

THE PUBLIC PRIVATE PARTNERSHIPS REGULATIONS, 2014

PART I—PRELIMINARY

1. These Regulations may be cited as the Public Private Partnerships Regulations, 2014. Citation.

2. (1) These Regulations shall apply to every contract for the design, financing, construction, operation, equipping or maintenance of a project for the provision of public services undertaken under the Act. Application.

(2) For the purposes of section 71(1)(c) of the Act, these Regulations shall not apply to a project if that project—

- (a) is a national project that has a capital expenditure component with a contract value of more than eighty-five million shillings;
- (b) is a county government project that has a capital expenditure component with a contract value of more than five million shillings; or
- (c) is either a national government project or a county government project that does not have a capital expenditure component but a contract value of more than five million shillings being life cycle costs.

(3) The requirements of paragraph (2) shall not apply—

- (a) if there is a material public interest;
- (b) if the Unit has recommended it; and
- (c) if the Committee has adopted objective parameters to guide it in determining whether or not to exempt the project.

PART II—PUBLIC PRIVATE PARTNERSHIP COMMITTEE

3. (1) A person qualifies to be appointed as a member of the Committee under section (4) (1) (g) of the Act if that person— Members of the Committee not being public officers.

- (a) is a Kenyan;
- (b) is reputable and of good standing;
- (c) is impartial and independent;
- (d) has not been convicted of an offence involving dishonesty or fraud; and
- (e) satisfies the requirements of Chapter Six of the Constitution.

(2) In relation to a declaration of interests—

- (a) once in every financial year, a member of the Committee appointed under section 4(1)(g) of the Act shall submit to the Unit a completed Interest Declaration Form in the prescribed form; and
- (b) if there is a material change to the interests declared by a member appointed under section 4(1)(g) of the Act, that member shall inform the Committee in writing in accordance with the provisions of paragraph (2) of the First Schedule to the Act.

(3) The Unit shall inform the Cabinet Secretary of a material change in the interests of a member appointed under section 4(1)(g) of the Act within fourteen days of that member informing the Committee of that material change, and the Cabinet Secretary shall determine whether or not that member shall continue to be a member of the Committee.

(4) Where the Cabinet Secretary decides to re-appoint a member of the Committee to another term, the Cabinet Secretary shall inform that member in writing before the re-appointment is made.

(5) The vice-chairperson of the Committee shall be elected by the members of the Committee at the first sitting of the Committee and the election shall be by simple majority of those members present and voting.

(6) Each member of the Committee, other than the Attorney-General who may send a representative, shall attend the meetings of the Committee in person.

(7) Each member of the Committee, other than the Committee Secretary, may vote or abstain when a vote of the Committee is required.

4. Where the Committee requires any information from any party, it shall notify that party in writing and shall state the proposed use of the required information and whether or not the information should be provided in writing.

Notifications by the Committee.

5. Where the Committee takes custody of a project agreement for the purpose of monitoring a party's compliance with the terms and conditions of the agreement, the Committee may delegate to a sub-committee the responsibility of monitoring that compliance.

Sub-committees of the Committee.

PART III—FUNCTIONS OF THE UNIT AND NODES.

6. (1) The Unit shall preserve an electronic copy and a paper copy of each project agreement for a period of at least six years after the determination of the project agreement.

Copies of project agreements.

(2) The Unit shall maintain electronic and paper copies of all documents related to a project including—

- (a) studies;
- (b) reports;

- (c) minutes of meetings;
- (d) decisions;
- (e) recommendations;
- (f) announcements;
- (g) requests;
- (h) expressions of interest;
- (i) letters;
- (j) bidding documents;
- (k) complaints; and
- (l) petitions.

(2) Every contracting authority shall keep the original copy of a project agreement in which the contracting authority is involved.

7. Every Public Private Partnerships Node established by a contracting authority is responsible for undertaking projects for that contracting authority under this Act.

Nodes to undertake projects for contracting authority.

8. (1) The contracting authority may alter the membership of a Node in accordance with the needs and priorities of the contracting authority.

Membership of Nodes.

(2) Each member of the Node, other than the Accounting Officer, shall be of the rank of a departmental head or its equivalent.

PART IV—PUBLIC PRIVATE PARTNERSHIPS ARRANGEMENTS

9. The Cabinet Secretary may approve a public private partnerships arrangement, other than an arrangement provided for in the Second Schedule to the Act, on—

Public private partnerships arrangements not provided for in the Second Schedule.

- (1) the written request of the contracting authority;
- (2) the recommendation of the Committee; and
- (3) if the project—
 - (a) is primarily based on outputs;
 - (b) provides value-for-money for public services;
 - (c) contributes knowhow and knowledge to public services;
 - (d) can be afforded by the contracting authority;
 - (e) offers value-for-money to the end-users;
 - (f) effectively transfers the risks arising from the performance of the function; and
 - (g) provides for the reliable delivery of facilities and services.

10. (1) The Committee shall publish guidelines for sector diagnostic studies and assessments by contracting authorities.

Sector diagnostic study and assessment.

(2) Where a contracting party has not prepared a sector diagnostic study and assessment at the time of initiating the project, that contracting authority shall follow the guidelines issued under section 30 of the Act and submit the reports required under section 31 of the Act when applying for the Committee's approval to undertake a project.

(3) A contracting authority shall work closely with the Unit and the Node when undertaking a sector diagnostic study and assessment.

11. (1) The Accounting Officer shall approve the project list prepared by the contracting authority before the list is submitted to the Unit for approval.

Submission of project lists.

(2) The contracting authority may update the project list every year but the final project list must be submitted to the Unit at least three months before the end of the financial year.

(3) The contracting authority shall prepare a project report for each project on the project list.

(4) The Unit shall screen each project on a project list to determine whether or not the project is eligible to be a public private partnerships project.

PART V—PROJECT PREPARATION AND APPRAISAL.

12. When preparing a project proposal, a contracting authority shall include the following information—

Project identification, selection and prioritisation.

- (a) demand assessment;
- (b) the estimated cost of the project based on—
 - (i) the prevailing market rates;
 - (ii) an updated cost of similar precedent projects; or
 - (iii) international best practices;
- (c) details of the project;
- (d) the expected private sector role in the project;
- (e) the socio-economic benefits of the project; and
- (f) the operational and strategic benefits of the project.

13. (1) A contracting authority shall appoint a project appraisal team which shall oversee the project during the preparation phase and up to the signing of the project agreement.

Project preparation and appraisal.

(2) Where the contracting authority constitutes a project appraisal team, the contracting authority shall request the Director to nominate the representative of the Unit to the Project Appraisal Team.

(3) The Accounting Officer shall appoint technical, financial and legal experts as members of the project appraisal team.

(4) The Accounting Officer, in consultation with the Unit, may appoint a transaction advisor to support the project appraisal team.

14. (1) The Node shall prepare the feasibility study for a project. Feasibility study.

(2) The Accounting Officer shall submit the feasibility study to the Committee for approval.

(3) The Committee shall publish guidelines for the development and the content of feasibility studies.

15. (1) The Committee shall publish guidelines for the preparation of— Value assessment report.

(a) affordability assessment;

(b) value for money assessment; and

(c) public sector comparator assessment.

(2) The Unit shall develop standardised forms for the submission of—

(a) sector diagnostic studies and assessments; and

(b) feasibility study reports.

(3) For the purposes of these Regulations, “public sector comparator” means an estimate of the total costs to the government of achieving the targeted outputs if the project is completed in the normal way.

16. (1) On receiving a project feasibility study report, the Committee shall inform the contracting authority in writing whether or not the contracting authority can tender for the project under the Act as a public private partnership project. Approval of feasibility reports by the Committee.

(2) Where the Committee refuses to permit a contracting authority to tender for the project, it shall set down in writing its reasons for refusal and it shall advise the contracting authority on the steps to be taken in order for the project to be approved.

(3) When making a decision under this regulation, the Committee shall take into account the written recommendations of the Unit and the approval of the Debt Management Office in relation to the proposed project.

PART VI—TRANSACTION ADVISORS.

17. (1) A contracting authority may appoint a transaction advisor. Appointment of transaction advisors.

(2) A transaction advisor shall, in accordance with the terms of reference of the appointment, assist the contracting authority to—

(a) develop feasibility studies;

(b) prepare bid documents;

(c) carry out due diligence activities for projects;

(d) structure the procurement process; and

(e) in managing such other technical or financial matters as the contracting authority may require assistance in relation to a

public private partnerships project.

18. (1) A contracting authority shall be responsible for procuring the services of a transaction advisor.

Contracting authority responsible for procuring transaction advisor.

(2) Where the services of a transaction advisor are to be paid for by the Unit the contracting authority shall request the Unit to undertake the procurement of the services of the transaction advisor on behalf of the contracting authority.

(3) The procurement of the services of a transaction advisor shall be done competitively or, with the approval of the Unit, from a list of pre-qualified persons.

19. Where a contracting authority wishes to appoint a transaction advisor through direct procurement, the contracting authority may make the appointment if—

Direct procurement of transaction advisors.

- (a) the Node of the contracting authority recommends the direct procurement procedure;
- (b) the Unit recommends the appointment; and
- (c) there are exceptional circumstances that warrant the appointment.

20. (1) The Unit may publish a short-list of pre-qualified persons who may offer transaction advisory services to the contracting authority—

Short-list of pre-qualified transaction advisors.

- (a) after publishing a general request for proposals at the beginning of each financial year; and
- (b) selecting persons who qualify to offer transaction advisory services to the contracting authority.

(2) A general request for proposals for prequalification of transaction advisors shall be in relation to the projects list and the general request may specify the expertise of the transaction advisors in relation to the project list.

21. (1) When procuring the services of a transaction advisor, a contracting authority shall prepare detailed terms of reference in relation to the project and where it has prepared a list of pre-qualified persons, the contracting authority shall invite those persons to submit proposals in relation to offering transaction advisory services for the project.

Procurement of transaction advisors.

(2) Where a contracting authority wishes to procure the services of a transaction advisor but the contracting authority has not prepared a list of pre-qualified persons, it shall invite submissions of expression of interest from any person in relation to the project by advertising in at least two newspapers of national circulation and in the *Gazette*.

22. In relation to a project that has been approved by the Cabinet but is not on the project list published under section 25 of the Act, a contracting authority may invite expressions of interest for transaction advisory services by advertising in at least two newspapers of national circulation and in the *Gazette* from—

Transaction advisory services for projects not on the project list.

- (a) any person or firm that responds to the advertisement in relation to that project; or
- (b) a pre-qualified person on the list prepared under regulation 20.

23. (1) When a contracting authority invites expressions of interest in relation to the provision of transaction advisory services for a proposed project, that contracting authority shall—

Expressions of interest for transaction advisory services.

- (a) state the deadline for the submission of the expression of interest by the interested parties;
- (b) indicate the place where the expressions of interest are to be submitted;
- (c) set out the format that shall be adopted by interested parties when submitting expressions of interest; and
- (d) set out the criteria for assessing each expression of interest that has been submitted.

(2) The contracting authority shall appoint an evaluation team to evaluate the expressions of interest.

(3) The evaluation team shall evaluate the expressions of interest and prepare a short list of at least three persons but not more than seven persons that meet the requirements of the contracting authority.

24. (1) A contracting authority shall prepare a request for proposal document that shall include—

Shortlisted firms to submit technical and financial proposals.

- (a) instructions on the preparation and submission of proposals;
- (b) the criteria that the contracting authority shall apply for the evaluation of proposals;
- (c) draft contract agreements; and
- (d) standardised forms for the submission of technical and financial proposals.

(2) A person or a firm on the short list prepared under regulation 23 shall be invited by the contracting authority to submit technical and financial proposals in relation to a project in accordance with the terms of a request for proposal document under sub-regulation (1).

(3) An evaluation team shall evaluate the proposals submitted under this regulation by opening and evaluating the technical proposals first.

(4) The evaluation team shall open and evaluate the financial proposals of the persons or firms that have been successfully evaluated under sub-regulation (3).

(5) The financial bids of persons or firms that were not successfully evaluated under sub-regulation (3) shall be returned by the contracting authority without being opened.

25. (1) The evaluation team shall recommend to the Accounting Officer the winning proposal.

Evaluation team to choose best proposal.

(2) Where an Accounting Officer disagrees with the recommendation of the evaluation team, the Accounting Officer shall refer the matter to the evaluation team and shall specify the ground on which he or she disagrees with the recommendation of the evaluation team but the Accounting Officer shall not have the authority to overturn or vary the recommendation of the evaluation team.

(3) The evaluating team shall consider the objections of the Accounting Officer and may, subject to the evaluation criteria applied in relation to the proposals, review its decision and independently recommend a different winning proposal.

(4) The evaluation committee shall inform in writing the person that submitted the winning proposal that the person has won the tender.

(5) The Accounting Officer shall inform in writing every other person that submitted a proposal that those persons were not successful and shall give reasons why those persons were not successful.

26. A person who was not successful may, after paying the prescribed fee, appeal against the decision of the evaluation team to the Petition Committee.

Appeal against decision of evaluation team.

27. The Accounting Officer of the contracting authority shall invite in writing the person that was successful to sign a contract for the provision of transaction advisory services with the contracting authority.

Accounting officer to invite successful bidder to sign contract.

PART VII—SOLICITED PROPOSALS

28. A contracting authority may, in consultation with the Unit, create a list of pre-qualified persons that may tender for the development and implementation of a public private partnerships project.

List of pre-qualified persons or firms.

29. (1) A contracting authority shall invite persons to apply for qualification to develop and implement a public private partnerships project by notice in the *Gazette* and in at least two newspapers of national circulation.

Invitation of requests for qualification.

(2) The contracting authority shall specify in the notice the qualifications required by a person who may bid for the tender to develop and implement the public private partnerships project including—

- (a) technical qualifications;
- (b) financial requirements;
- (c) relevant experience;
- (d) compliance with health and safety regulations; and
- (d) compliance with environment regulations.

(3) A contracting authority may, before issuing an applicant with the tender documents, charge the applicant a prescribed fee.

30. (1) The secretary of a pre-qualification committee of a contracting authority shall be appointed by the Accounting Officer and

Pre-qualification committee.

shall carry out all administrative functions related to the pre-qualification committee.

(2) The functions of a pre-qualification committee are—

- (a) to advise the contracting authority regarding any aspect of the pre-qualification process;
- (b) to receive, register and review applications for pre-qualification; and
- (c) to prepare a pre-qualification evaluation report.

(3) The representative of the Unit in the pre-qualification committee shall not have the right to vote on any decision of the committee.

(4) The Unit shall publish standardised pre-qualification documents that may be used by applicants for pre-qualification.

31. (1) Subject to the approval of the contracting authority, each pre-qualification committee shall determine its own procedure.

Procedures of a pre-qualification committee.

(2) Each pre-qualification committee shall make its decisions by a simple majority vote and the decisions shall be submitted to the contracting authority for approval.

(3) Where a pre-qualification committee requires any person to do anything or provide any document, the pre-qualification committee shall grant that person a reasonable period of time to comply with its requirement.

32. (1) The pre-qualification committee, while evaluating applications for pre-qualification, may ask an applicant for clarifications regarding that applicant's application.

Evaluation of applications for pre-qualification.

(2) Where an applicant has failed or refused to submit a document required to be submitted when applying for pre-qualification, that document may not be submitted when the pre-qualification committee asks an applicant to clarify any matter.

33. (1) The pre-qualification committee shall prepare a short list of pre-qualified persons and shall notify the contracting authority in writing.

Preparation of short list of pre-qualified persons.

(2) The contracting authority shall notify each applicant of the content of the short list in writing.

(3) The contracting authority shall publish the short list of the persons that pre-qualify in the *Gazette* and in at least two newspapers of national circulation.

34. (1) A contracting authority may alter the specifications of a project based on the outcome of the preliminary meetings of bidders but only if the alteration shall not disqualify any pre-qualified bidder.

Alterations of the specifications of projects.

(2) The Accounting Officer of the contracting authority shall inform all pre-qualified bidders of the altered specifications of the project within seven days of the alterations being made.

(3) Where a contracting authority alters the specifications of a project, that contracting authority shall invite bids for the project based on the altered specifications.

35. (1) A contracting authority may delegate to the project appraisal team the preparation of tender documents.

Tender documents.

(2) When preparing tender documents, the project appraisal team shall take into account these Regulations and any guidelines that may be published by the Committee.

(3) In addition to the information required under section 43(2) of the Act, tender documents shall provide—

- (a) the methodology to be used during the technical or financial evaluation of bids;
- (b) the validity period of the bids;
- (c) the value of bid security;
- (d) the method of calculating a performance bond;
- (e) the validity period of a performance bond;
- (f) whether the competitive dialogue procedure will be used;
- (g) the deadline for receiving bids;
- (h) where the tender documents may be collected from;
- (i) the price of tender documents;
- (j) the scoring system to be applied in the evaluation of bids, where applicable;
- (k) the criteria for assessing technical bids and the threshold each technical bid should meet;
- (l) the criteria for ranking the successfully evaluated bids;
- (m) the criteria for evaluating and comparing financial bids; and
- (n) the circumstances under which a bid may be rejected.

36. (1) A notice of an invitation to tender shall be published by the Accounting Officer of a contracting authority.

Invitation to tender.

(2) The Accounting Officer shall publish the notice in the *Gazette* and in at least two newspapers of national circulation.

(3) Where a contracting authority has a website or some other electronic means for communications, the Accounting Officer shall also publish the notice on the website or such other electronic means of communications.

37. (1) After a notice of an invitation to tender is published, a contracting authority shall convene a pre-bid conference to clarify key issues in relation to a tender.

Pre-bid conference.

(2) Any person participating in the tender may attend a pre-bid conference.

38. (1) A contracting authority may alter a tender document based on the outcome of a pre-bid conference.

Alteration of tender documents.

(2) Where a contracting authority has altered a tender document based on the outcome of a pre-bid conference, it may extend the deadline for the submission of bids if the alterations introduce significant variations to the original project conceptualisation.

39. (1) A bid shall be submitted in two separate and sealed envelopes being—

Submission of bids.

- (a) the technical bid which shall include details of the inputs required in relation to the tender specifications; and
- (b) the financial bid which shall be in the form prescribed in the tender documents.

(2) The figures quoted in the financial bid shall be expressed in both words and numbers but where there is a discrepancy between the figure expressed in words and the figure expressed in numbers the figure expressed in words shall prevail.

(3) The financial bid shall be evaluated where the technical bid of the bidder has passed the scoring threshold indicated in the tender documents.

(4) Each bidder shall cause the bid to be delivered to the place on or before the deadline specified by the contracting authority in the tender document.

(5) The proposal evaluation team of the contracting authority shall receive and register each bid and shall issue a receipt to the bidder.

(6) A bid shall not be received or registered by the proposal evaluation team if that bid—

- (a) has not been delivered to the place specified in the tender documents; or
- (b) has not been delivered within the period designated in the tender document.

(7) The proposal evaluation team shall ensure that the submitted bid documents are not tampered with by any person.

(8) A bidder may not withdraw a bid once the bid has been submitted.

(9) A bid shall be deemed to be valid during the bid validity period specified in the tender document.

(10) The contracting authority may extend the bid validity period.

40. (1) The Accounting Officer of a contracting authority shall appoint a proposal evaluation team in accordance with section 47(1) of the Act:

Proposal Evaluation Team.

Provided that the representatives of the Unit, the Attorney-General and regulatory bodies shall be appointed as advisors or observers and shall not vote in relation to a decision made by the

proposal evaluation team.

(2) The Accounting Officer shall appoint the chairperson of a proposal evaluation team and the members of its secretariat.

(3) If a contracting authority has appointed a transaction advisor in relation to the project, that transaction advisor shall be part of the project evaluation team.

(4) The proposal evaluation team shall keep in safe and secure custody all proposals submitted to it.

(5) The proposal evaluation team shall preserve the confidentiality of a tender evaluation process and shall not be influenced or directed by any person regarding the evaluation of a proposal except in accordance with the Act and these Regulations.

41. (1) A bid security shall be—

Bid security.

- (a) in the form of an irrevocable bank guarantee issued by the bidder in favour of the contracting authority from a bank licenced to operate in Kenya; and
- (b) an undertaking by the issuing bank to pay the contracting authority on the first formal claim to pay, in writing, by the contracting authority regardless of any objection by the bidder.

(2) The validity period of a bid security shall be at least sixty days from the date the bid validity period ends.

(3) The Unit shall publish standard forms of bid securities and contracting authorities shall adapt the forms in relation to the tender documents prepared for each project.

42. (1) Where a proposal evaluation team rejects a bid the contracting authority shall notify in writing the bidder of the reasons for rejecting the bid.

Rejection of a bid.

(2) Where the proposal evaluation team rejects a bid because of the non-compliance of a bidder, the contracting authority shall notify the bidder of the particulars of non-compliance by that bidder.

(3) Where the proposal evaluation team rejects all bids on the ground of non-compliance, the tender process shall be terminated and all processes or proceedings in relation to that tender shall cease.

(4) Where a tender process is terminated in accordance with this regulation and the contracting authority re-initiates the process, regulations 29 to 41 shall apply to the re-initiated tender process.

43. Where the proposal evaluation team rejects the bid based on the evaluation of the technical offer, the proposal evaluation team shall enclose the unopened financial offer in the notification of rejection of the bid made under regulation 42(1).

Financial offer to be returned unopened.

44. If the rejection of the bid is based on the evaluation of both the technical and financial offers, the proposal evaluation team shall promptly return the bid security to the person whose bid has been

Bid security to be returned.

rejected.

45. (1) A bidder whose bid is rejected may file a written objection with the Petition Committee to a decision of the proposal evaluation team.

Objection to decision of proposal evaluation team.

(2) The Petition Committee shall hear and determine an objection filed under paragraph (1) within ten working days of receiving the objection.

(3) Where an objection is made after the technical bids have been opened and evaluated and the bidders have been informed of the outcome in writing, the proposal evaluation team shall not open nor shall it evaluate the financial bids until the Petition Committee makes a decision.

(4) Where an objection is made after the Committee has approved a proposal evaluation report, the tender shall not be awarded until the Petition Committee makes a determination.

46. (1) The financial offers shall be opened at a time and at a place designated by the proposal evaluation team after the technical bids have been opened and evaluated.

Opening of financial bids.

(2) The proposal evaluation team shall invite every bidder whose technical offer has been evaluated successfully to the session at which the financial offers shall be opened.

(3) Where a bidder or that bidder's representative attends the session for the opening of the financial offers, that bidder or that bidder's representative shall sign an attendance sheet kept and maintained by the proposal evaluation team.

(4) The proposal evaluation team shall confirm to the bidders present that each of the envelopes containing the financial offers is sealed before the offers are opened.

(5) The chairperson of the proposal evaluation team shall announce the value of each financial offer at the session where the financial offers are opened.

47. (1) The proposal evaluation team shall apply the criteria specified in the tender documents when evaluating technical offers.

Evaluation scoring system.

(2) The proposal evaluation team shall apply the criteria specified in the tender documents against each technical bid but shall not compare one bid against another bid.

(3) Where the proposal evaluation team assesses a technical bid as falling below the threshold of the criteria specified in the tender documents, the bidder's financial offer shall be returned to the bidder unopened.

(4) Where the proposal evaluation team applies a scoring system, it shall rank each offer in accordance with the scores each offer has attained after the evaluation.

48. (1) A proposal evaluation team shall evaluate the proposals

Evaluation report.

within seven days of the opening of the technical bids.

(2) The proposal evaluation team shall prepare a report on the proposal evaluation process and submit the report and its recommendations to the contracting authority within five days of the completion of the report.

(3) The contracting authority shall send the report prepared under paragraph (1) to the Committee for approval within seven days of receiving the report from the proposal evaluation team.

(4) The Committee shall approve or reject the report within twenty-one days of the report being received by the Committee from the contracting authority.

(5) Where the Committee approves the report, it shall inform the contracting authority in writing within two days of the approval.

49. (1) A public body may hold shares in a project company in accordance with the provisions of the Act. Project company.

(2) A project company shall be a company— Cap. 486

(a) that is incorporated in Kenya in accordance with the Companies Act;

(b) that is incorporated specifically to execute the project in accordance with the Act and these Regulations;

(c) whose documents of incorporation shall incorporate the provisions of the project agreement and the tender documents;

(d) whose shareholding arrangement is in accordance with the project agreement; and

(e) whose shareholding arrangement shall not be altered by the shareholders except as provided in the Act.

50. (1) A project company shall submit a performance security in relation to a project before the deadline specified in the letter of award and before a project agreement is signed between the project company and the contracting authority. Performance security.

(2) A performance security shall be in the form of an unconditional and irrevocable letter of guarantee in favour of the contracting authority issued by a bank licenced to operate in Kenya.

(3) The annual value of a performance security shall not be altered for the duration specified in the tender documents and where the period for the completion of the project has been extended, the period of validity of the performance security shall be extended to cover the extended period.

(4) The value of a performance security during the construction phase of a project shall be a percentage of the annual value of the construction works specified in the financial offer.

(5) The contracting authority may prescribe such performance security arrangements that may be appropriate or that may be specified in the tender documents during the operation phase and service phase

of the project.

PART VIII—PRIVATELY INITIATED INVESTMENT
PROPOSALS

51. (1) A contracting authority may consider a privately initiated investment proposal if it is not a proposal specified in section 61(1) (a), (b) or (c) of the Act.

Preliminary
assessment of
private proposals.

(2) The contracting authority shall not consider a privately initiated investment proposal if that project is not included in the contracting authority's development programme.

(3) The contracting authority shall, through the Unit, apply to the Cabinet Secretary to use the privately initiated investment proposal for a project that is not a project specified in section 61(1) (a), (b) or (c) of the Act.

(4) The Unit shall review the privately initiated investment proposal made in accordance with this regulation and make recommendations to the Committee in relation to the proposal.

(4) The Cabinet Secretary shall make a decision on an application made in accordance with this regulation after taking into consideration the recommendations of the Committee in relation to the application.

52. (1) A contracting authority shall develop criteria for the negotiation of a privately initiated investment proposal and submit them to the Unit for review and recommendation where—

Criteria for
negotiating
private proposals.

- (a) the privately initiated investment proposal is affordable;
- (b) the privately initiated investment proposal provides value for money; and
- (c) the privately initiated investment proposal provides for the effective transfer of risk from the contracting authority.

(2) The contracting authority may engage the services of a transaction advisor in relation to a privately initiated investment proposal—

- (a) for the development of criteria for negotiating the privately initiated investment proposal; or
- (b) to work in conjunction with any project appraisal team that the contracting authority may appoint in relation to the privately initiated investment proposal.

53. (1) The Unit shall review a privately initiated investment proposal made to a contracting authority and shall recommend to the Committee whether or not to approve the proposal and the negotiation criteria.

Privately initiated
investment
proposals.

(2) The contracting authority shall only initiate negotiations on a privately initiated investment proposal after obtaining the approval of the Committee.

(3) During the negotiations in relation to a privately initiated

investment proposal, the Contracting authority may request from the person making the proposal—

- (a) more information in relation to the privately initiated investment proposal; or
- (b) a modification of the privately initiated investment proposal.

(4) A person who submits a privately initiated investment proposal to a contracting authority shall submit a technical bid and a financial bid as part of the proposal.

(5) When the negotiations between a contracting authority and the person who has made a privately initiated investment proposal have been concluded, the contracting authority shall prepare a project risk assessment report specifying the terms agreed between the contracting authority and that person and submit the report to the Unit for review.

(6) The Unit shall review the report prepared under paragraph (5) and submit a copy of the report to the Debt Management Office to review and confirm the accuracy of the contingent liabilities and the risk matrix of the proposal.

(7) A contracting authority may award a tender to the person who submits a privately initiated investment proposal where the negotiations in relation to the proposal have been successfully concluded:

Provided that the tender shall only be awarded after the Committee approves of the award.

(8) A person who submits a privately initiated investment proposal shall not be entitled to compensation where a contracting authority discontinues negotiations in relation to the proposal.

PART IX—NEGOTIATIONS GENERALLY

54. Where a contracting authority enters into negotiations with a successful bidder under section 52 of the Act or with a private party under regulation 51, the contracting authority shall—

- (a) take all reasonable steps to prevent a conflict of interest by officers of the contracting authority;
- (b) take all reasonable step to ensure that the contracting authority obtains value for money in relation to the negotiations;
- (c) ensure that the negotiations are only held at—
 - (i) the offices of the contracting authority;
 - (ii) the registered offices of the private party; or
 - (iii) such other venue as the contracting authority may specify;
- (d) take all reasonable steps to avoid private solicitations in relation to the negotiations and where private solicitations have been made, determine whether or not to discontinue the negotiations;

Negotiations by contracting authority.

- (e) determine whether or not to publish a list of bidders who may not participate in a tender on account of the bidders engaging in unacceptable conduct during negotiations;
- (f) ensure that the laws relating to public financial management, ethics and integrity of public officers are complied with at all times during the negotiations; and
- (g) take all necessary steps to prevent any impropriety in relation to the negotiations.

PART X—PROJECT AGREEMENTS

55. (1) The Unit shall, after obtaining the permission of the Committee, publish on its website or other similar communications medium—

Bid documents and project agreements.

- (a) model bid documents;
- (b) guidelines relating to model bid documents; and
- (c) model contracts or agreements.

(2) The terms of a project agreement shall be in accordance with the provisions of the Third Schedule to the Act.

(3) The contracting authority shall appoint a contract negotiation committee for the purposes of negotiating a project agreement.

56. (1) The contracting authority and the private party to a project agreement under the Act shall jointly appoint an independent expert.

Independent experts.

(2) The appointment of an independent expert appointed in accordance with this regulation shall be terminated when all the terms of the project agreement have been fulfilled.

(3) The project agreement shall provide for the manner in which an independent expert shall be selected, the remuneration and expense of the independent experts and how the independent expert shall perform his or her duties.

(4) The agreement between a party to a project agreement and an independent expert shall be considered to be part of the project agreement.

(5) The Unit shall publish guidelines to be applied by contracting authorities when appointing independent experts in relation to a project.

(6) Any guidelines published under this regulation may provide for how independent experts may assist the contracting authority with the reviewing, inspection and monitoring of construction works, and the monitoring of compliance with performance and maintenance standards during the operational phase of a project.

57. (1) The Committee may impose a success fee to the successful bidder of a tender where—

Success fees.

- (a) the Unit has provided technical or other support services; or
 - (b) it is necessary to defray the costs of transaction advisory services.
- (2) Where a success fee is charged—
- (a) the fee shall not exceed 0.5% of the contract value of the project or 100% of the transaction advisory service provided for the project, whichever is the higher; and
 - (b) the manner in which the fee shall be imposed and the amount to be imposed shall be stated explicitly in the tender documents.
- (3) Where a successful bidder is required to pay a success fee, that bidder shall pay the fee, through the project company, on achieving financial closure of the project.
- (4) Where a success fee is charged, that fee shall be paid into the Fund.

58. (1) The Cabinet Secretary shall, in consultation with the Salaries and Remuneration Commission, determine the remuneration, fees or allowances that shall be payable to members of the Petition Committee.

Petition
Committee and
secretariat of
Petition
Committee

(2) A person may be appointed as a member of the Petition Committee under section 67(2)(b) of the Act if that person—

- (a) is a Kenyan;
- (b) is of good standing;
- (c) is impartial;
- (d) has not been convicted of any offence involving fraud or dishonesty; and
- (e) meets the requirements of Chapter Six of the Constitution.

(3) The Cabinet Secretary shall appoint a secretariat to support the Petition Committee in the performance of its functions.

(4) The secretariat of the Petition Committee shall—

- (a) receive, date, catalogue and file all petitions and complaints submitted to the Petition Committee by private parties;
- (b) record the proceedings of the Petition Committee when the Committee is investigating a petition or a complaint; and
- (c) provide research and documentation support services to the Petition Committee.

59. (1) When the secretariat for the Petition Committee receives a petition or a complaint, the secretariat shall assign a serial number to that petition or complaint.

Petitions or
complaints.

(2) The secretariat to the Petition Committee shall inform the chairperson of the Petition Committee that a petition or complaint has

been received and the chairperson shall notify the Petition Committee and the petitioner or complainant of the date from when hearings will be held.

(3) Where the Petition Committee is required to notify a petitioner or a complainant of any matter related to the determination of a petition or a complaint, the Petition Committee shall notify that petitioner or complainant in writing by registered mail.

60. (1) When dealing with a petition or a complaint, the Petition Committee—

Determination of petitions or complaints.

- (a) may require a petitioner or a complainant to appear before the Petition Committee;
- (b) may require a petitioner or a complainant to provide further information in addition to the information contained in the petition or complaint;
- (c) may compel a person in relation to the petition or the complaint to produce documents for examination by the Petition Committee;
- (d) may issue summons to any person in relation to the petition or the complaint who is likely to help in the resolution of the petition or complaint; or
- (e) may allocate the costs of hearing the petition or complaint to the parties to the petition or complaint.

(2) The Petition Committee may suspend the tendering process while the petition or complaint is being heard and determined.

(3) The Petition Committee shall hear and determine a petition or complaint within seven working days of the hearing to consider the petition or complaint and the secretariat shall notify the parties in writing to the petition or complaint promptly of the determination but in any case in not later than three days after the determination is made.

(4) The Petition Committee shall develop and publish standardised forms for use by private parties in the submission of petitions or complaints to the Petition Committee and the standardised forms may provide for—

- (a) the identity of the petition or the complainant;
- (b) the date the petition or the complaint is made;
- (c) the tendering process against which the petition or complaint is being made;
- (d) the nature of the decision against which the petition or complaint is being made;
- (e) the reasons for the petition or the complaint; and
- (f) documents, if any, that the petitioner or complainant shall rely on in the petition or complaint.

(5) The Cabinet Secretary shall prescribe fees that may be charged by the Petition Committee in relation to the filing and

determination of a petition.

PART XI—PROJECT FACILITATION FUND

61. (1) In relation to the Project Facilitation Fund—

Monies paid into
the Fund.

- (a) the monies paid into the Fund shall be paid into bank accounts opened for the purposes of the Fund; and
- (b) different bank accounts may be opened for the purposes of each sector.

(2) Where the Committee authorises allocations from the Fund the Committee shall do so in writing.

(3) The Committee shall only authorise an allocation from the Fund after the Committee has—

- (a) convened for the purpose of making such an allocation; and
- (b) passed a written resolution authorising the allocation from the Fund.

(4) The Committee, in relation to the Fund—

- (a) shall, once in every year or such shorter period as it might determine, review the use of the disbursements from the fund in relation to a particular project; and
- (b) may delegate routine monitoring of disbursements from the Fund in relation to a particular project to a sub-committee.

62. (1) There is established a Fund Policy Board which shall administer the Fund.

Fund Policy
Board.

(2) The chairperson of the Committee shall be the chairperson of the Fund Policy Board.

(3) The Cabinet Secretary shall appoint two other members to the Fund Policy Board.

(4) The functions of the Fund Policy Board are—

- (a) to formulate general policy guidelines for the Fund;
- (b) to identify priority sectors for funding;
- (c) to approve all operational and management procedures of the Fund;
- (d) to approve the criteria for the selection and evaluation of projects for funding;
- (e) to approve all reporting policies;
- (f) to approve financial statements and management reports;
- (g) to approve the Fund's operating manual;
- (h) authorise withdrawals from the bank accounts of the Fund; and
- (i) delegate such of its functions to the Fund's secretariat as it

may determine.

63. (1) The Unit shall be the secretariat for the Project Facilitation Fund. Secretariat of the Fund.

(2) The functions of the Unit in relation to the Fund are—

- (a) to notify every eligible contracting authority of the Fund and the Fund's mandate;
- (b) to develop and publish standardised forms for use by eligible contracting authorities;
- (c) to develop and publish the procedures for the managing applications made by eligible contracting authorities;
- (d) to prepare every Funding Agreement between the Fund and a contracting authority;
- (e) to ensure that every contracting authority that has received an allocation from the Fund reports adequately on the use of the allocation; and
- (f) to monitor the progress of projects that have received an allocation from the Fund.

64. (1) The Committee, with the approval of the Cabinet Secretary, shall develop and publish, from time to time, a manual for the governance of the Fund. Fund manuals.

(2) The manual shall provide for, among other things—

- (a) the accounting standards applied by the Fund;
- (b) the financial policies and procedures of the Fund;
- (c) budget and cash-flow management at the Fund;
- (d) reporting mechanisms;
- (e) financial regulation;
- (f) standard forms; and
- (g) chart of accounts.

Dated the 4th December, 2014.

HENRY ROTICH,
*Cabinet Secretary,
The National Treasury.*

LEGAL NOTICE NO. 172

THE CUSTOMS AND EXCISE ACT

(Cap. 472)

MUTUAL TARIFF CONCESSION—COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

IN EXERCISE of the powers conferred by section 118 of the Customs and Excise Act, the Cabinet Secretary for the National Treasury declares that the duty payable on goods imported from the Republic of Seychelles shall be reduced by one hundred percent if the

goods meet the Rules of Origin of the Common Market of Eastern and Southern Africa (COMESA), except that the goods specified in the Schedule shall attract full duty as specified in the East African Community Common External Tariff.

SCHEDULE

<i>Tariff heading.</i>	<i>Good description.</i>
03.04	Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen.
03.05	Fish, dried, salted, or in brine, smoked fish, whether or not cooked before or during the smoking process; flours, meals and pellets of fish fit for human consumption.
06.03	Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared.
07.09	Other vegetables, fresh or chilled.
08.07	Melons (including watermelons) and papaws (papayas), fresh. 0807.20.00 – Papaws (papayas)
09.02	Tea, whether or not flavoured.
16.04	Prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs. 1604.14.00 – Tunas, skipjack and bonito (<i>Sarda</i> spp.)
20.09	Fruit juices (including grape must) and vegetable juices, unfermented and not containing added spirit, whether or not containing added sugar or other sweetening matter.
21.06	Food preparations not elsewhere specified or included.
22.01	Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavoured, ice and snow.
22.02	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09
22.03	Beer made from malt.
22.04	Wine of fresh grapes, including fortified wines; grape must other than that of heading 20.09
22.05	Vermouth and other wine of fresh grapes flavoured with plants or aromatic substances.
22.06	Other fermented beverages (for example, cider,

<i>Tariff heading.</i>	<i>Good description.</i>
	perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included.
22.07	Undenatured ethyl alcohol of an alcoholic strength by volume of 80% vol or higher; ethyl alcohol and other spirits, denatured, of any strength.
22.08	Undenatured ethyl alcohol of an alcoholic strength by volume less than 80% vol; spirits, liqueurs and other spirituous beverages.
24.01	Unmanufactured tobacco; tobacco refuse.
24.02	Cigars, cheroots, cigarillos and cigarettes; of tobacco or of tobacco substitutes.
24.03	Other manufactured tobacco and manufactured tobacco substitutes, "homogenised" and "reconstituted" tobacco, tobacco extracts and essences.
27.10	Petroleum oils and oils obtained from bituminous minerals, (other than crude), preparations not elsewhere specified or included, containing by weight 70% or more of petroleum oils or of oils obtained from bituminous minerals, these oils being the basic constituents of the preparations, other than those containing biodiesel and other than waste oils.
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14 3926.40.00 – statuettes and other ornamental articles.
44.20	Wood marquetry and inlaid wood, caskets and cases for jewellery or cutlery, and similar articles, of wood; statuettes and other ornaments of wood, wooden articles of furniture not falling in Chapter 94.
83.06	Bells, gongs and the like, non-electric, of base metal; statuettes and other ornaments, of base metal; photograph, picture or similar frames, of base metal; mirrors of base metal. 8306.21.00 – plated with precious metal.
84.07	Spark-ignition reciprocating or rotary internal combustion piston engines.
87.02	Motor vehicles for transport of ten or more persons, including the driver.
87.03	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 87.02), including station wagons and racing cars.
87.04	Motor vehicles for the transport of goods.

<i>Tariff heading.</i>	<i>Good description.</i>
87.06	Chassis fitted with engines, for the motor vehicles of headings 87.01 to 87.05.
87.07	Bodies (including cabs), for the motor vehicles of headings 87.01 to 87.05.
87.11	Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars.

Dated the 4th December, 2014.

HENRY ROTICH,
Cabinet Secretary for the National Treasury.



PUBLIC PRIVATE PARTNERSHIPS REGULATIONS 2014

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO.23 OF 2013 AND IN THE MATTER OF THE PUBLIC PRIVATE PARTNERSHIPS ACT NO.15 OF 2013

[2015] No. [.....]

EXPLANATORY MEMORANDUM ON THE PUBLIC PRIVATE PARTNERSHIPS REGULATIONS 2014

PART 1

Name of the Statutory Instrument	:	Public Private Partnerships Regulations 2014
Name of the Parent Act	:	Public Private Partnerships (PPP) Act, No.15 of 2013
Enacted Pursuant to	:	Section 71, Public Private Partnerships Act 2013
Name of Ministry	:	The National Treasury
Gazetted on	:	24 December 2014
Tabled on	: January 2015
Submitted under	:	Section 11, Statutory Instruments Act No.23 of 2013

PART II

1. Purpose of the Statutory Instrument

1.1 The PPP Regulations 2014 are aimed at facilitating broad-based private sector participation in the development and financing of public infrastructure in Kenya through articulating detailed procedural step by step guidance to ministries, state departments, state corporations and county governments undertaking PPP projects, more specifically: on how to identify, select and prioritize projects ideal for development under the PPP framework, as well as how selected projects should be prepared, the approvals that must be sought, from whom and when, and how projects may be procured, and contracts negotiated.

1.2 The Regulations additionally provide specific and detailed administrative guidance to the various institutions established under the PPP Act 2013, specifically how each of the institutions should work, the qualification of persons to be appointed to each named institution, the records institutions should keep, and how decisions are to be taken.

1.3 Furthermore, the Regulations make provision for a number of PPP project enablers – particularly how transaction advisors should be procured to assist a PPP implementing agency to properly prepare a project for PPP procurement, and how projects that are not viable on their own financially and yet are deemed economically and socially desirable may be facilitated to attract private sector participation through provision of a range of possible support measures including

viability gap funding, comfort letters and associated guarantees, as well as project preparation facilities to support feasibility study work or project-linked early works.

- 1.4 The statutory instrument was published in the Kenya Gazette under Legal Notice No.171 of 2014, on 24 December 2014. A copy of this Legislative Supplement is attached to this Explanatory Memorandum.

2. Legislative Context of the Statutory Instrument

- 2.1 In line with section 71 of the Public Private Partnerships (PPP) Act 2013, the regulations are made to guide the better carrying out of functions under the Act. The PPP Act was enacted to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development of projects of the Government through concession or other contractual arrangements. It establishes the institutions that regulate the performance of functions under the Act including regulating, monitoring, supervising and evaluating the implementation of PPP projects in Kenya.
- 2.2 The PPP Act declares the principles, the norms and the standards that should govern how PPP projects are identified, prepared, procured, implemented and monitored. The regulations detail the how-to of the processes under the Act. Where the PPP Act establishes an institution and confers certain functions on such institutions, for example, these Regulations give guidance on who should be appointed to man those institutions, what their qualifications should be, and what procedures they need to implement in the performance of those functions. In addition, the regulations have the effect of amplifying declared public policy on PPPs, and translating them into a set of practices and ethics that promote broad-based compliance with the parent law. These Regulations are therefore addressed to processes under the PPP Act, and are written as a set of specific instructions, obligations and mechanisms by which each aspect of project preparation activity under the PPP Act may be undertaken.
- 2.3 The PPP Act 2013 anticipates and contemplates at least two additional sets of implementing regulations. These are (1) regulations to govern the conduct of PPPs in counties (under section 54 of the Act), and (2) regulations to govern PPP procurement disputes or petitions (under section 67 of the Act). Since these two additional sets of regulations are crucial to the completion of the PPP legal framework in Kenya, it is the intention of the National Treasury to table them before Parliament before March, 2015.

3. Policy Background

- 3.1 Official Government policy on public private partnerships in Kenya was stated in 2012, wherein Government affirms the important role played by the private sector in development, and how that participation can be harnessed to accelerate the pace of delivering some of the most critical pieces of infrastructure across most economic sectors. PPPs are seen as an important determinant for the attainment of Vision 2030. In this regard, an enabling regulatory framework was deemed necessary to create a structured process by which the desired partnerships could occur.
- 3.2 An important reason for these Regulations additionally lies in the overall policy objective of leveraging private finance and private sector efficiencies and innovation in the delivery of public services. Since the private sector is generally risk-averse, the quality of projects promoted through the PPP framework should be high. This can only be achieved through careful project

selection and preparation. In many ways, the quality of projects assume the colour of the implementing institution, hence house-keeping practices become crucial determinants of private sector comfort and confidence that projects are well selected and well prepared. The PPP policy framework recognizes that the public sector has a number of legacy constraints (seen in failed projects, projects with serious cost overruns, projects that fail to get completed, and projects that complete and fall apart soon after commissioning). Through creating a new business paradigm for public infrastructure development, supported by well-defined and properly mandated institutions, the Government through these Regulations will be communicating a firm message to the investing private sector that Kenya is committed to making the PPP transaction structure work, and that all participating entities will draw value from engaging under that framework.

3.3 Legislative practice in Kenya recognizes the role of implementing regulations promulgated under Acts of Parliament. While the PPP Act 2013 declares the main principles, standards and norms that govern and regulate how PPPs are procured and undertaken in Kenya, the PPP Regulations 2014 create the mechanics for the law's implementation, breaking down the principles, norms and standards in the Act into specific practice protocols, thereby amplifying the practice content and elements of the declared PPP policy.

3.4 In many respects, the PPP law prescribes a specific procurement method by which private investors are identified and contracted to develop this country's infrastructure. In line with constitutional standards on all public procurement, the policy framework for PPPs should and does recognize the need for uniformity in matters procurement. The Regulations provide crucial amplifications to the parent law on all procurement related issues, providing in necessary level of detail what the actual mechanics should look like at each key stage of the PPP procurement life cycle. This is a matter of such fundamental magnitude under the devolved governance structure in Kenya for the following reasons –

- 3.4.1 PPPs by their very nature tend to give rise to some form of contingent liability on Government (e.g., where a project requires a Government letter of support or some form of guarantee) or fiscal commitments (e.g. direct financial obligation on Government to make certain payments to the project to secure private sector participation (to make the project bankable);
- 3.4.2 PPP procurement should accord with the principles of transparency, free and fair competition and equal opportunity, and should be grounded on the principles of full disclosure during implementation. This objective can only be achieved through the universal application of a singular normative system by all contracting authorities across the country;
- 3.4.3 Constitutional principles of fiscal prudence also apply, and without a uniform system of practice on PPPs, it will not be possible to monitor and control the likely magnitude of commitments entered into in the name and to the account of Government.

3.5 In the end, the PPP policy framework in Kenya, as indeed the Act, is premised on the triad platform of affordability, value for money and optimal risk allocation. These objectives apply to PPPs at both levels of Government (national and county). In this context, the Regulations provide a mechanism through which PPP policy objectives and aspirations are applied uniformly throughout Kenya.

3.6 The application of the PPP Act 2013 since it became operational early 2013 has generated an immense amount of interest from both investors and public bodies desiring to speed up the scale and quality of infrastructure development. The PPP Unit has been receiving numerous inquiries from investors and the public generally, including from academia, and the expressed interest has so far demonstrated a lot of support for the PPP agenda in Kenya. A huge proportion of the enquiries currently received (averaging above 80%) relate to questions on when the Regulations will become effective. This indicates that the general public is optimistic the Regulations will provide much needed practice clarity on the PPP process. The National Treasury believes this will be the case.

4. Consultation Outcome

- 4.1 The National Treasury consulted a wide range of stakeholders while preparing these Regulations. These included the Kenya Private Sector Alliance, the Kenya Association of Manufacturers, electricity generating companies including Kenya Electricity Generating Company, Kenya Power and the Geothermal Development Corporation, professional bodies and societies including the Law Society of Kenya, the Institute of Certified Public Accountants, the Institution of Engineers of Kenya, commercial banks in Kenya and the Kenya Bankers Association.
- 4.2 Public bodies and agencies were also consulted. These included Government Ministries and State Departments, National Government State Corporations, health sector institutions including Kenyatta National Hospital and Moi Teaching and Referral Hospital, Kenya Railways Corporation, the Kenya Ports Authority, Water Resource Management Authority, Nairobi Water Company, the Capital Markets Authority, Ken Invest, roads sector agencies including Kenya National Highways Authority, Kenya Civil Aviation Authority, the Central Bank of Kenya, as well as the Attorney General.
- 4.3 Furthermore, specialised comments were sought and obtained on the draft regulations from specialist law firms practicing in the PPP area in Kenya, development partners including the World Bank, USAID and DfID, and from eminent individuals including professors of law.
- 4.4 To cap it all, a stakeholders' validation workshop was convened and held at the Nairobi Crowne Plaza Hotel on 2 July 2013, and it was attended by over 100 private sector and public sector persons interested in the PPP legal framework and project development method. Prior to the said workshop, the National Treasury received written comments from about 40% of the institutions named above, which offered a good representation of the dominant stakeholder viewpoints.
- 4.5 Over 95% of the consulted stakeholders supported the proposed regulations. About 30% of the stakeholder responses related to questions of clarity in the draft regulations, for instance where there were overlaps with the parent Act, and where the draft regulations appeared to go beyond the letter and spirit of the parent law. All of these interventions were incorporated in an improved draft of the regulations. About 40% of the responses related to the structure of the draft regulations, specifically the logical order in which events in the PPP life cycle should pan out. These recommendations were taken into account in the Regulations by providing necessary cross-referencing, and adopting logical sections for each constituent project development phase.
- 4.6 Overall, the consultations yielded the important outcome that the Regulations should remain within the spirit of the parent law, and promote ease of doing business under the PPP

framework to render the transaction structure both understandable and attractive to both investors and implementing agencies.

5. Guidance

- 5.1 Contracting authorities, investors, and professional service providers will all require guidance and capacity building to enable them effectively apply the law and to comply with it.
- 5.2 An important obligation reposed in the PPP Unit under the PPP Act 2013 is the duty to conduct civic education to promote awareness and understanding of the PPP process amongst stakeholders. In addition, the Unit is obligated to provide capacity building to and advise contracting authorities on PPPs with respect to the planning, coordinating, undertaking or monitoring PPP projects. Furthermore, the Unit is designated a resource centre on matters relating to PPPs and for that purpose, is required to conduct research and gap analysis to ensure continuous performance improvement in the implementation of PPPs. Part of this mandate extends to collating, analysing and disseminating information including data on contingent liabilities of Government in relation to PPP projects.
- 5.3 The PPP Unit has a well-structured stakeholder engagement plan that targets both public and private stakeholder groups, as well as specialist groups such as financial institutions and professional societies. Information and guidance on the PPP legal framework is provided through workshops, seminars, and embedded engagement. The embedded engagement happens on a one-to-one basis whereby the Unit immerses itself into a contracting authority, and works with the designated institutions of the contracting authority to build the real-life and real-time capability of implementing institutions to undertake project-specific aspects of the PPP procurement cycle.
- 5.4 In addition, the Unit supports contracting authorities to access relevant PPP training both locally and internationally. In the medium term (over the next 2 to 3 years), the Unit is rolling out a comprehensive structured capacity building programme that embeds the existing legal and policy framework for PPPs. This programme targets up to 500 public officials engaged in dedicated PPP institutions within those agencies.
- 5.5 To spearhead this process, the Unit has retained the services of a range of different specialists including embedded PPP experts within the Unit, sector PPP advisors, and transaction advisors retained by the Unit to support contracting authorities in preparing PPP projects. We believe this to be a sustainable method for effective skills transfer, and further believe that with increased appreciation of the legal standards and requirements, Kenya will observe fewer instances of non-compliance with the law, meaning fewer litigations and fewer procurement challenges.
- 5.6 This engagement strategy is thus intense, real-time and practical.

6. Impact

- 6.1 In line with Section 9 of the Statutory Instruments Act, 2013, the PPP Regulations 2014 do not impose any additional cost on the private sector, and does not impose any charges or levies of

equivalent effect, and does not make provision involving any expenditure from the Consolidated Fund or any other public revenue. Furthermore, the Regulations are not in any way addressed to individual rights and entitlements, and do not create offences.

- 6.2 In addition, the Regulations do not oust the jurisdiction of the courts, and do not make any right, liberty or obligation unduly dependent upon any non-reviewable decisions. In general, they are designed to accord with the principles of good governance, rule of law and administrative efficiency and justice.
- 6.3 It is therefore not necessary to prepare a regulatory impact statement for the PPP Regulations 2014 on account of their neutral impact on the private and voluntary sectors of Kenyan society.

7. Monitoring and Review

7.1 A proper application of the PPP Regulations 2014 will yield the following positive outcomes –

- 7.1.1 More projects are going to be successfully developed, leading to the development and completion of new public infrastructure faster and in higher quality;
- 7.1.2 More projects means more job opportunities for Kenyans, hence job creation will be a positive spin-off from the successful implementation of these regulations;
- 7.1.3 Fewer disputes arising from flawed procurement processes, meaning a higher procurement success rate, itself a strong factor in promoting investment expenditure into the Kenyan economy;
- 7.1.4 More projects attaining financial closure equate to improved confidence in the Government's ability to procure and manage complex transactions, directly improving the country's overall perception and standing as an investment destination for the international private sector;
- 7.1.5 Successful project development under the Regulations will additionally validate the utility of this transaction model, expanding Government's repertoire of options in discharging its overall mandate in the production and sustenance of public goods in Kenya.

7.2 These success criteria will be subject to continuous review, monitoring and evaluation in line with the statutory responsibilities of the PPP Unit. That mandate requires the Unit to continuously rate, compile and maintain an inventory of PPP projects, support contracting authorities by ensuring that tendering processes conform to the Act, monitor contingent liabilities and accounting and budgetary issues related to PPPs, among other like responsibilities imposed under law.

7.3 Contracting authorities implementing PPPs are required, during the implementation phase of a project, to establish contract management and monitoring teams, and they are required to maintain project-related reports, and to make reports to the PPP Unit periodically on the performance of projects under their portfolio.

7.4 In addition, the PPP Committee is obligated to routinely monitor the implementation of the Act, and the Unit submits periodic reports to the PPP Committee on the performance of the PPP programme in Kenya, as well as the level of compliance with the established legal framework and policy.

7.5 The PPP Unit is mandated to conduct research and gap analysis to ensure continuous performance improvement in the implementation of PPPs

7.6 The data collated and analysed routinely through all the foregoing mechanisms and contexts will be subjected to annual reviews whose results will be published by the Unit.

8. Contact

8.1 For further information on this statutory instrument, please contact **Eng. Stanley Kamau, Director of Public Private Partnerships Unit** at the National Treasury on telephone number 020-2252299 Ext 316.

