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THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL, 2017

A Bill for

AN ACT of Parliament to amend the Public Private Partnerships Act, 2013

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Private Partnerships (Amendment) Act, 2017.

2. Section 2 of the Public Private Partnerships Act, 2013, in this Act, referred to as the “principal Act”, is amended by—

(a) deleting the definition of the term “contracting authority” and substituting therefor the following new definition —

“contracting authority” means —

(i) at the national government level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or

(ii) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;

(b) deleting the definition of the term “transaction advisor” and substituting therefor the following new definition —

“transaction advisor” means a person 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.

3. The principal Act is amended by repealing section 3 and replacing it with the following new section—

3. The provisions of this Act shall apply to every contract for the design,
financing, construction, operation, equipping, management or maintenance of a project or for the provision of public services undertaken as a public private partnership.

4. The principal Act is amended by inserting the following new section immediately after section 3—

Exemption.

3A. The Public Procurement and Asset Disposal Act, 2015, shall not apply to contracts under this Act.

5. Section 15 of the principal Act is amended by inserting the words “the county government or” immediately after the words “Unit with”.

6. The principal Act is amended by repealing section 20.

7. Section 24 of the principal Act is amended—

(a) by adding the following proviso at the end of subsection (1)—

Provided that the county priority list shall be subject to approval by the county government and be submitted to the Unit for publication alongside the national government priority list.

(b) by deleting subsection (2) and substituting therefor the following subsection—

(2) Upon receipt of the project lists from the national government contracting authorities, the committee shall consider the lists and the recommendations of the Unit and prepare and submit to the Cabinet for approval a national priority list which shall include county approved priority lists of public private partnership projects that have been submitted to the Unit.

8. Section 31 of the principal Act is amended in subsection (3) by deleting the word “Committee” and substituting therefor the word “Unit”.

9. Section 36 of the principal Act is amended—

(a) by deleting subsection (1) and replacing it with the following subsection—
(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.

(b) by deleting subsection (2) and replacing it with the following subsection—

(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, in consultation with the unit, appoint a transaction advisor to assist the authority in the preparation, procurement, contract negotiations and financial close phase of a project.

10. Section 49 of the principal Act is amended in subsection (2) by deleting the words “Committee for approval” and substituting therefor the words “Unit for concurrence”.

11. Section 51 of the principal Act is amended by renumbering the existing provision as subsection (1) and adding the following new subsections —

(2) A proposal evaluation team may reject all submissions by bidders where all bidders do not comply with the conditions and requirements specified in the tender documents or the rules made under section 44.

(3) Where a proposal evaluation team rejects a submission under this section, the proposal evaluation team shall prepare and submit to the accounting officer a report setting out the reasons for the rejection.

(4) The accounting officer shall inform the bidder of the decision of the contracting authority to reject the bid within fourteen days of receiving the report under subsection (3).

(5) A bidder whose bid has been rejected under this section shall not be entitled to compensation.

(6) Where all bids have been rejected under this section, the contracting authority may start the tender process anew.

12. Section 54 of the principal Act is amended—

(a) by deleting subsection (2) and substituting therefor the following subsection—
(2) The Committee shall consider the reports submitted to it under subsection (1) and, if satisfied, approve the execution of the public private partnership agreement with the successful bidder.

(b) by deleting subsection (3).

13. The principal Act is amended by inserting the following new section immediately after section 54—

54A. (1) A county government may enter into a public private partnership arrangement and shall be responsible for the management and administration of the overall project development cycle in accordance with this section.

(2) Where a county government intends to enter into a public private partnership arrangement, it shall cause its user departments or county corporations, as the case may be, to prepare and submit a project proposal to the Unit for consideration and recommendation detailing the strategic and operational benefits of entering into such an arrangement.

(3) Where the Unit recommends that a project may be developed as a public private partnership under this Act, the county government may grant its approval for the project and subject the project to a detailed feasibility study in accordance with section 33.

(4) For every county public private partnership project, the Committee shall—

(a) approve the feasibility study report prepared by the county government on each proposed public private partnership arrangement, in accordance with section 35;

(b) approve the negotiated commercial, financial and technical terms of a proposed public private
partnership project in accordance with section 54;

(c) approve any proposed variations to a project agreement in accordance with section 64; and

(d) exercise the powers vested in it under section 8 (c).

(5) A county government shall implement a public private partnership project if the project—

(a) provides value for money;

(b) is determined to be affordable; and

(c) ensures appropriate risks are transferred to the private party.

(6) The Cabinet Secretary may make regulations for the better implementation of public private partnership arrangements by county governments, including—

(a) projects that may be undertaken by county governments;

(b) the thresholds of contingent liabilities that may be approved for such projects;

(c) the management of the public-private partnership procurement processes by county governments; and

(d) the negotiation of project terms by county governments.

14. Section 56 of the principal Act is amended by—

(a) deleting subsection (1) and substituting therefor the following subsection—

(1) The Committee shall, within a period of thirty days from the date of its decision of approving the project and financial risk assessment report, inform the contracting authority of its decision.
(b) deleting subsection (2) and substituting therefor the following subsection—

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

c) deleting the words “Cabinet or Parliament as the case may be,” appearing in subsection (3) and substituting therefor the word “Committee”.

15. The principal Act is amended by repealing section 57 and substituting therefor the following new section—

Execution of contract. 57. The contracting authority shall, following its finalisation of the project agreement and after all parties to the agreement have complied with all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder.

16. Section 67 of the principal Act is amended in subsection (2)—

(a) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) not less than six but not more than eight other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the Unit, consider appropriate;

(b) by deleting paragraph (c).
MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The object of this Bill is to amend the Public Private Partnerships Act, 2013, to recognise county governments as distinct contracting authorities for public-private partnerships projects. To achieve this, the Bill makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnerships arrangements.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Cabinet Secretary. It does not limit any fundamental rights and freedoms.

Statement that the Bill concerns county governments

The Bill affects the functions of the county governments as set out in the Fourth Schedule to the Constitution and is therefore a Bill concerning counties for purposes of the Standing Orders.

Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution

The Bill is a money Bill within the meaning of Article 114 of the Constitution.

Dated the 15th December, 2017.

ADEN DUALE,
Leader of the Majority Party, National Assembly.
The definition of "contracting authority" in section 2 of Act No.15 of 2013 which it is intended to delete—

"contracting authority" means a State department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party.

The definition of "transaction advisor" in section 2 of Act No.15 of 2013 which it is intended to delete—

"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, including the preparation, accession and conclusion of a project agreement and the financial close.

Section 3 of Act No.15 of 2013 which it is intended to amend—

Application.

3. The provisions of this Act shall apply to every contract for the financing, construction, operation, equipping or maintenance of a project or for the provision of public services undertaken as a public private partnership.

Section 15 of Act No. 15 of 2013 which it is intended to amend—

Rules for framework of the unit.

15. The Cabinet Secretary shall make rules for the administrative and financial framework of the unit, the relationship of the unit with other State departments and organizations and the conduct of the affairs of the unit.

Section 20 of Act No.15 of 2013 which it is intended to delete—

Sector diagnostic study and assessment.

20. A contracting authority shall, prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following—

(a) technical issues;
(b) legal, regulatory and technical frameworks;
(c) institutional and capacity status;
(d) commercial, financial and economic issues; and
(e) such other issues as the Cabinet Secretary may stipulate.

Section 24 of Act No. 15 of 2013 which it is intended to amend—

Approval of projects by the Committee and Cabinet.
24. (1) The unit shall assess the project lists submitted to it by the contracting authorities under section 23 and submit the lists, together with its recommendations, to the Committee for approval.

(2) Upon receipt of the project lists, the Committee shall consider lists and the recommendations of the unit and prepare and submit to the Cabinet for approval, a national priority list.

(3) The Cabinet Secretary shall prescribe the thresholds for approval and the carrying out of projects by the county governments under this Act.

Section 31 of Act No. 15 of 2013 which it is intended to amend—

Project identification, selection and prioritization

31. (1) A contracting authority which intends to implement a project through a public private partnership under this Act, together with the unit and the node, shall, subject to , be responsible for conceptualizing or identifying potential projects and undertaking the preparatory and tendering process of the project.

(2) In conceptualizing, identifying and prioritizing potential projects under this Act, a contracting authority shall consider the strategic and operational benefits of entering into a public private partnership arrangement compared to the development of the facility or provision of the service by the contracting authority.

(3) Where a contracting authority considers it appropriate to implement a project through a public private partnership, it shall submit a report of the consideration and analysis under subsection (2) and a project proposal in relation to the project to the Committee for approval in the prescribed form.

(4) A contracting authority that receives approval under subsection (3) shall, apply the recommendations of the unit in all its procedures while undertaking the project.

Section 36 of Act No. 15 of 2013 which is intended to amend—

Assessment of contracting authority’s technical expertise to procure services

36. (1) The unit shall assess the technical expertise of the contracting authority to procure the development of a project under this Act.

(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 a transaction advisor to assist the authority in the procurement process.
(3) The engagement of a transaction advisor under subsection (2) shall be based on the principles of disclosure, transparency, equality, free competition and equal opportunity in accordance with the procedure prescribed by the Cabinet Secretary under this Act.

Section 49 of Act No. 15 of 2013 which it is intended to amend—

Preparation of evaluation report

49. (1) The proposal evaluation team shall, upon evaluating the bids and before declaring the first ranked bidder, prepare an evaluation report specifying the evaluation criteria, the manner in which the first ranked bidder satisfied the requirements specified in the tender documents in comparison with the other bidders, and such other information as the contracting authority shall consider necessary.

(2) The contracting authority shall submit the evaluation report prepared under subsection (1) to the Committee for approval.

Section 51 of Act No. 15 of 2013 which it is intended to amend—

Non-compliance by a bidder

51. A proposal evaluation team shall reject a bidder’s submission where he does not comply with the conditions and requirements specified in the tender documents or the rules made under section 44.

Section 54 of Act No. 15 of 2013 which is intended to amend—

Submission of memorandum to Cabinet for approval

54. (1) The unit shall submit the project report, the financial risk assessment report submitted to it under section 53 and its recommendations to the Committee for consideration.

(2) The Committee shall consider the reports submitted to it under subsection (1) and prepare a report on its recommendations as to whether the project may be undertaken as a public private partnership under this Act.

(3) The Cabinet Secretary and the Cabinet Secretary in the State department responsible for the implementation of the project shall prepare a joint cabinet memorandum based on the recommendations of the Committee under subsection (2) and submit the memorandum to the Cabinet for approval.

(4) Where a project does not pose contingent liabilities to the national or county government, a county government may approve the undertaking of the project within that county under this Act in accordance with regulations made by the Cabinet Secretary under this Act.

Section 56 of Act No. 15 of 2013 which is intended to amend—

Approval of project