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CONTENT

Bill for Introduction into the National Assembly—	PAGE
The Public Private Partnerships Bill, 2021	159



THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2021

ARRANGEMENT OF CLAUSES

Clause

PART I—PRELIMINARY

- 1—Short title.
- 2—Interpretation.
- 3—Object of the Act.
- 4—Application of Act.
- 5—Act to prevail.

PART II—PUBLIC PRIVATE PARTNERSHIP COMMITTEE

- 6—Public Private Partnership Committee.
- 7—Qualification and terms of members.
- 8—Functions and powers of the Committee.
- 9—Vacation of office.
- 10—Subcommittees.
- 11—Delegation by the Committee.
- 12—Conduct of the business of the Committee.
- 13—Code of conduct.
- 14—Remuneration.
- 15—Directorate.
- 16—Director-General.
- 17—Staff of the Directorate.
- 18—Secondment of staff to the Directorate.
- 19—Functions of the Directorate.

PART III—PUBLIC PRIVATE PARTNERSHIPS

- 20—Project agreements.
- 21—Public private partnership arrangements.
- 22—Duties of contracting authorities.
- 23—Determination of the duration of public private partnership agreements.

- 24—Execution of project agreements.
- 25—Submission of project lists.
- 26—National list and priority list of projects.
- 27—Pre-qualification procedures.
- 28—Government support measures.
- 29—Success fees and recoverable project development costs.

**PART IV—PROJECT IDENTIFICATION AND
SELECTION OF PRIVATE PARTIES**

- 30—Project identification, selection and prioritisation.
- 31—Project preparation and implementation.
- 32—Feasibility studies.
- 33—Approval of feasibility reports.
- 34—Technical expertise of contracting authority.
- 35—Standards and procedures.
- 36—Limitation of contingent liabilities.

**PART V—PUBLIC PRIVATE PARTNERSHIPS
PROCUREMENT METHODS**

- 37—Procurement methods.

Direct Procurement

- 38—Direct procurement.
- 39—Procedure for direct procurement.

Privately-Initiated Proposals

- 40—Privately-Initiated Proposals.
- 41—Due diligence on Privately-Initiated Proposals.
- 42—Evaluation of Privately-Initiated Proposals.
- 43—Project development of Privately-Initiated Proposals.
- 44—Procurement design.

Competitive Bidding

- 45—Requests for qualification.
- 46—Qualification of private parties.

- 47—Prequalification committees.
- 48—Disqualification of private parties.
- 49—Invitations to bid.
- 50—Submission of bids.
- 51—Competitive dialogue.
- 52—Bids by consortiums.
- 53—Proposal evaluation teams.
- 54—Evaluation of bids and evaluation reports.
- 55—Non-compliance by bidders.
- 56—Negotiations.
- 57—Project and risk assessment reports.
- 58—Approval of project and financial risk assessment reports by the Committee.
- 59—Approval of project.
- 60—Execution of project agreements.
- 61—Cancellation of tenders.
- 62—Ratification of project agreements by Parliament.

**PART VI—PUBLIC PRIVATE PARTNERSHIP
PROJECTS BY COUNTY GOVERNMENTS**

- 63—Project agreements by county governments.
- 64—Approval by county assemblies.
- 65—County project lists.
- 66—Part V to apply.

**PART VII—PROJECT COMPANIES,
DISCLOSURES AND PROJECT AGREEMENTS**

- 67—Project companies.
- 68—Publishing information on execution of project agreements.
- 69—Minimum obligations of parties to a project agreement.
- 70—Applicable law.

71—Amendment and variation of project agreements.

72—Project management.

73—Secondment of employees of contracting authority.

74—Petition Committee.

PART VIII—FINANCIAL PROVISIONS

75—Public Private Partnership Project Facilitation Fund.

76—Financial reporting, audit and project performance reports.

PART IX—MISCELLANEOUS PROVISIONS

77—Local content.

78—Offences and penalties.

79—Participation of State officers or public officers in tenders under this Act.

80—Inspection of public private partnership premises, etc.

81—Application of Part V and Part VI of No. 3 of 2003.

82—Annual report.

83—Regulations.

PART X—SAVINGS AND TRANSITIONAL PROVISIONS

84—Interpretation.

85—Members and Staff.

86—Savings.

87—Repeal.

First Schedule —Provisions as to the conduct of business and affairs of the Committee

Second Schedule —Public private partnership arrangements

Third Schedule —Minimum contractual obligations required to be specified in a project agreement

THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2021**A Bill for**

AN ACT of Parliament to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships; to repeal the Public Private Partnerships Act, 2013; and for connected purposes

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Public Private Partnerships Act, 2021. Short title.

2. In this Act, unless the context otherwise requires— Interpretation.

“affordability” means that—

- (a) the financial commitments to be incurred by a contracting authority in terms of a project agreement are sustainable and do not impose an unreasonable burden to the contracting authority and may be met by funds—
 - (i) designated within the existing budget of the contracting authority for its function for which the agreement relates; and;
 - (ii) assigned to the contracting authority in accordance with its relevant future budgetary allocation: and
- (b) the cost of delivering a facility or service in relation to the project by the contracting authority does not impose an unreasonable financial burden on the end users;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to finance;

“Committee” means the Public Private Partnership Committee established under section 6;

“concession” means a contractual licence formalized by a project agreement, which may be linked to a separate interest or right over real property, with or without a fee to Government, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession;

“contracting authority”, means—

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

“contracting authority’s property” includes all movable and immovable property belonging to the contracting authority and the intellectual property rights vested in the contracting authority;

“Directorate” means the Directorate of Public Private Partnerships established under section 15;

“feasibility study” means a study undertaken to explore the technical, financial, legal, social and environmental feasibility of undertaking an infrastructure or development facility as a public private partnership;

“financial close” means the date when all conditions precedent required to be met to achieve first draw down on Senior Debt under a project agreement are met, as specified under a project agreement;

“Fund” means the Public Private Partnership Project Facilitation Fund established under section 75;

“local content” means the added value brought to the Kenyan economy from project-related activities by way of local distribution of accruing benefits including through the procurement of locally available workforce, services and supplies and systematic development of national capacity and capabilities;

“private party” means a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority under this Act;

“privately-initiated proposal” means a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables the complete evaluation of the proposal as if it were a bid;

“project” means the design, construction, development or operation of a new infrastructure, asset or facility or the rehabilitation, modernization, expansion, operation or management of an existing infrastructure, asset or facility;

“project agreement” means a contract concluded between a contracting authority and a private party and includes any ancillary agreement entered into by the parties in relation to an agreement;

“project company” means a special purpose vehicle company incorporated by a successful bidder for the purpose of undertaking a project in accordance with a project agreement executed by the parties;

“Public Debt Management Office” means the Public Debt Management Office established by section 62 (1) of the Public Finance Management Act, 2012;

No. 18 of 2012.

“public private partnership” means a contractual arrangement between a contracting authority and a private party under which a private party—

- (a) undertakes to perform a public function or provide a service on behalf of the contracting authority;
- (b) receives a benefit for performing a public function by way of—
 - (i) compensation from a public fund;
 - (ii) charges or fees collected by the private party from users or consumers of a service provided to them; or
 - (iii) a combination of such compensation and such charges or fees;

(c) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement; and

(d) transfers the facility to the contracting authority;

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

“user fee” means the rate, toll, fee, or other charge imposed for the use of all or part of an infrastructure or development facility or service; and

“value for money” means that the undertaking of a public function of the contracting authority by a private party under a public private partnership results in a net benefit accruing to that contracting authority defined in terms of cost, price, quality, quantity, timeliness or risk transfer.

3. The object of this Act is to—

Object of the Act.

(a) prescribe the procedures for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships;

(b) harmonize the institutional framework for the implementation of public private partnership projects;

(c) give effect to Article 227 of the Constitution on procurement relating to public private partnerships;

(d) streamline and rationalize the regulatory, implementation and monitoring mandates of relevant agencies; and

(e) provide for a transparent project selection process, clear procurement procedures, reduced regulatory approvals and expanded contractual models in order to promote private sector investment.

4.(1) This Act shall apply to every project agreement for the financing, design, construction, rehabilitation,

Application of Act.

operation, equipping or maintenance of a project or provision of a public service undertaken as a public private partnership.

(2) The provisions of the Public Procurement and Asset Disposal Act, 2015, shall not apply to a public private partnership.

No. 33 of 2015.

5. Where there is a conflict between the provisions of this Act and the provisions of any other written law, the provisions of this Act shall prevail.

Act to prevail.

PART II—PUBLIC PRIVATE PARTNERSHIP COMMITTEE

6. (1) There is established the Public Private Partnership Committee which shall consist of—

Public Private
Partnership
Committee.

- (a) the Principal Secretary in the State department responsible for matters relating to finance, who shall be the chairperson;
- (b) the Principal Secretary in the State department responsible for matters relating to planning;
- (c) the Principal Secretary in the State department responsible for matters relating to industrialisation;
- (d) a representative of the Cabinet Secretary responsible for matters relating to infrastructure;
- (e) the Solicitor-General;
- (f) one person nominated by the Council of County Governors;
- (g) three persons, not being public officers, appointed by notice in the *Gazette* by the Cabinet Secretary; and
- (h) the Director-General, who shall be the secretary.

(2) The members referred to under paragraphs (1)(a), (b), (c), (d), (e) and (f) shall attend the Committee's meetings in person and may designate in writing an officer to represent them in sub-committees of the Committee.

7. (1) A person is qualified to be appointed as a member of the Committee under section 6(1) (g) if that

Qualification and
terms of members.

person has at least ten years' professional experience in matters relevant to public private partnerships.

(2) The members appointed under section 6(1) (g) shall hold office for a period of three years and may be eligible for reappointment for one further term.

(3) The persons appointed under section 6(1) (g) shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.

8. (1) The Committee shall be responsible for—

Functions and powers of the Committee.

- (a) formulating policies on public private partnerships;
- (b) overseeing the implementation of public private partnerships contracts;
- (c) approving standardized public private partnership bid documents;
- (d) approving feasibility studies;
- (e) approving privately-initiated proposals;
- (f) approving negotiated contract terms, the cancellation of procurements or termination of project agreements, and the variation of project agreements;
- (g) monitoring the implementation of this Act, including the sustainability of contingent liabilities that may be incurred by a contracting authority for projects approved under the Act; and
- (h) carrying out any other function that may be conferred on it under this Act.

(2) The Committee shall have all the powers necessary for the proper discharge of its functions under this Act.

9. (1) The office of an appointed member of the Committee shall become vacant if that member—

Vacation of office.

- (a) is unable to perform the functions of his or her office by reason of mental or physical infirmity;
- (b) is otherwise unable or unfit to continue serving as a member of the Committee;

- (c) is adjudged bankrupt;
- (d) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;
- (e) is absent, without reasonable cause, from three consecutive meetings of the Committee;
- (f) resigns in writing addressed to the Cabinet Secretary;
- (g) fails to declare his or her interest in any matter being considered or to be considered by the Committee;
- (h) dies; or
- (i) is removed from office by the Cabinet Secretary.

(2) A member of the Committee may be removed from office on the ground of gross misconduct, incompetence, conviction for a cognizable offence, or violation of the Constitution.

(3) Before a member of the Committee is removed from office, that member shall be afforded an opportunity to be heard before such removal.

(4) A person who is aggrieved by the decision to remove that person from office under this section may appeal against the decision to the High Court.

10. The Committee may establish such subcommittees as it may consider necessary for the proper performance of its functions and exercise of its powers under this Act.

Subcommittees.

11. The Committee may, by a resolution either generally or in a particular case, delegate to a subcommittee or to a member, officer, employee or agent of the Directorate, the exercise of any of the powers or performance of any of the functions of the Committee.

Delegation by the Committee.

12. (1) Subject to subsection (2), the business and affairs of the Committee shall be conducted in accordance with the First schedule.

Conduct of the business of the Committee.

(2) Except as provided in this Act, the Committee may regulate its own procedure.

(3) The Committee shall maintain a proper record of its meetings of the Committee, including minutes, in such manner as it may determine.

13. The Cabinet Secretary may make Regulations prescribing a code of conduct for Committee's members and officers, employees and agents of the Directorate.

Code of conduct.

14. There shall be paid to the members of the Committee such remuneration or allowances as the Cabinet Secretary may, in consultation with the Salaries and Remuneration Commission, determine.

Remuneration.

15. (1) There shall be established a directorate to be known as the Directorate of Public Private Partnerships.

Directorate.

(2) The Directorate shall be headed by the Director-General.

16. (1) A person shall be qualified to be appointed as the Director-General if that person holds an advanced degree from a university recognized in Kenya and has knowledge and at least ten years' professional experience in any of the following fields—

Director-General.

(a) finance;

(b) economics;

(c) law; or

(d) any other related and relevant field as the Cabinet Secretary may determine.

(2) The Director-General shall hold office for a period of four years, and may only be reappointed once for a further period of four years, subject to the terms of appointment.

17. (1) The Cabinet Secretary shall, in consultation with the Director General, appoint the staff of the Directorate.

Staff of the Directorate.

(2) The staff of the Directorate shall be appointed on such terms and for such period as the Cabinet Secretary may determine.

18. (1) The Directorate may request the secondment of staff from a contracting authority, county government, county corporation or a development or strategic partner on

Secondment of staff to the Directorate.

such terms and for such duration as may, on the consultation with the contracting authority, county government, county corporation or a development or strategic partner, be needed.

(2) The staff seconded to the Directorate shall be deemed to the staff of the Directorate and fall under the authority of the Directorate for the duration of the secondment.

19. (1) The Directorate shall be the lead institution in the implementation of a public private partnership project under this Act and, in this regard, shall be responsible for—

Functions of the Directorate.

- (a) originating, guiding and co-ordinating the selection, ranking and prioritization of public private partnership projects within the public budget framework;
- (b) overseeing project appraisal and development activities of contracting authorities including providing technical expertise in the implementation of projects under this Act;
- (c) leading contracting authorities in project structuring, procurement, tender evaluation, contract negotiation and deal closure;
- (d) on its own motion, originating and leading in project structuring and procurement, in liaison with a contracting authority;
- (e) supporting the development of public private partnerships programmes in the country;
- (f) overseeing contract management frameworks for projects under this Act; and
- (g) undertaking any other activity necessary for the fulfilment of any of the functions of the Directorate.

(2) In the performance of its functions, the Directorate shall—

- (a) establish an open, efficient and equitable process for the management of the identification, screening, prioritization, development,

- procurement, implementation and monitoring of projects;
- (b) serve as the national resource centre on public private partnerships;
 - (c) conduct capacity-building for contracting authorities;
 - (d) create public awareness on public private partnerships;
 - (e) provide advisory and support services to contracting authorities in national and county governments at all stages of a project under this Act;
 - (f) on behalf of contracting authorities, retain transaction advisors and to enter into agreements for that purpose to assist contracting authorities during project appraisal and implementation;
 - (g) review and approve project proposals and tender evaluation reports;
 - (h) establish a national register of projects implemented under this Act;
 - (i) monitor contingent liabilities and accounting and budgetary issues related to public private partnerships in conjunction with relevant government departments; and
 - (j) conduct research and publish findings on public private partnerships in order to ensure the continuous improvement of public private partnership projects.
- (3) The Directorate shall prepare financial accounts and inventory of any monies allocated to it, and on any financial support received by it under this Act.

PART III—PUBLIC PRIVATE PARTNERSHIPS

20. (1) A contracting authority intending to finance, operate, equip or maintain an infrastructure facility or provide a public service may enter into a project agreement with a qualified private party for the financing, construction, operation, equipping or maintenance of the

Project agreements.

infrastructure facility or provision of the public service in accordance with the provisions of this Act.

(2) A contracting authority that enters into a project agreement with a private party under subsection (1) may, where it is appropriate, designate its property for the use by a private party, in relation to, and for the duration of, a project on such terms and conditions as the contracting authority shall consider appropriate.

(3) A contracting authority shall implement the directions of the Directorate at every stage of a project.

(4) Where a project involves more than one contracting authority, the Directorate shall designate one of the contracting authorities to be the lead contracting authority.

21. Subject to the provisions of this Act, a contracting authority may enter into a public private partnership arrangement with a private party in accordance with the Second Schedule.

Public private partnership arrangements.

22. (1) A contracting authority has a duty to—

Duties of contracting authorities.

- (a) in liaison with the Directorate, identify, screen and prioritize projects based on a guidance issued by the Directorate;
- (b) prepare and appraise each project to ensure its legal, regulatory, social, economic and commercial viability;
- (c) undertake the tendering process in accordance with this Act;
- (d) provide such technical expertise as the Directorate may require to evaluate and appraise a project;
- (e) monitor the implementation of a project agreement;
- (f) liaise with all key stakeholders during the project cycle;
- (g) oversee the management of a project in accordance with the project agreement;
- (h) submit to the Directorate annual or such other periodic reports on the implementation of project agreements;

- (i) maintain a record of all documentation and agreements entered into relating to the implementation of a project agreement under this Act;
 - (j) prepare project agreements in accordance with standard documents and other guidance issued by the Directorate; and
 - (k) ensure that the transfer of assets at the expiry or early termination of a project agreement is consistent with the terms of the project agreement where the project agreement involves a transfer of assets.
- (2) In the performance of its duties under subsection (1), a contracting authority shall report to the Directorate and—
- (a) implement the recommendations of the Directorate;
 - (b) comply with the guidelines issued by the Directorate; and
 - (c) submit such information as may be required by the Directorate or Committee.

23. (1) In determining the duration of a public private partnership agreement, a contracting authority shall take into account the following factors—

- (a) the provisions of this Act and any other relevant written law;
- (b) the life span of the technology to be employed under the agreement;
- (c) the investment standards that are required to be maintained by each party to the project agreement throughout the duration of the public private partnership agreement;
- (d) the economic and financial viability of the project and the economic life of the facilities to be provided;
- (e) the depreciation of the project assets during the life of the public private partnership agreement; and

Determination of the duration of public private partnership agreements.

(f) the period required by the parties to the partnership to—

(i) maintain service delivery standards and investment levels during the life span of the public private partnership agreement; and

(ii) recoup the parties' investment.

(2) The Directorate may issue guidelines in respect of the determination of the duration of a public private partnership agreement.

(3) The Directorate may extend the tenure of a project agreement on such terms and for such period as may be approved by the Committee and the Attorney-General:

Provided that an extension shall not impose an additional fiscal or statutory burden on the contracting authority or the Government.

24. Where a contracting authority intends to enter into a public private partnership, a person shall not, unless that person is the accounting officer of the contracting authority, enter into a project agreement in relation to that project on behalf of the contracting authority.

Execution of
project
agreements.

25. (1) A contracting authority, other than a county government or county corporation, shall prepare a list of projects that it intends to undertake on a priority basis under this Act and submit it to the Directorate for approval.

Submission of
project lists.

(2) A contracting authority shall not submit a project list unless the projects are part of the development program of that authority.

(3) A project list prepared under this section shall be supported by appropriate project concept notes which shall be prepared in accordance with guidelines issued by the Directorate.

(4) The Directorate shall notify the Committee, the Cabinet Secretary and Cabinet, periodically, on all projects it approves for implementation under the Act.

(5) The Directorate may reject any project included in a proposed project list and shall specify the reasons for such refusal in writing.

(6) Where the Directorate rejects a proposed project in a project list, it shall provide the respective contracting authority with the necessary guidance.

26. (1) The Directorate shall establish and maintain an up-to-date national list of projects that have been approved under sections 25 and 65 of this Act.

National list and priority list of projects.

(2) The national list shall be maintained in a publicly accessible database hosted by the Directorate.

(3) The Directorate shall prepare a priority list of the projects specified in the National List for implementation under this Act.

27. A contracting authority intending to enter into a project agreement with a private party shall, before the execution of the project agreement, confirm that the private party has—

Prequalification procedures.

- (a) the financial capacity to undertake the project;
- (b) the relevant experience in undertaking projects of a similar nature;
- (c) the relevant expertise to undertake the project; and
- (d) satisfied the legal, social and environmental due diligence parameters prescribed by the Directorate.

28. (1) The Cabinet Secretary may issue Government support measures for a public private partnership including—

Government support measures.

- (a) a binding undertaking;
- (b) a letter of support;
- (c) a letter of credit;
- (d) a credit guarantee, whether partial or full;
- (e) approval for issuance of partial risk guarantees and political risk insurance; or
- (f) any other instrument that Cabinet Secretary responsible for matters relating to finance may, on the advice of the Committee, determine:

Provided that the instrument shall comply with the provisions of the law relating to public finance management.

(2) The Cabinet Secretary may only issue Government support measures under this section—

(a) where it is necessary to support a project to lower premiums factored for the profiling of political risks; or

(b) to underwrite approved commercial risks under a negotiated project agreement.

(3) The Cabinet Secretary may prescribe guidelines for the issuance of Government support measures under this section.

29. (1) The Directorate shall impose a success fee not exceeding one per cent of the total project cost of a transaction payable by a private party that achieves financial close on a project.

Success fees and recoverable project development costs.

(2) Where the Directorate or a contracting authority incurs costs for transaction advisory services offered in support of project preparatory and procurement activities or any other recoverable project development costs, such costs shall be recoverable in full, without any inflation adjustment, from the private party that enters into a project agreement with the contracting authority.

(3) Success fees and recoverable project costs under subsection (2) shall be payable into the Public Private Partnership Project Facilitation Fund.

(4) The Directorate may issue guidelines on the allocation of costs and disbursements on success fees imposed under this section in relation to recoverable project costs.

PART IV—PROJECT IDENTIFICATION AND SELECTION OF PRIVATE PARTIES

30. (1) A contracting authority intending to implement a project through a public private partnership under this Act shall, in consultation with the Directorate, be responsible for conceptualizing or identifying potential projects and undertaking the preparatory and tendering process of the project.

Project identification, selection and prioritisation.

(2) In conceptualizing, identifying and prioritizing potential projects under this Act, a contracting authority shall consider the strategic and operational benefits of the

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 elects to implement a project prioritized under section 25, it shall appraise the project for viability in accordance with section 32.

(4) The Cabinet Secretary shall, in consultation with the Directorate, make Regulations for the conceptualization, identification and prioritization of projects under this Act.

31. (1) A contracting authority shall, under the direction of the Directorate, constitute a project implementation team for overseeing the structuring and implementation phases of the project including—

Project preparation and implementation.

- (a) overseeing the conduct of feasibility studies;
- (b) preparing the project for procurement;
- (c) conducting the tender stage of the project; and
- (d) negotiating project agreements for the project.

(2) A project implementation team constituted under subsection (1) shall consist of a representative of the Directorate and such technical, financial and legal experts of the contracting authority as the contracting authority and the Directorate shall determine.

32. (1) A contracting authority shall, under the direction of the Directorate, undertake a feasibility study of the project it intends to implement under this Act in order to determine the viability of the project.

Feasibility studies.

(2) The contracting authority shall consider the following matters when undertaking the feasibility study—

- (a) the technical requirements of the project;
- (b) the legal requirements to be met by the parties to the project;
- (c) the social, economic and environmental impact of the project;
- (d) the affordability and value for money proposition in the project; and

- (e) the project's land requirements and required site preparatory activities necessary for effective and efficient project initiation.

33. (1) A contracting authority intending to implement a project through public private partnership shall submit the feasibility report prepared under section 32 to the Directorate for evaluation.

Approval of feasibility reports.

(2) The Committee shall consider the feasibility report in determining whether or not the contracting authority may procure a project under this Act.

34. (1) The Directorate 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.

Technical expertise of contracting authorities.

(2) Where the Directorate determines that the contracting authority does not have the technical expertise to procure the project, the contracting authority shall, in consultation with the Directorate, appoint a transaction advisor to assist the authority in the preparation, procurement, contract negotiations and financial close phases of a project.

(3) The engagement of a transaction advisor under subsection (2) shall be based on the principles of disclosure, transparency, equality, cost-effectiveness and equal opportunity in accordance with the procedure prescribed by the Cabinet Secretary in Regulations.

(4) The Directorate may procure transaction advisors on a sectoral basis based on the projects contained in the National List under section 25.

35. (1) The Cabinet Secretary shall, on the recommendation of the Directorate, prescribe the standards and procedures for the identification, selection, feasibility study, pre-tender approval, tendering, negotiation, post-tender approval, monitoring and evaluation of projects under this Act.

Standards and procedures.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary shall prescribe standards and procedures—

- (a) on practice elements in the procuring of privately initiated project proposals;
- (b) on the conduct of competitive tender processes under this Act;
- (c) on the protocols to be observed in a direct negotiation process between a contracting authority and a private party;
- (d) on disclosure requirements at every stage of a project;
- (e) on standard contractual clauses applicable to the competitive procurement of principal subcontracts for Privately-Initiated Proposals in the interest of fair price discovery and higher value for money for Government;
- (f) on procedures for benchmarking and market testing;
- (g) on timelines and procedures for every stage of privately-initiated proposals;
- (h) for public participation and stakeholder engagement during project development stages;
- (i) on hiring of transaction advisors;
- (j) on the management of conflicts of interest;
- (k) on standardised evaluation criteria templates;
- (l) on feasibility studies;
- (m) on timelines for project development; and
- (n) any other relevant matter required for the better implementation of this Part.

36. (1) The Cabinet Secretary shall approve a limit for contingent liabilities that the Committee may assign to projects under the Act.

Limitation of contingent liabilities.

(2) The Committee shall assign contingent liabilities to a project approved under this Act within the approved contingent liability limit.

(3) The Directorate—

- (a) shall notify the Cabinet Secretary of the allocated quantum of the approved contingent liability portfolio at least once every six months; and

(b) shall notify the Cabinet Secretary of any requirement for additional contingent liability headroom where the approved limit is exceeded.

(3) The Cabinet Secretary may, on the recommendation of the Committee, approve an increased contingent liability headroom to meet the objectives of the public private partnerships programme of the Government.

(4) The Directorate shall prepare and submit to the Cabinet Secretary an annual report on contingent liabilities assigned during the year in question providing projections on future contingent liability requirements based on the projects portfolio in the national list of projects prepared under section 25.

PART V—PUBLIC PRIVATE PARTNERSHIPS PROCUREMENT METHODS

37. (1) A contracting authority may procure a public private partnership project under this Act through—

Procurement methods.

- (a) direct procurement;
- (b) privately-initiated proposals; or
- (c) competitive bidding.

(2) In procuring a public private partnership project, a contracting authority shall be guided by the principles of transparency, cost-effectiveness and equal opportunity.

(3) The Cabinet Secretary shall prescribe guidelines for the procurement of a public private partnership under this Part.

Direct Procurement

38. A contracting authority may, in consultation with the Directorate, use direct procurement if any of the following conditions are satisfied—

Direct procurement.

- (a) the private party possesses the intellectual property rights to the key approaches or technologies required for the project;
- (b) the works or services are only available from a limited number of private parties;

- (c) a particular private party has exclusive rights in respect of the works or services, and no reasonable alternative or substitute is available;
- (d) the contracting authority determines that there are operational and strategic advantages and or reasons linked to particular private parties on the basis of national interest, bilateral or international cooperation, or external trade;
- (e) the direct engagement of a private party shall significantly lower the cost of delivering the works or services on the basis of the project's qualifying for funding on such terms as the Government shall approve without such outcomes becoming part of the public debt;
- (f) there is an urgent need for the works or services, and any other procurement method is impractical:

Provided that the circumstances giving rise to the urgency were not foreseeable by the contracting authority or the result of dilatory conduct by the contracting authority;
- (g) the contracting authority, having procured goods, equipment, technology or services from a private party, determines that additional supplies shall be procured from that private party for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the—
 - (i) effectiveness of the original procurement in meeting the needs of the contracting authority;
 - (ii) limited size of the proposed procurement in relation to the original procurement; and
 - (iii) reasonableness of the price and the unsuitability of alternatives to the goods or services in question;
- (h) the works or services are procured from a public entity;

Provided that the acquisition price shall be fair and reasonable and compare well with known prices of works or services in the circumstances; or

- (i) any other reason that may be prescribed by the Cabinet Secretary.

39. A contracting authority shall adhere to the following procedures during direct procurement of projects—

Procedure for direct procurement.

- (a) issue a tender document which shall be the basis of tender preparation by the contracting authority and subsequent negotiations;
- (b) appoint an evaluation committee in accordance with the standards and practice procedures issued under this Act for the negotiation of a direct procurement of a project;
- (c) ensure that appropriate approvals under this Act have been granted;
- (d) ensure that the resulting project agreement complies with this Act; and
- (e) any other procedure that may be prescribed by the Cabinet Secretary.

Privately-Initiated Proposals

40. (1) A private party may submit a privately-initiated proposal to a contracting authority.

Privately-initiated proposals.

(2) A contracting authority may consider a privately-initiated proposal submitted under subsection (1) if—

- (a) the project is aligned with national infrastructure priorities and meets a demonstrated societal need;
- (b) the project provides value for money;
- (c) the project proposal provides sufficient information for the contracting authority to assess fiscal affordability and the potential contingent liability implications of the proposal;
- (d) the project can be delivered at a fair market price;

- (e) the project is supported by all documents listed under subsection (3) for purposes of transparency and accountability; and
 - (f) the project supports the efficient transfer of risk from the public sector.
- (3) The privately-initiated proposal under subsection (1) shall contain the following information—
- (a) a detailed description of the proposed project, including reference designs, sketches and alignment maps;
 - (b) detailed project needs analysis, including a description of the benefits to society and alignment with Government's infrastructure plan;
 - (c) a description of the environmental and social features of the proposed project;
 - (d) a detailed technical description of the project, including a construction schedule and requirements on enabler services;
 - (e) a detailed description of the financial viability of the project, including costs and revenues, preliminary funding and financing plan, supported by relevant financial model in open format;
 - (f) a preliminary operating plan for the proposed project;
 - (g) a description of the key project risks and the risk allocation under the project;
 - (h) disclosure of any Government support measures the proposed project may require;
 - (i) a description of non-monetary Government support measures that the project may require; and
 - (j) a justification why the project is not suitable for open competitive procurement.
- (4) The contracting authority shall submit the privately-initiated proposal to the Directorate for assessment and approval.

(5) The Cabinet Secretary may, by notice in the *Gazette*, prescribe when submissions may be made under this section.

(6) A private party shall pay into the Fund a non-refundable review fee at the time of submitting its privately-initiated proposal under subsection (1), calculated at the rate of zero-point-five per cent of the estimated project cost or fifty thousand United States dollars, whichever is lower.

(7) The review fee paid under subsection (6) shall not create any obligation on the contracting authority or the Directorate towards the proponent.

(8) The Cabinet Secretary shall, in consultation with the Directorate, make Regulations for the better implementation of this section.

41. The Directorate, in co-ordination with the contracting authority, shall, before commencing an evaluation of a privately-initiated proposal, conduct due diligence to confirm that the private party—

Due diligence on privately-initiated proposals.

- (a) has not been debarred by any country or any international organization from participating in public private partnerships or similar arrangement;
- (b) is not corrupt, has not engaged in acts of corruption, and has not been sued or convicted on account of acts of corruption;
- (c) is not insolvent, under receivership or bankrupt and its affairs are not being administered by a court or judicial officer, its business activities have not been suspended, and it is not subject to any current legal proceedings;
- (d) is tax-compliant in all jurisdictions in which it has local tax presence, and in its home country of registration, and is not at default on payment of social security and employment benefits or contributions in its jurisdictions of operation and registration; and
- (e) has not, and its directors or officers have not, been convicted of any criminal offence related to

professional conduct within a period of five years preceding the submission of the proposal, and have not otherwise been disqualified pursuant to administrative suspension or debarment proceedings.

42. (1) The Directorate shall, in consultation with the contracting authority, in evaluating a privately-initiated proposal with a view to determining its suitability for further development as a public private partnership project, establish evaluation criteria for the proposal.

Evaluation of
privately-initiated
proposals.

(2) The private party shall not be required to submit additional proposals to the contracting authority or the Directorate during the evaluation of the privately-initiated proposal.

(3) The evaluation criteria established under subsection (1) shall include—

- (a) public interest criteria;
- (b) project feasibility criteria;
- (c) public private partnership suitability criteria; and
- (d) affordability criteria.

(4) If requested by the Directorate or a contracting authority, the private party shall provide any clarifications or additional information on the privately-initiated proposal in written form.

(5) The Directorate and contracting authority shall, in consultation with relevant government departments, evaluate the proposal against the evaluation criteria within ninety days from the date the proposal is submitted to the Directorate.

(6) The Directorate shall prepare a detailed assessment report on the privately-initiated proposal based on the evaluation criteria established under subsection (1) and make recommendations to the Committee within five working days after concluding the evaluation on whether or not the project can proceed to the project development phase.

(7) The Committee shall, within fourteen working days of receiving the report under subsection (6), determine

whether or not the proposed project may proceed to the project development phase, and provide guidance on the procurement method that shall be applied to the said project.

(8) In making its determination under subsection (7), the Committee shall take into consideration—

- (a) the assessment report submitted under subsection (6);
- (b) the review and recommendations of the Directorate; and
- (c) any benchmarking or market testing results.

(9) The approval of a privately-initiated proposal shall not create an obligation on the part of the Directorate, contracting authority or Government toward the private party.

43. (1) Where the Committee approves a privately-initiated proposal, the proposal shall proceed to the project development phase, during which a private party shall prepare specific project development activities before the project can be approved.

Project
development of
privately-initiated
proposals.

(2) The project development phase shall be completed within six months from the date of the approval by the Committee.

(3) Despite subsection (2), a contracting authority may apply in writing to the Directorate for the extension of time for the completion of the project development phase, specifying the justification for the application for additional time, and proposing a new timeframe and mitigation measures to prevent any further delays.

(4) Where the Directorate is satisfied with the justifications of the contracting authority under subsection (3), it shall grant the application.

(5) The project development phase consists of the activities necessary to enable the contracting authority and other appropriate decision-making agencies, under the guidance of the Directorate, to undertake a detailed evaluation of the proposed project before contracting, including the development of—

- (a) a detailed geographical, temporal and functional scope of the proposed project, including any right of way or land acquisition or human resettlement plan, where applicable;
- (b) a technical feasibility study, including a technical design and technical specification schedule that is capable of supporting pricing and socio-environmental impact assessments;
- (c) a financial feasibility study, including a detailed risk assessment, fiscal impact assessment or affordability assessment and a funding and financial plan;
- (d) a legal feasibility study, including an assessment of legal risks and uncertainties;
- (e) a social and environmental impact assessment where applicable;
- (f) an economic feasibility study;
- (g) private public partnership suitability assessment or value for money assessment;
- (h) a comprehensive risk matrix;
- (i) a preliminary private public partnership structure; and
- (j) a plan for stakeholder outreach to ensure social acceptability of the project.

(6) At the request of a private party, the contracting authority may enter into a project development agreement with the private party that shall outline the terms under which the private party will undertake project development activities.

(7) A project development agreement between the contracting party and the private party shall provide for the—

- (a) objectives of the project and project development agreement;
- (b) responsibilities of the contracting authority and the private party under the agreement;

- (c) compensation principles specifying that—
 - (i) if the project is eventually awarded to the private party, there shall be no compensation;
 - (ii) if the project is awarded to another private party, the costs of the private party that submitted the proposal for completing the project development phase, shall be paid by the private party, at financial close; and
 - (iii) if the project does not progress beyond the project development phase, there shall be no compensation liability on the part of the Government;
- (d) modalities for coordination and communication between the contracting authority and the private party;
- (e) timelines for project development;
- (f) conditions under which the agreement may be terminated;
- (g) legal or regulatory obligations of the contracting authority and the private party; and
- (h) policies related to transparency and disclosure, accountability, confidentiality and conflicts of interest.

(8) The Directorate shall develop standardized contract documents for a project development agreement with respect to privately-initiated proposals.

(9) All documents resulting from the project development phase shall be evaluated by the contracting authority in accordance with the evaluation criteria specified in section 42 and the Directorate shall make recommendations thereon to the Committee for approval within twenty working days of completing the project development phase.

(10) The contracting authority, in co-ordination with the Directorate, may hire external advisors to review and provide an independent opinion regarding the studies

conducted by the private party regarding the privately-initiated proposal.

(11) The Committee may, on the recommendations of the contracting authority, and any independent reviews or advice that the Committee may solicit in that regard, make a determination that—

- (a) the project meets the public interest, public private partnership suitability, project feasibility and affordability criteria, and grant approval for the project to be procured under this Act;
- (b) the project does not meet public private partnership suitability criteria and give guidance on alternative methods by which the project may be implemented; or
- (c) the project does not meet any of the relevant criteria and should be abandoned.

(12) Where the Committee determines that the project should be abandoned under paragraph (11) (c), the contracting authority may elect to restructure the project to meet the evaluation criteria and resubmit the project to the Committee for a fresh determination.

(13) The Committee shall render its decision under this section within fourteen days of receiving the report under subsection (9).

(14) Following the determination of the Committee, the contracting authority shall publish the feasibility studies and project documentation used to evaluate the project, subject to any applicable disclosure guidelines on public private partnership projects for the time being in force.

(15) For the purposes of this section—

- (a) “public interest” means the proposed project aligns with stated infrastructure needs, policy objectives and priorities of the Government, addresses a defined societal need, and contributes to the country’s socio-economic agenda; and
- (b) “project feasibility” means the proposed project has been confirmed to be technically, financially, socially, environmentally and legally feasible.

44. (1) Where the Committee determines that the privately-initiated proposal may be procured in terms of section 43 (11) (a), the contracting authority shall, with the assistance of the Directorate, directly negotiate the project proposal with the private party, if—

Procurement
design.

- (a) the contracting authority determines that the proposal shall not generate market interest under competitive procurement;
- (b) the proposal is anchored on unique elements; or
- (c) direct negotiations are justified for any other reason in the public interest.

(2) For the purposes of subsection (1), a contracting authority shall establish clear and realistic timelines for the conduct of the direct negotiations on the project:

Provided that the contracting authority or authorities and the private party shall undertake to finalise the negotiations within six months.

(3) Where the direct negotiations are not completed within six months, the negotiations shall be terminated.

(4) Where the contracting authority receives more than one privately-initiated proposal with respect to the same matter and all proposals proceed to the project development stage, the contracting authority may utilize a restricted tendering procedure that limits competitive bidding to the private parties that submitted proposals.

(5) Where a contracting authority determines that the project should be procured competitively because of market interest or the existence of equally competent alternative technologies that could deliver higher value for money to the Government, the contracting authority may elect to subject the project to open competitive tender under this Act:

Provided that the contracting authority may determine whether or not to reimburse the costs incurred by the private party if—

- (a) the project is awarded to any other bidder;
- (b) the project achieves financial close;

- (c) the development costs do not exceed zero-point-five per cent of the estimated project cost; and
- (d) the development costs are borne by the successful bidder.

(6) Where the contracting authority determines that an open tender is in the public interest, it shall establish a clear and realistic timeline for the preparation of tender documentation and the administration of the bidding process.

(7) Subject to subsection (4), the contracting authority shall ensure equal bidding conditions when designing a procurement strategy under this section.

Competitive bidding

45. (1) A contracting authority shall, on the approval of a feasibility report, invite requests for qualifications from qualified bidders with respect to the proposed project.

Requests for qualification.

(2) The Directorate shall prescribe the standards and specify the practice notes on procurement and tender administration regarding the requests for qualification.

(3) A contracting authority shall, in the request under subsection (1), specify the eligibility criteria of a bidder and may require each bidder to provide statements or documents to prove the bidder's eligibility.

(4) A contracting authority shall consult the Directorate during the procurement cycle.

(5) Any person who responds to a request for qualification shall comply with the provisions of this Act and the instructions to bidders contained in the tender documents.

(6) Where the Directorate determines that this section should not apply to a public private partnership project, the Directorate shall notify the contracting authority and the project may proceed to the bidding stage.

(7) The Directorate shall issue guidelines regarding the making of a determination under sub-section (6).

46. (1) A private party intending to respond to a request for qualification under section 45 may do so as part of a consortium of private parties.

Qualification of private parties.

(2) A private party or consortium is eligible to respond to a request for qualification if the party or consortium—

- (a) satisfies the criteria specified in the request for qualification issued by the contracting authority;
- (b) has the technical and financial capacity to undertake the proposed project;
- (c) has the legal capacity to enter into a project agreement with the contracting authority;
- (d) is not insolvent, in receivership, bankrupt or in the process of being wound up; and
- (e) is not for any reason precluded by the contracting authority from entering into a project agreement with the contracting authority.

47. (1) The contracting authority shall, upon issuing a notice under section 44, constitute a prequalification committee for the purpose of pre-qualifying bidders.

Prequalification committees.

(2) The contracting authority may, where it considers it appropriate, constitute the project appraisal team as the prequalification committee for purpose of prequalifying bidders under subsection (1).

48. (1) The prequalification committee constituted under section 47 shall review the requests for qualification submitted to the contracting authority and prepare a shortlist of qualified bidders.

Disqualification of private parties.

(2) A bidder shall be disqualified at the prequalification stage if that bidder—

- (a) submits false, inaccurate or incomplete information;
- (b) colludes, connives or is involved in any corrupt or dishonest practice intended to confer an unfair advantage over other bidders in the award of the tender;
- (c) fails to meet any of the eligibility criteria specified in the request for qualification; or
- (d) contravenes the provisions of this Act or any other written law in order to have an unfair advantage over other bidders in the award of the tender.

(3) A disqualified bidder may object to its disqualification under subsection (2) by lodging a petition in the prescribed form with the Petition Committee within fourteen days of being notified of the disqualification.

(4) The Petition Committee shall hear and determine an objection under subsection (3) within twenty-eight days of the petition being lodged.

49. (1) A contracting authority shall, in consultation with the Directorate, after the preparation of a short list of prequalified bidders, prepare tender documents in relation to a project for the purpose of inviting bids from eligible bidders.

Invitations to bid.

(2) The tender documents prepared under subsection (1) shall include the following information—

- (a) general information related to the project necessary for the preparation and submission of bids;
- (b) specifications of the project including the technical and financial conditions that should be met by bidders;
- (c) specifications of the final product, level of services, performance indicators and such other requirements as may be necessary including the safety, security and environment preservation requirements to be met by bidders;
- (d) basic terms of the project agreement including non-negotiable conditions;
- (e) the criteria and method to be used in evaluating bids;
- (f) forms and documents that are required to be filled and submitted by bidders;
- (g) the value of the bid security required to be submitted by bidders;
- (h) the conditions, procedures and administration of bid clarifications;
- (i) the date, time and place for the submission of tender documents by bidder;

- (j) instructions regarding pre-bid conferences, where necessary;
- (k) the conditions to be met by any consortiums on permissible changes to a consortium arrangement;
- (l) the procedure to be followed in a competitive dialogue process; and
- (m) any other matter that may be necessary for the proper conduct of the tender stage of the project.

50. (1) A bidder intending to bid for a project under this Act shall complete and submit a technical and financial bid.

Submission of bids.

(2) The bidder shall submit the technical and financial bid in separate sealed envelopes in the manner prescribed by the contracting authority.

51. (1) A contracting authority may, with the approval of the Directorate, hold a competitive dialogue with each shortlisted bidder for the purpose of defining the technical or financial aspects of the project.

Competitive dialogue.

(2) The contracting authority may require each bidder to submit a technical and financial non-binding proposal as part of the competitive dialogue with the authority.

(3) The competitive dialogue shall be held with each bidder on the basis of equality and transparency.

(4) The discussions held during a competitive dialogue shall not be disclosed to any person by any party to the discussions.

(5) At the end of the competitive dialogue stage, the contracting authority may —

- (a) alter the project specifications, risk matrix or structure; and
- (b) reopen prequalification for the project.

(6) Where the contracting authority reopens prequalification, it shall invite each bidder that participated in the competitive dialogue to submit a best and final offer which shall form the basis for the evaluation of the bids and award of the tender.

52. (1) A consortium constituted for the purpose of bidding for a project under this Act may submit a bid in the name of the consortium.

(2) A bid by a consortium shall be accompanied by a notarised binding agreement executed by the consortium's members.

(3) A consortium shall—

- (a) appoint a person from among its members to be the lead consortium member to represent the consortium in its dealings with the contracting authority on the basis of that person's technical, financial and experiential capacity to undertake the project; and
- (b) submit a notice of the appointment of the lead consortium member to the contracting authority.

(4) A member of a consortium shall not, with respect to a bid by the consortium, submit a separate bid, whether directly or indirectly, or through another consortium, or through a company which submits a bid if that person owns a majority of the company's shares or has control over its management.

(5) The contracting authority shall disqualify from the bidding process any consortium that submits a bid in contravention of the provisions of this section.

(6) The contracting authority may, where a member of a consortium withdraws from the consortium—

- (a) disqualify that consortium from participating in the bidding process; or
- (b) review the terms of a project agreement entered into with the consortium.

(7) The contracting authority shall disqualify a consortium from the bidding process if the consortium dismisses its lead consortium member or the lead consortium member withdraws from the consortium.

(8) Subsection (7) shall not apply where the consortium replaces the lead consortium member with another person in a manner that ensures that the consortium remains eligible to participate in the bid.

(9) Each member of a consortium which submits a bid shall be—

- (a) bound jointly and severally by the terms of the project agreement; and
- (b) jointly responsible for the performance of the obligations under the agreement.

(10) The Cabinet Secretary may, in consultation with the Directorate, make Regulations for the better implementation of this section.

53. (1) A contracting authority shall, in consultation with the Directorate, constitute a proposal evaluation team for the purpose of evaluating bids submitted under this Act.

Proposal
evaluation teams.

(2) The proposal evaluation team shall—

- (a) open and evaluate bids in accordance with the procedure specified in the tender documents and any guidelines issued by the Directorate for that purpose; and
- (b) evaluate the bids by taking into account the evaluation and award criteria prescribed in the tender documents.

54. (1) The proposal evaluation team shall evaluate the technical and financial bids within twenty-eight days in accordance with the procedure specified in the tender documents and guidelines prescribed by the Directorate and prepare an evaluation report specifying—

Evaluation of bids
and evaluation
reports.

- (a) the evaluation criteria;
- (b) the manner in which the first-ranked bidder has satisfied the requirements specified in the tender documents in comparison with the other bidders;
- (c) such other information as the contracting authority shall consider necessary; and
- (d) the first-ranked and reserve bidder.

(2) The proposal evaluation team shall submit the evaluation report together with its recommendations thereon to the accounting officer of the contracting authority for approval.

(3) If the accounting officer is not satisfied with the recommendations of the evaluation committee, the

accounting officer may return the evaluation report to the proposal evaluation team with recommendations for the review of the report.

(4) The contracting authority shall submit than an evaluation report to the Directorate for no objection within seven days of conclusion of the evaluation.

55. (1) A proposal evaluation team shall reject a bidder's submission where the bidder fails to comply with the conditions specified in the tender documents or Regulations made under this Act.

Non-compliance
by bidders.

(2) A proposal evaluation team may reject all submissions where the bidders fail to comply with the conditions specified in the tender documents or the Regulations made under this Act.

(3) Where a proposal evaluation team rejects a submission under this section, the proposal evaluation team shall 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 in a given tender process, the tender process shall be deemed to have terminated on account of failure by bidders to comply with tender requirements, and the contracting authority shall, in consultation with the Directorate, determine whether to start the tender process afresh.

56. (1) A contracting authority shall, in consultation with the Directorate, constitute a negotiating committee which shall—

Negotiations.

- (a) enter into negotiations with the first-ranked bidder in accordance with sections 38, 40 or 45;
- (b) for negotiations resulting from section 45, request the second-ranked bidder or any number of bidders as the tender documents may have

indicated to extend the validity of its or their bids pending the completion of negotiations with the first-ranked bidder;

- (c) appoint a negotiation committee which shall be led by the Directorate:

Provided that the contracting authority may, with the permission of the Directorate, be responsible for leading the negotiations with respect to specific parts of the process.

(2) The negotiations between the negotiating committee and the first-ranked bidder may, among other elements—

- (a) cover the technical, commercial, legal, social, environmental, local content and financial terms of the project agreement; and
- (b) be subject to any limitations that may be expressly set out in the tender documents or in the approvals issued under section 44.

(3) The negotiations and resolutions by the negotiating parties shall not—

- (a) alter the criteria on which tender was awarded;
- (b) affect the non-negotiable terms and conditions specified in the invitation to tender
- (c) alter the financial structure of the project;
- (d) affect the conditions applying to a privately-initiated proposal; and
- (e) affect the conditions in respect of which there were no reservations raised by the bidder in the bid or proposal.

(4) Despite subsection (3), adjusting bid prices to account for changes in the foreign exchange rate or changes due to inflation shall not be deemed to be price-increasing adjustments:

Provided that the tender documents shall expressly provide that a change in the exchange rate or a change due to inflation shall not be deemed to be a price-increase adjustment.

(5) The negotiating parties shall not amend the negotiated terms and terms upon which the bid has been evaluated.

(6) Where the negotiations between the negotiating committee and the first-ranked bidder are unsuccessful, the negotiating committee shall enter into negotiations with the second-ranked bidder.

(7) The provisions of subsections (2), (3), (4) and (5) shall apply to the negotiations with the second-ranked bidder.

(8) The negotiating committee shall conduct the negotiations in accordance with the guidelines prescribed by the Directorate, including guidelines on the duration of the negotiations between the committee and the bidder.

57. (1) The negotiating committee shall, upon concluding negotiations under section 56, submit to the contracting authority a project and financial risk assessment report which shall specify the negotiated terms, the contingent liability in respect of the project and the committee's recommendations.

Project and risk assessment reports.

(2) If the contracting authority is satisfied with the recommendations of the negotiating committee, it shall submit the project and financial risk assessment report to the Directorate for approval.

(3) If the Directorate is not satisfied with the recommendations of the negotiating committee, it shall notify the contracting authority in writing and specify the reasons thereof.

(4) Where the contracting authority has been notified under subsection (3), it shall refer the project and financial risk assessment report back to the negotiating committee together with the Directorate's notification under subsection (3) and request the committee to review the report.

(5) Subsections (1), and (2) shall apply, with the necessary modifications, to the review of the report under subsection (4).

58. (1) The Directorate shall submit the project and financial risk assessment report and its recommendations thereon to the Committee for approval.

Approval of project and financial risk assessment reports by the Committee.

(2) The Committee shall consider the report submitted to it under subsection (1) and if satisfied, approve the execution of a project agreement between the contracting authority and the successful bidder within twenty-eight days after receiving the report under subsection (1).

59. (1) The Committee shall notify the contracting authority in writing of the approval of the project and financial risk assessment report within thirty days of the approval.

Approval of projects.

(2) On the notification under subsection (1), the contracting authority shall prepare a final draft of the project agreement between the contracting authority and the bidder and submit it to the Attorney-General for clearance and if cleared, present it to the bidder for execution.

(3) The contracting authority shall notify in writing—

- (a) all the bidders who participated in the tender process of the decision of the Committee; and
- (b) the Cabinet of the Committee's approval to enter into a project agreement with the successful bidder.

60. On the approval under section 59, the contracting authority shall execute the project agreement with the successful bidder.

Execution of project agreements.

61. (1) A contracting authority may cancel a tender process at any time before the execution of the project agreement if it is in the public interest so to do.

Cancellation of tenders.

(2) Despite subsection (1), a contracting authority shall not cancel a tender unless the Committee and Attorney-General approve the cancellation.

(3) A cancellation under subsection (1) shall be by notice in writing issued to the bidders and shall specify the reasons for the cancellation.

(4) The bidders in a cancelled tender shall not be entitled to compensation for any losses occasioned by the cancellation.

(5) For purposes of this section, public interest is impaired where the following circumstances exist—

- (a) the project has been overtaken by operation of law or rendered obsolete as a consequence of substantial technological change or by reason of a *force majeure* event;
- (b) there is evidence that the bids are significantly above market prices;
- (c) material governance issues have been demonstrably detected;
- (d) all evaluated tenders are non-responsive;
- (e) civil commotion, hostilities or armed conflict has arisen that renders the implementation of the project impractical; or
- (f) evidence of commission of an offence under the Anti-Corruption and Economic Crimes Act, 2003 or the Proceeds of Crime and Anti-Money Laundering Act, 2009.

No. 3 of 2003.
No. 9 of 2009.

62. The Cabinet Secretary responsible for a contracting authority that enters into a project agreement with a private party under this Act in respect of the exploitation of natural resources shall submit the project to Parliament for approval in accordance with Article 71 of the Constitution and the relevant written law relating to the exploitation, conservation or management of the natural resource.

Agreements to be ratified by Parliament.

PART VI—PUBLIC PRIVATE PARTNERSHIPS BY COUNTY GOVERNMENTS

63. (1) A county government may enter into a public private partnership agreement with a private party to undertake a public private partnership project in accordance with this Part.

Project agreements by county governments.

(2) A county government that enters into a public private partnership agreement with a private party shall be responsible for the administration of the overall project development cycle.

(3) A county government intending to undertake a public private partnership project shall subject the project to a detailed feasibility study in accordance with section 32.

(4) A county government intending to undertake a public private partnership project shall liaise with the Directorate during each phase of the project.

(5) A county government intending to undertake a public private partnership project shall obtain the written approval to undertake the project from the Committee and Cabinet Secretary responsible for matters relating to finance where the feasibility study under subsection (3) shows that the project—

- (a) shall require a government support measure; or
- (b) exceeds the fiscal ability of the county government to implement the project.

(6) Each county government shall submit to the Directorate all feasibility studies prepared under subsection (3).

64. (1) Subject to section 63 (5), each county government intending to undertake a public private partnership project shall obtain the approval of the respective county assembly before undertaking the project.

Approval by county assemblies.

(2) Where a public private partnership project by a county government requires a government support measure, the county government shall not undertake the project or enter into a project agreement before obtaining the written approval of the Cabinet Secretary.

65. A county government or county corporation that intends to implement public private partnership projects under this Act, shall submit a list of the projects to the Directorate.

County project lists.

66. The provisions of Part V shall apply, with the necessary modifications, to public private partnership projects by county governments.

Part V to apply.

PART VII—PROJECT COMPANIES, DISCLOSURES AND PROJECT AGREEMENTS

67. (1) On the execution of a project agreement, the contracting authority and successful bidder shall establish a project company in accordance with the Companies Act, 2015 for the purpose of undertaking the project.

Project companies.

No. 17 of 2015.

(2) A project company established under subsection (1)—

- (a) may include a public entity as a minority shareholder in the company; and
- (b) shall provide such performance security and fulfil such conditions as may be specified in the project agreement and prescribed by the Cabinet Secretary in accordance with Regulations made under this Act.

(3) The directors of a project company shall not wind up the company, alter the legal structure or reduce the share capital of the company without the written approval of the contracting authority, which approval shall not be unreasonably withheld.

(4) A majority shareholder of a project company shall not transfer any shares held in the project company or permit the dilution of its majority stake in the project company to a point where the shareholder loses such majority standing before the issuance by the contracting authority of a certificate confirming the contracting authority's acceptance of the quality of the project undertaken in accordance with the project agreement.

(5) Notwithstanding subsection (4), any party to a project agreement may, with the approval of the Cabinet Secretary, restructure the project company's shareholding as may be necessary to secure the equity component of a transaction:

Provided that the restructuring of the project company's shareholding shall not—

- (a) alter the overall split between debt and equity approved under the project agreement; and
- (b) dilute the majority position of the lead member of a consortium within the shareholding structures of the project company.

(6) Notwithstanding the provisions of the Companies Act, 2015, where the transfer of shares results in the transfer of control of a project company to a third party, the transfer shall not be valid unless the shareholder has applied for, and obtained, the written approval of the contracting authority.

(7) A project company shall not pledge its shares except for the purpose of financing the project.

(8) In granting approvals under this section, the Cabinet Secretary shall, on the recommendation of the Committee, do so, but may also decline to issue an approval if there are reasonable grounds to determine that the requested shareholding alterations would impair the assurance of delivery of the public facility or service.

(9) The Cabinet Secretary shall, in consultation with the Directorate, make Regulations for the better implementation of this section.

68. (1) A contracting authority shall, on the execution of a project agreement, publish in at least two newspapers of national circulation and electronic media the results of the tender and the following information—

Publishing information on execution of project agreements.

- (a) the nature of the project and key terms of the project agreement;
- (b) the works to be developed or public services to be performed under the project;
- (c) the successful bidder;
- (d) the amount of any public funds committed to the project;
- (e) the project tariff, if applicable;
- (f) any government support measures provided to the project;
- (g) the social and economic benefits of the project;
- (h) the duration of the project;
- (i) the expected asset quality when the project is handed back to the contracting authority; and
- (j) the manner in which the project will be monitored and reported on during the duration of the project.

(2) The Directorate may prescribe the manner in which the contracting authority shall publish the information specified in subsection (1).

(3) The Cabinet Secretary shall, in consultation with the Directorate, make Regulations for the better implementation of this section.

69. (1) The parties to a project agreement under this Act shall specify the minimum obligations to be met by the parties as set out in the Third Schedule.

Minimum obligations of parties to a project agreement.

(2) The Cabinet Secretary may make Regulations specifying the manner in which project agreements shall be drawn.

70. (1) Project agreements under this Act shall be subject to the provisions of the Laws of Kenya and any provision in a project agreement to the contrary shall be void.

Applicable law.

(2) The parties to a project agreement may agree to resolve any disputes arising under the project agreement through arbitration or any other non-judicial means of dispute resolution as may be provided for in the project agreement in accordance with paragraph 18 of the Third Schedule.

71. (1) A party to a project agreement intending to make any amendment or variation to the agreement in relation to the terms and conditions specified therein, the outputs of a project or any waivers specified in the agreement, may enter into negotiations with the other party on the proposed amendment, variation or waiver:

Amendment and variation of project agreements.

Provided that the amendment, variation or waiver shall not take effect unless it is approved by the Committee and Attorney-General.

(2) An amendment, variation or waiver to a project agreement under subsection (1) shall not be approved unless it is demonstrated that the agreement, if so amended or varied or provision waived, shall ensure—

- (a) the project shall continue to provide value for money;
- (b) the project shall continue to be affordable as verified by the Directorate, where such amendment, variation or waiver has financial implications;
- (c) the continued transfer of appropriate risks to the private party;
- (d) the continued provision of efficient and effective public services; and

(e) the continued protection and preservation of the environment.

(3) Any approval under subsection (2) shall be in writing.

72. (1) A contracting authority that is party to a project agreement shall, together with sector regulators, and with the guidance of the Directorate, establish and implement a contract management framework for the project agreement for the purpose of—

Project
management.

- (a) monitoring the implementation of the project agreement;
- (b) measuring the output of the project;
- (c) liaising with the other party to the agreement, users of the facility or service and other relevant stakeholders;
- (d) overseeing the management of the project agreement;
- (e) preparing periodic reports on project implementation;
- (f) submitting reports on project implementation to the Directorate;
- (g) implementing the recommendations and guidelines relevant hereto issued under the Act;
- (h) submitting of such information as may be required by the Directorate with respect to project oversight; and
- (i) submitting of such information as may be required by the Public Debt Management Office with respect to contingent liability management.

(2) The project parties shall, in co-ordination with the Directorate, appoint an independent expert to manage the implementation of the project agreement under such terms as the Directorate shall prescribe.

(3) The cost of hiring an independent expert under subsection (2) shall form part of the project cost to be borne by the private party.

(4) A project agreement involving the performance of a function of a contracting authority by a private party shall

not divest the contracting authority of the responsibility for ensuring that the function is effectively and efficiently performed.

(5) A project agreement involving the use of a contracting authority's assets by a private party shall not divest the contracting authority of the responsibility of ensuring that the assets are protected against factors which may negatively affect the assets including forfeiture, theft, loss and wastage.

(6) The Directorate shall monitor and provide necessary guidance to contracting authorities on the implementation of each project under this Act.

(7) Where the Directorate determines in accordance with this section and section 71 that there has arisen an imbalance in the distribution of benefits, and for the purpose of promoting the sustained transfer of project-linked economic benefits to the citizens of Kenya, the Directorate shall, in consultation with contracting authority, initiate the amendment or variation of the project agreement in accordance with section 71.

(8) Sector regulatory authorities shall monitor the performance of contracting authorities and private parties in the implementation of projects under this Act in accordance with the Regulations prescribed by the Cabinet Secretary under this Act.

73. (1) A contracting authority may, on the request of the project company, second to the company such number of employees as may be necessary for the purposes of the undertaking a project under this Act.

Secondment of employees of contracting authority.

(2) An employee seconded to the project company shall, during the period of secondment, be deemed to be an employee of the company and shall be subject only to the direction and control of the company.

(3) An employee of the contracting authority seconded to the project company shall be seconded on the same or improved terms of service during the period of secondment.

74. (1) There is established a committee to be known as the Petition Committee which shall hear and determine petitions regarding any decision by the Committee, Directorate or a contracting authority under this Act.

Petition Committee.

(2) The Petition Committee shall consist of the following persons appointed by the Cabinet Secretary—

- (a) the chairperson, who shall be a person qualified to be appointed as a judge of the High Court;
- (b) five other persons with such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate; and
- (c) one person, not being a member of county executive committees, and possessing such relevant knowledge and experience as the Cabinet Secretary shall consider appropriate, nominated by the Council of County Governors.

(3) The members of the Petition Committee shall hold office for a term of three years and may be eligible for re-appointment for one further term.

(4) A person who is aggrieved by a decision of the Directorate, Committee or a contracting authority regarding a tender process or project agreement may lodge a petition to review the decision with the Petition Committee in the prescribed form and after paying the prescribed fee.

(5) A petition under this section shall be made within seven days from the date of the decision of the Directorate, Committee or a contracting authority.

(6) The Petition Committee shall hear and determine the petition within twenty-eight days from the date the petition was lodged.

(7) A person aggrieved by the decision of the Petition Committee may appeal to the High Court within fourteen days from the date of the Committee's decision.

(8) The Cabinet Secretary may, by Regulations, provide for the procedure for hearing and determining a petition and the applicable fees under this section.

PART VIII—FINANCIAL PROVISIONS

75. (1) There is established the Public Private Partnership Project Facilitation Fund which shall be a financing mechanism for purposes of this Act.

Public Private
Partnership
Project
Facilitation Fund.

(2) The source of the Fund shall include—

- (a) grants, gifts, donations or other endowments accruing to the Fund;
 - (b) such levies or tariffs as may be imposed on a project;
 - (c) success fees paid by a project company under this Act;
 - (d) appropriations-in-aid;
 - (e) money which may vest in or accrue to the Fund under this Act or any other written law; and
 - (f) money from any other source as may be approved by the Cabinet Secretary.
- (3) The moneys received into the Fund shall be applied to—
- (a) support contracting authorities in the preparation phase of a project, the tendering process and project appraisal under this Act;
 - (b) support the activities of the Directorate and Committee under this Act; and
 - (c) extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government.
- (4) The management of the Fund shall be in accordance with Regulations made by the Cabinet Secretary in accordance with the Public Finance Management Act, 2012.

No. 18 of 2012.

76. (1) The project company or the private party to a project agreement shall keep and maintain proper books of accounts and records in relation to the project.

Financial reporting, audit and project performance reports.

(2) The books of account kept and maintained under subsection (1) shall, on reasonable notice, be open for scrutiny by the contracting authority or the Directorate.

(3) The project company or the private party to a project agreement shall submit the audited financial accounts and any other information as may reasonably be required by the contracting authority or Directorate within six months after the end of each financial year.

(4) The project company shall prepare and submit project performance reports and monitoring reports to the contracting authority and Directorate within such periods as may be specified in the project agreement and in any case, at least once in each calendar year.

PART IX—MISCELLANEOUS PROVISIONS

77. (1) The parties to a project agreement shall, in the performance of project-related activities— Local content.

- (a) give priority to services provided in Kenya;
- (b) give priority to supplies manufactured in Kenya where the supplies meet the specifications applicable to the related industry;
- (c) ensure mechanisms for technology transfer locally;
- (d) optimise opportunities for trade concessions for Kenyan goods and services outside Kenya;
- (e) promote structured corporate social responsibility programmes; and
- (f) comply with local content requirements provided under any other written law and policy for the time being in force or applicable in Kenya.

(2) The Committee, on the advice of the Directorate, shall issue such guidelines, standards and practice notes on local content as shall be deemed necessary based on the priority requirements of the Kenyan economy.

78. (1) A person commits an offence if that person— Offences and penalties

- (a) obstructs or hinders a person carrying out a duty or function or exercising a power under this Act;
- (b) knowingly lies to or misleads a person carrying out a duty or function or exercising a power under this Act;
- (c) delays without justifiable cause the—
 - (i) opening or evaluation of tenders beyond the prescribed period;
 - (ii) awarding of a contract beyond the prescribed period; or

(iii) payment of contractors beyond the period specified in the project agreement and performance obligations;

- (d) unduly influences or exerts pressure on any member of an evaluation committee, or employee or agent of the Directorate or contracting authority, or the accounting officer to take a particular action which favours or tends to favour a particular party;
- (e) divulges confidential information relating to any confidential processes under this Act;
- (f) inappropriately influences tender evaluations;
- (g) commits an act that is expressly prohibited under the terms of a tender document;
- (h) signs a project agreement or otherwise a tender in contravention of this Act or Regulations made under it;
- (i) wilfully violates any provision of this Act; or
- (j) commits a fraudulent act.

(2) A person who is convicted of an offence under this section shall be liable upon conviction—

- (a) if the person is a natural person, to a fine not exceeding two million shillings or imprisonment for a term not exceeding five years, or to both;
- (b) if the person is a body corporate, to a fine not exceeding ten million shillings.

(3) In addition to the penalty prescribed by subsection (2)—

- (c) a State officer or public officer who is convicted of an offence under this section shall be liable to disciplinary action;
- (d) any other person who is not a State officer or public officer who is convicted of an offence under this section shall be barred from participating in any public private partnership project under this Act; and

(e) a body corporate shall be debarred by the Government and barred from participating in any public private partnership project under this Act.

(4) If a person or an employee or agent of a person participating in a tender process under this Act contravenes the provisions of this Act—

(a) that person, employee or agent shall be disqualified from entering into any project agreement for the project; or

(b) if the project agreement has already been entered into with that person, the contract shall be voidable at the option of the Directorate.

(5) The Directorate may lodge a complaint with the relevant professional body for the commencement of disciplinary proceedings against a person who is a member of a professional body who contravenes the provisions of this Act.

(6) The penalties imposed by a professional body pursuant to a complaint lodged under subsection (5) shall apply in addition to any penalties that may be imposed under this Act.

79. (1) A State officer or public officer shall not, directly or indirectly, participate in any tender under this Act.

Participation of State officers or public officers in tenders under this Act.

(2) This section shall apply to a State officer or public officer who uses the officer's spouse, child, or business associate or a company that officer holds shares in, or otherwise controls or directs to participate in a tender under this Act.

(3) A State officer or public officer who contravenes the provision of this section commits an offence and shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both.

80. A private party shall, on the request of a contracting authority or Directorate, grant to an agent or employee of the contracting authority or Directorate, access to the project premises, site and storage facilities as well as

Inspection of public private partnership premises, etc.

records for the purpose of conducting an inspection in accordance with the terms of a project agreement.

81. The Offences set out under Part V and the compensation and recovery of improper benefits set out under Part VI of the Anti-Corruption and Economic Crimes Act, 2003, shall apply to this Act with the necessary modifications.

Application of Part V and Part VI of No. 3 of 2003.

82. (1) The Directorate shall, not more than three months after the 30th of June in each year, prepare and submit to the Committee a report on the state of public private partnerships in Kenya.

Annual report.

(2) Notwithstanding the generality of subsection (1), the annual report shall detail the following—

- (a) the state of public private partnerships in Kenya;
- (b) the number, types and value of public private partnerships being implemented in Kenya;
- (c) the contracting authorities implementing public private partnerships in Kenya;
- (d) the Government support measures that have been given by contracting authorities and to whom;
- (e) the private parties that have been debarred or blacklisted under the Act;
- (f) the number, types and values of public private partnerships tenders that have been cancelled;
- (g) the value of contingent liabilities, if any, approved for any public private partnership; and
- (h) any other information that may be relevant.

83. (1) The Cabinet Secretary may make Regulations generally for the better carrying out of the provisions of this Act.

Regulations.

(2) The Regulations made under subsection (1) shall include regulations on—

- (a) the execution of the Committee's or Directorate's functions under this Act; and
- (b) the financing, construction, operation, equipping and maintenance of infrastructure or development projects under this Act.

(3) For the purpose of Article 94(6) of the Constitution—

- (a) the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make rules to provide for the better carrying into effect the provisions of this Act;
- (b) the authority of the Cabinet Secretary to make regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;
- (c) the principles and standards applicable to the rules made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act, 2013.

Cap. 2.

No. 23 of 2013.

PART X—SAVINGS AND TRANSITIONAL PROVISIONS

84. In this Part, unless the context otherwise requires—

Interpretation.

No. 15 of 2013.

- (a) “repealed Act” means the Public Private Partnerships Act, 2013, repealed under section 87;
- (b) “former Committee” means the Public Private Partnership Committee existing immediately before the commencement of this Act;
- (c) “former Petition Committee” means the Petition Committee existing immediately before the commencement of this Act; and
- (d) “former Unit” means the Public Private Partnership Unit existing immediately before the commencement of this Act.

85. (1) A person who, immediately before the commencement of this Act was a member of the former Committee shall, upon the commencement of this Act, be deemed to have been appointed, as a member of the Committee, under this Act for the remainder of that person’s term.

Members and staff.

(2) A person who, immediately before the commencement of this Act was a member of the former Petition Committee shall, upon the commencement of this Act, be deemed to have been appointed as a member of the Petition Committee under this Act for the remainder of that person's term.

(3) Every person who, immediately before the commencement of this Act, was a public officer of the former Unit shall, on the commencement of this Act, be deemed to be an officer of the Directorate under the same terms of contract that applied immediately before the commencement of this Act.

86. (1) Any Regulations, standards, guidelines, procedures or approvals relating to public private partnership projects made or issued by the former Committee or former Directorate before the commencement of this Act shall be deemed to have been made or issued under this Act insofar as the Regulations, standards, guidelines, procedures or approvals are not inconsistent with this Act.

Savings.

(2) Any petition that had been lodged with the former Petition Committee that had not been heard or determined at the time this Act came into force shall be deemed to have been lodged under this Act and shall be heard and determined as if it had been lodged under this Act.

(3) Any project lists that had been approved by the former Committee or Cabinet before the commencement of this Act shall be deemed to have been approved by the Committee or Cabinet, as the case may be, under this Act.

(4) Any project agreement that had been entered into by a contracting authority and a private party in accordance with the repealed Act shall be deemed to have been entered into under this Act:

Provided that any petition challenging the validity of any project agreement entered into under the repealed Act shall be heard and determined in accordance with the provisions of the repealed Act.

87. The Public Private Partnerships Act, 2013 is repealed.

Repeal.
No. 15 of 2013.

FIRST SCHEDULE

[Section 12 (1).]

**PROVISIONS AS TO THE CONDUCT OF BUSINESS AND
AFFAIRS OF THE COMMITTEE**

1. Meetings

(1) The Committee shall meet at such place in Kenya as the chairperson may determine and the meetings shall be convened by the chairperson.

(2) The Committee shall have at least four meetings in every financial year and not more than three months shall elapse between one meeting and the next meeting.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member by the Director-General of the Directorate.

(4) The chairperson may, at his or her discretion or at the written request made by at least half of the members of the Committee and within seven days of the request, convene an extraordinary meeting at such time and place that he or she may appoint.

(5) Meetings shall be presided over by the chairperson or in his or her absence by the vice-chairperson.

(6) The members of a Committee shall elect a vice-chairperson from among themselves—

- (a) at the first sitting of the Committee; and
- (b) whenever it is necessary to fill the vacancy in the office of the vice chairperson.

(7) Where the chairperson or vice-chairperson is absent, the members shall appoint from among themselves, a person to chair the meeting of the Committee.

(8) The Committee may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Committee.

2. Conflict of interest

(1) If any person has a personal or fiduciary interest in a project, proposed contract or any matter before the Committee, and is present at a meeting of the Committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the

commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under subparagraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) The Committee shall adopt a code of conduct and a conflicts of interest policy for the better administration of the affairs of the Committee.

3. Quorum

(1) Subject to subparagraph (2), the quorum of the meeting shall not be less than half of the members of the Committee.

(2) Where the persons present at a meeting of the Committee do not constitute the quorum necessary to hold a meeting under this Act or where by reason of exclusion of a member from a meeting, the number of members present falls below the quorum necessary to hold a meeting, the Committee shall postpone the consideration of the matter in question until there is a quorum.

4. Voting

A question before the Committee shall be decided by simple majority of the members present and voting and the chairperson shall, in the case of an equality of votes, have a casting vote.

5. Rules of Procedure and minutes

The Committee shall—

- (a) determine rules of procedure for the conduct of its business; and
- (b) keep minutes of its proceedings and decisions.

SECOND SCHEDULE

[Section 21.]

PUBLIC PRIVATE PARTNERSHIP ARRANGEMENTS

1. Management contract where a private party is responsible for the management and performance of a specified obligation, within well-defined specifications for a specified period of time not exceeding ten years, and the contracting authority retains ownership and control of all facilities and capital assets and properties.

2. Output performance-based contract where the private party is responsible for the operation, maintenance and management of an infrastructure facility for a specified period of time not exceeding ten years and the contracting authority retains ownership of the facility and capital assets.

3. Lease whereby the private party pays the contracting authority rent or royalties and manages, operates and maintains the facility or utilizes the leased property for the purpose of exploration, production and development of minerals and receives fees, charges or benefits from consumers for the provision of the service or sale of products for specified period of time not exceeding thirty years.

4. Brownfield Concession where contracting authority issues a contractual licence to the private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee while paying a concession fee to the contracting authority.

5. Build-Own-Operate-Transfer scheme where the private party designs, constructs, finances, operates and maintains an infrastructure facility owned by the private party for a specified time period not exceeding thirty years, or such longer period as may be agreed, after which the private party transfers the facility to the contracting authority.

6. Build-Own Operate scheme where the private party designs, finances, constructs, operates and maintains the infrastructure facility and provides services for a specified period of time.

7. Build-Operate-and-Transfer scheme where the private party finances, constructs, operates and maintains an infrastructure facility and transfers the facility to the contracting authority at the end of a specified term which shall not exceed thirty years.

8. Build-Lease-and-Transfer where the contracting authority authorizes the private party to finance and construct an infrastructure or development facility and upon its completion lease it to the contracting

authority for a specified period and upon the expiry of which the ownership of the facility automatically transfers from the private party to the contracting authority.

9. Build-Transfer-and-Operate where the private party constructs an infrastructure facility and assumes the costs and risks associated with the construction of the building and upon completion, transfers the ownership of the facility to the contracting authority and continues to operate the facility on behalf of the contracting authority.

10. Build Transfer where the private party designs, builds, and finances a public facility in exchange for payments by the contracting authority over a specified period of time, after which transfer occurs automatically to the contracting authority.

11. Develop-Operate-and-Transfer where favourable conditions external to a proposed infrastructure project by a private party are integrated into the arrangement by giving that private party the right to develop adjoining property, and enjoy the benefits the investment creates as the parties agree on condition that the private party transfers the infrastructure facility to the contracting authority within a period not exceeding thirty years from the commencement of the project and the developed property remain the property of the private party in perpetuity.

12. Rehabilitate-Operate-and-Transfer where the private party refurbishes, operates and maintains for a specified period, an existing facility at the expiry of which the private party transfers the facility to the contracting authority.

13. Rehabilitate-Own-and-Operate where an existing facility is transferred by the contracting authority to the private party to refurbish and operate it with no time limitation imposed on ownership and the private party abides by the conditions of the arrangement during the operation of the facility.

14. Annuity-based Design, Build, Finance and Operate under which a private party is authorized by a contracting authority to design, finance, construct, operate or maintain a public infrastructure facility, in exchange for which the private party receives defined annuity payments over a specified period of time, at the end of which the facility transfers back to the contracting authority automatically.

15. Joint Venture partnerships under which a contracting authority and a private party collaborate in the joint development of a public facility, and under which the contracting authority contributes by designating public assets such as land to the project, and various government support measures as the case may be, and under which the

private partner is responsible primarily for financing, construction and maintenance of the public infrastructure facility for a defined period of time not exceeding thirty years.

16. Strategic Partnerships under which a public agency sources strategic private partners to jointly develop a public investment programme under such terms as they may agree, but under which key project risks including construction, financing and operations are held by the private party, and which arrangements may have a defined end date or a defined set of parameters that support relationship adjustment over time.

17. Land Swap where a contracting authority transfers existing public land or an asset to the private party in consideration of an asset or facility that has been developed by that private party.

THIRD SCHEDULE

[Section 69.]

MINIMUM CONTRACTUAL OBLIGATIONS REQUIRED TO BE SPECIFIED IN A PROJECT AGREEMENT

1. The nature and scope of works and services that the parties shall carry out and the conditions for their implementation.
2. The rights of a contracting authority, the project company and where applicable, the lender, in relation to the project including step in rights of lenders.
3. A description of any property to be contributed by a party to the project agreement.
4. A description of any utilities to be provided in relation to the project and the responsibility thereof.
5. The ownership of the project assets, the obligations of parties related to the handover and receipt of the project site.
6. The responsibility for obtaining authorizations, permits, and approvals.
7. A description of any sharing of revenue between the contracting authority and the private party.
8. Mutual financial obligations and their relation to the funding mechanism including the requirements relating to performance bonds and guarantees.
9. The preparation and submission of financial and other reports and the carrying out of financial audits in relation to the project.
10. The product sale price or the service availability payment on which the project is based and the rules for its determination and amendment, either by an increase or decrease, as well as the indexation mechanisms to reflect inflation or changes in the interest rate, if required.
11. The means of quality assurance and quality control, and supervision as well as administrative, financial and technical monitoring of the project operation, utilization, and maintenance.
12. The extent of the right of the contracting authority to vary the conditions of the project and other obligations imposed on private party, and the basis and mechanisms of compensation for any loss resulting from such variation order.

13. The types of insurance to be taken out on the project, and the risks of its operation or utilization, executive warranties issued in favour of the contracting authority, and provisions and procedures for their release.

14. The basis of risk allocation in respect of a change in the law, unforeseeable accidents, *force majeure*, or discovery of antiquities, as the case may be, and the resultant compensation.

15. The duration of the contract.

16. Early termination events under which a party may terminate the contract prior to the expiry of the project agreement and the rights of the parties in relation to the termination.

17. The process of handing over the project on expiry or on termination of the project agreement by a party to the agreement.

18. Mechanism for dispute resolution including resolution of disputes by way of arbitration or any other amicable dispute resolution mechanism.

19. The events giving rise to compensation and the mechanisms for payment of such compensation or penalties.

20. Performance securities required when undertaking a project, the value and renewal mechanisms.

21. Appointment of independent experts.

22. Local content requirements.

23. Direct agreements and lenders rights where applicable.

24. Termination and expiry of the project agreement.

25. Obligations of, undertakings and warranties by contracting parties.

26. Cases of emergency step in by either contracting authority or lenders in case of private party default.

MEMORANDUM OF OBJECTS AND REASONS

The principal object of this Bill is to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships; to repeal the Public Private Partnerships Act, 2013; and for connected purposes.

The Bill proposes to enhance efficiency in the regulatory process of engagement of private parties and the manner in which public private partnerships are conducted so as to ensure the provision of high-quality facilities and services. It provides a comprehensive framework for the implementation of public private partnerships and addresses the gaps in the existing legal framework.

The Bill proposes timelines on key project processes and stages for a more efficient and predictable project development environment. Further, it reduces the number of oversight approvals required from the Committee in the course of project development, and delegates to the Directorate extensive operational latitudes to guide and champion project development.

Further, the Bill expands the scope of arrangements that qualify as public private partnerships and expands the scope of available procurement methods for public private partnerships by introducing direct procurement as one of the approved methods. This allows for partnerships to be procured either competitively, or single-sourced through direct procurement or Privately-Initiated Proposals. The Bill simplifies procedural elements on the conduct of feasibility studies, tender evaluations, contract negotiations and approval applications.

The Bill is expected to speed up project development by facilitating faster processing of Privately-Initiated Proposals, enabling direct negotiations through direct procurement where it is feasible as well as value engineering of open procurement options in line with the new directive to align public investment programmes into project prioritization.

PART I of the Bill (clauses 1 to 5) provides for preliminary matters including the interpretation of key terms, the object of the Act, the application of the Act and the circumstances under which the Act shall prevail over any other written law.

PART II of the Bill (clauses 6 to 19) provides for the establishment of the Public Private Partnership Committee, its composition, functions and powers. It further provides for the establishment of the Directorate of Public Private Partnerships, its staff, functions and powers. It provides for

the appointment of the Director-General, his or her qualifications and tenure.

PART III of the Bill (clauses 20 to 29) provides for the manner in which public private partnerships are undertaken. It provides for the manner in which parties enter into and execute project agreements. It also provides for the preparation and submission of project lists by contracting authorities for approval by the Directorate, the publication of approved projects, the creation of a National List by the Directorate, and the preparation of a list of prioritised projects that may be undertaken under the Act. It also provides for the determination of success fees and the cost of delivering a facility or service in relation to a project. Part III further provides for the issuance of Government support measures to cover various kinds of risks.

PART IV of the Bill (clauses 30 to 36) provides for the process of project identification and prioritization by a contracting authority. It provides for the constitution of a project implementation team to oversee the implementation phase of a project. It also provides for the carrying out and approval of a feasibility study in relation to a project and the appointment of transaction advisors by a contracting authority where it does not have the technical expertise to procure a project.

PART V of the Bill (clauses 37 to 62) outlines the procurement methods for public private partnerships including direct procurement, privately-initiated proposal and competitive bidding. It provides for the applicable procedure during the prequalification of bidders and provides for the establishment of prequalification committees by a contracting authority for this purpose. It also provides for the constitution of consortiums by bidders and the holding of competitive dialogues. This Part provides for the manner in which the evaluation of bids, negotiations, and approval processes are to be carried out. It provides for the establishment of a project company by a bidder for the carrying out of a project. It also provides for the manner in which a tender may be cancelled and the publication of information on the results of a tender process.

PART VI of the Bill (clauses 63 to 66) provides for public private partnership projects by county governments. It provides for project agreements by county governments; the approval of public private partnership projects by county assemblies; the preparation and submission of county project lists; and the application of Part V of the Act to county public private partnership projects.

Part VII of the Bill (clauses 67 to 74) provides for project agreements. It requires the establishment of project companies by the contracting authorities and private parties to undertake public private partnership

projects. It also provides for the preparation and amendment or variation of project agreements entered into by parties in relation to a project. It also provides for the implementation and management of a project as well as the establishment of a Petition Committee to determine petitions and complaints in relation to a project.

PART VIII of the Bill (clauses 75 and 76) sets out the financial provisions and provides for the establishment of a Public Private Partnership Project Facilitation Fund and the application of monies received into the fund. It also provides for the scrutiny of the financial records of a project company or private party and requires it to prepare audited accounts for submission to the relevant contracting authority.

PART IX of the Bill (clauses 77 to 83) sets out miscellaneous provisions of the Act including provision on local content; offences and penalties; a prohibition on the participation of state officers and public officers in public private partnership projects; the inspection of public private partnership premises by contracting authorities and the Directorate; the application of Parts V and VI of the Anti-Corruption and Economic Crimes Act, 2003, to public private partnerships; the preparation and submission of annual reports; and power for the Cabinet Secretary to make regulations.

PART X of the Bill (clauses 84 to 87) contains transitional and saving provisions including the repeal of the Public Private Partnerships Act, 2003; the transition of the Committee, Unit, Petition Committee, staff and subsidiary legislation made under the repealed Act.

The First Schedule contains provisions as to the conduct of the business and affairs of the Committee.

The Second Schedule provides for the public private partnership arrangements that a contracting authority may engage in with a private party.

The Third Schedule contains the minimum contractual obligations that are required to be specified in a project agreement.

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 fundamental rights and freedoms.

Statement that the Bill concerns county governments

The Bill affects the functions of the county governments within the meaning of Article 110 of 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 enactment of this Bill shall occasion additional expenditure of public funds to be provided for through the annual estimates.

Dated the 25th February, 2021.

AMOS KIMUNYA,
Leader of the Majority Party.

