

NO. 15 OF 2013

PUBLIC PRIVATE PARTNERSHIPS ACT

SUBSIDIARY LEGISLATION

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PUBLIC PRIVATE PARTNERSHIPS REGULATIONS, 2014

[L.N. 171/2014, L.N. 75/2017.]

PART I – PRELIMINARY

1. Citation.

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

2. Application.

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

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

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

[L.N. 75/2017, Sch.]

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

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

PART II — PUBLIC PRIVATE PARTNERSHIP COMMITTEE

3. Members of the Committee not being public officers.

(1) A person qualifies to be appointed as a member of the Committee under section (4) (1) (g) of the Act if that person —

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

(2) In relation to a declaration of interests —

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

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

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

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

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

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

4. Notifications by the Committee.

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

5. Sub-committees of the Committee.

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

PART III – FUNCTIONS OF THE UNIT AND NODES.

6. Copies of project agreements.

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

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

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

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

7. Nodes to undertake projects for contracting authority.

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

8. Membership of Nodes.

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

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

PART IV —PUBLIC PRIVATE PARTNERSHIPS ARRANGEMENTS

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

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

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

10. Sector diagnostic study and assessment.

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

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

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

11. Submission of project lists.

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

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

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

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

PART V — PROJECT PREPARATION AND APPRAISAL

12. Project identification selection and prioritisation.

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

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

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13. Project preparation and appraisal.

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

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

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

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

14. Feasibility study.

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

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

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

15. Value assessment report.

(1) The Committee shall publish guidelines for the preparation of —

- (a) affordability assessment;
- (b) value for money assessment; and
- (c) public sector comparator assessment.

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

- (a) sector diagnostic studies and assessments; and
- (b) feasibility study reports.

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

16. Approval of feasibility reports by the Committee.

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

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

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

PART VI — TRANSACTION ADVISORS**17. Appointment of transaction advisors.**

(1) A contracting authority may appoint a transaction advisor.

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

- (a) develop feasibility studies;
- (b) prepare bid documents;
- (c) carry out due diligence activities for projects;
- (d) structure the procurement process; and

- (e) in managing such other technical or financial matters as the contracting authority may require assistance in relation to a public private partnerships project.

18. Contracting authority responsible for procuring transaction advisor.

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

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

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

19. Direct procurement of transaction advisors.

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

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

20. Short-list of pre qualified transaction advisors.

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

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

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

21. Procurement of transaction advisors.

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

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

22. Transaction advisory services for projects not on the project list.

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

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

23. Expressions of interest for transaction advisory services.

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

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

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

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

24. Shortlisted firms to submit technical and financial proposals.

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

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

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

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

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

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

25. Evaluation team to choose best proposal.

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

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

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

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

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

26. Appeal against decision of evaluation team.

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

27. Accounting officer to invite successful bidder to sign contract.

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

PART VII — SOLICITED PROPOSALS

28. List of pre qualified persons or firms.

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

29. Invitation of requests for qualification.

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

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

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

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

30. Pre-qualification committee.

(1) The secretary of a pre-qualification committee of a contracting authority shall be appointed by the Accounting Officer and shall carry out all administrative functions related to the pre qualification committee.

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

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

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

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

31. Procedures of a pre-qualification committee.

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

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

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

32. Evaluation of applications for pre-qualification.

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

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

33. Preparation of short list of pre-qualified persons.

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

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

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

34. Alterations of the specifications of projects.

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

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

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

35. Tender documents.

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

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

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

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

36. Invitation to tender.

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

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

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

37. Pre-bid conference.

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

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

38. Alteration of tender documents.

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

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

39. Submission of bids.

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

(a) the technical bid which shall include details of the inputs required in relation to the tender specifications; and

(b) the financial bid which shall be in the form prescribed in the tender documents.

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

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

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

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

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

(a) has not been delivered to the place specified in the tender documents; or

(b) has not been delivered within the period designated in the tender document.

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

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

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

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

40. Proposal Evaluation Team.

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

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

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

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

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

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

41. Bid security.

(1) A bid security shall be —

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

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

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

42. Rejection of a bid.

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

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

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

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

43. Financial offer to be returned unopened.

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

44. Bid security to be returned.

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

45. Objection to decision of proposal evaluation team.

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

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

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

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

46. Opening of financial bids.

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

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

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

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

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

47. Evaluation scoring system.

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

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

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

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

48. Evaluation report.

(1) A proposal evaluation team shall evaluate the proposals within seven days of the opening of the technical bids.

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

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

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

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

49. Project company.

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

(2) A project company shall be a company —

- (a) that is incorporated in Kenya in accordance with the Companies Act (Cap. 486);
- (b) that is incorporated specifically to execute the project in accordance with the Act and these Regulations;
- (c) whose documents of incorporation shall incorporate the provisions of the project agreement and the tender documents;
- (d) whose shareholding arrangement is in accordance with the project agreement; and
- (e) whose shareholding arrangement shall not be altered by the shareholders except as provided in the Act.

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50. Performance security.

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

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

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

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

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

PART VIII — PRIVATELY INITIATED INVESTMENT PROPOSALS**51. Preliminary assessment of private proposals.**

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

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

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

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

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

52. Criteria for negotiating private proposals.

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

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

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

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

53. Privately initiated investment proposals.

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

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

(3) During the negotiations in relation to a privately initiated investment proposal, the Contracting authority may request from the person making the proposal—

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

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

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

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

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

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

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

PART IX —NEGOTIATIONS GENERALLY

54. Negotiations by contracting authority.

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

- (a) take all reasonable steps to prevent a conflict of interest by officers of the contracting authority;
- (b) take all reasonable step to ensure that the contracting authority obtains value for money in relation to the negotiations;
- (c) ensure that the negotiations are only held at —
 - (i) the offices of the contracting authority;
 - (ii) the registered offices of the private party; or
 - (iii) such other venue as the contracting authority may specify;
- (d) take all reasonable steps to avoid private solicitations in relation to the negotiations and where private solicitations have been made, determine whether or not to discontinue the negotiations;
- (e) determine whether or not to publish a list of bidders who may not participate in a tender on account of the bidders engaging in unacceptable conduct during negotiations;
- (f) ensure that the laws relating to public financial management, ethics and integrity of public officers are complied with at all times during the negotiations; and
- (g) take all necessary steps to prevent any impropriety in relation to the negotiations.

PART X —PROJECT AGREEMENTS

55. Bid documents and project agreements.

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

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

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

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

56. Independent experts.

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

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

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

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

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

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

57. Success fees.

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

- (a) the Unit has provided technical or other support services; or
- (b) it is necessary to defray the costs of transaction advisory services.

(2) Where a success fee is charged —

- (a) the fee shall not exceed 0.5% of the contract value of the project or 100% of the transaction advisory service provided for the project, whichever is the higher; and
- (b) the manner in which the fee shall be imposed and the amount to be imposed shall be stated explicitly in the tender documents.

(3) Where a successful bidder is required to pay a success fee, that bidder shall pay the fee, through the project company, on achieving financial closure of the project.

(4) Where a success fee is charged, that fee shall be paid into the Fund.

58. Petition Committee and secretariat of Petition Committee.

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

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

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

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

(4) The secretariat of the Petition Committee shall —

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

59. Petitions or complaints.

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

(2) The secretariat to the Petition Committee shall inform the chairperson of the Petition Committee that a petition or complaint has been received and the chairperson shall notify the Petition Committee and the petitioner or complainant of the date from when hearings will be held.

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

60. Determination of petitioner complaints.

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

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

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

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

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

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

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

PART XI — PROJECT FACILITATION FUND

- 61. *Revoked by L.N. 75/2017, Sch.*
 - 62. *Revoked by L.N. 75/2017, Sch.*
 - 63. *Revoked by L.N. 75/2017, Sch.*
 - 64. *Revoked by L.N. 75/2017, Sch.*
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PUBLIC PRIVATE PARTNERSHIPS (PROJECT FACILITATION FUND) REGULATIONS, 2017

[L.N. 75/2017.]

PART I – PRELIMINARY

1. Citation.

These Regulations may be cited as the Public Private Partnerships (Project Facilitation Fund) Regulations, 2017.

2. Interpretation

In these Regulations, unless the context otherwise requires —

"Act" means the Public Private Partnerships Act, 2013;

"approved transaction advisor" means a transaction advisor appointed by a contracting authority;

"capital subsidy" means a financial contribution to construction costs of a project whether in the form of a grant, loan, equity or other financial instrument;

"Committee" means the Public Private Partnerships Committee established under section 4 of the Act;

"Contingent Liability Reserve Account" is an account by that name opened by the Officer Administering the Fund, as a dedicated sub-account within the Fund, for the sole purpose of ensuring ready liquidity to meet contingent liability disbursement requirements of the Fund;

"eligible projects" means projects that meet the requirements provided in these Regulations for support under the Fund;

"eligible services" means services for which payments out of the Fund are supportable;

"Fund" means the Public Private Partnerships Project Facilitation Fund established under section 68 of the Act;

"funding agreement" means an agreement entered into under these Regulations as a condition precedent to disbursements from the Fund;

"funding window" means the category of support available to projects under the Fund;

"implementation" means development, procurement, construction, operation and maintenance, as well as other related activities, of a public private partnership project;

"Officer Administering the Fund" means the Officer designated as such under regulation 20;

"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 the Act;

"project" has the same meaning as assigned to it under the Act;

"recoverable land acquisition costs" means monetary advances made by the Fund to a contracting authority to support that contracting authority's shortfalls in land acquisition costs, and are refundable to the Fund by the contracting authority within the immediate next budgeting cycle, and includes the cost of land acquisition, compensation, resettlement, and environmental remediation;

"secretariat" means the secretariat established under regulation 23(1);

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"unit" means the public private partnerships unit under section 11 of the Act;

"viability gap funding" means payment that is made under these Regulations to a project whether by way of loan, grant, equity or other financial instrument to promote the financial capability of a project.

3. Object of the Fund

The object of the Fund is to provide financial support for the implementation of public private partnership projects under the Act, which may be provided in the form of grants, loans, equity, guarantees and other financial instruments as may from time to time be approved by the Cabinet Secretary.

PART II — ELIGIBILITY AND APPLICATIONS

4. Eligible projects.

The Fund shall be applied to the following purposes with respect to eligible projects under these Regulations —

- (a) support to contracting authorities' third party costs in the preparation of public private partnership projects, including settlement of transaction advisory costs;
- (b) support to the activities of the Unit;
- (c) provision of viability gap funding to projects; and
- (d) provision of a source of liquidity to meet contingent liabilities arising from a project.

5. Support to the contracting authorities

(1) In supporting contracting authorities in project preparation, the Fund may be applied to meet the cost of —

- (a) recoverable land acquisition costs;
- (b) consultancy services related to the public private partnerships programme including the conduct of sector diagnostic and studies, project proposal and feasibility studies;
- (c) conduct of tender processes including project advertisements, marketing and communications, tender documentation and due diligence;
- (d) transaction and associated advisory services; or
- (e) other project preparation activities as may be approved from time to time by the Committee.

(2) Subject to guidelines to be issued by the Committee, project preparation funding provided under paragraph (1) (c) and (d) may be recoverable.

6. Support to the unit

(1) In supporting the unit in project related activities, the Fund may be applied to fund the budget of the unit including costs relating but not limited to —

- (a) consultancy and advisory services;
- (b) capacity building programmes;
- (c) purchase of office equipment, systems and associated software;
- (d) research activities;
- (e) establishment of knowledge management systems and frameworks; or
- (f) recurrent operation and maintenance costs for the secretariat.

(2) Funding for the unit shall be approved by the Committee in accordance with these Regulations.

7. Viability gap funding

(1) In supporting the provision of viability gap funding for eligible projects, the Fund may, among others, be applied to fund —

- (a) capital grants made to a project during construction;
- (b) recoverable advances made to a contracting authority;
- (c) any other recoverable advances that may be made to a project under these regulations; or
- (d) loans, equity or other financing arrangement as may be made available to a project in accordance with a project agreement and guidelines governing the operations of the Fund.

(2) The Officer Administering the Fund shall regularly advise the Committee on new categories of viability gap funding necessary to enable the Fund to better support the objectives for which it has been established.

8. Liquidity for contingent liabilities

(1) As a source of liquidity to meet short term liquidity gaps, the Fund shall be used to meet contingent liabilities arising from the implementation of a project agreement where the liability —

- (a) cannot be handled by the National Treasury under alternative frameworks;
- (b) cannot be handled under the National Government Contingency Fund; and
- (c) does not arise from a contracted obligation of a contracting authority under a project agreement for which a budgetary allocation has been made by that contracting authority.

(2) Without prejudice to the provisions of paragraph (1) —

contingent liabilities materialising out of national government default and not recoverable from a contracting authority under a project agreement shall be eligible for settlement under the Fund and shall not be recoverable;

- (a) contingent liabilities arising out of contracting authority default under a project agreement shall remain the responsibility of the contracting authority to settle, but as a last resort in exceptional circumstances, a contracting authority may apply to the Fund for a recoverable advance in settling such liabilities; or
- (b) contingent liabilities which are neither the responsibility of a contracting authority or a private party, and which arise from the implementation of a project agreement shall be eligible for settlement under the Fund, subject to any guidelines that may for this purpose be issued from time to time by the Committee.

(3) The Officer Administering the Fund shall establish and maintain a separately designated revolving Contingent Liability Reserve Account within the Fund for the purposes of this Regulation.

(4) For purposes of paragraph (3), contracting authorities shall, in conjunction with the debt management office, submit annually to the Officer Administering the Fund estimates of contingent liability arising from their eligible projects, provided that the Fund may finance short term liquidity gaps in support of a project.

(5) For purposes of this regulation, every contracting authority shall in each financial year remit into the Fund a percentage of their estimated contingent liability funding requirements in accordance with guidelines issued by the Committee from time to time.

(6) Where payments out of the Fund are made towards satisfying materialised contingent liabilities under a project at the request of a contracting authority, the contracting authority shall refund the Fund in its immediate subsequent budget cycle.

(7) The Officer Administering the Fund shall base the annual estimates of expenditure under this Regulation on the assessment of the debt management office with respect to the amount of funds to set aside for payments in any given financial year.

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(8) The debt management office shall assess, manage and monitor all contingent liabilities arising from projects under the Act.

(9) The Committee shall adopt rules within the Fund Governance Manual for addressing default in repayment of recoverable advances with the view to promoting the sustainability of the Fund.

9. Exclusions

The following shall not be eligible for support under the Fund —

- (a) viability gap funding for privately initiated investment proposals; and
- (b) projects procured before the Act came into operation.

10. Eligibility for support under project preparation

Any application to the Fund shall satisfy the following eligibility requirements when seeking support for project preparation under the Fund —

- (a) for sector diagnostic studies and preparation of project proposal documentation, the contracting authority shall have established a node under the Act, and provided evidence of a function capable of performance by a private party;
- (b) for feasibility study preparation, evidence that the project is included in the approved list of projects under the Act, and the contracting authority engages an approved transaction advisor to undertake the study;
- (c) for land acquisition, evidence of an approved feasibility under the Act, land acquisition, compensation and resettlement plans; and
- (d) for procurement of a private party under the act, evidence of an approved feasibility study and the contracting authority engages an approved transaction advisor.

11. Eligibility for viability gap funding and contingent liability support

(1) To be eligible for viability gap funding, a project requires to have had its contingent liability requirements estimated and approved at feasibility stage, and re-estimated and re-confirmed under section 53(4) of the Act.

(2) Viability gap funding shall only be available to support project capital costs and recoverable land acquisition costs.

(3) When applying for viability gap funding and contingent liability liquidity support under the Fund, contracting authorities shall be required to provide to the Fund —

- (a) an approved feasibility study report, which approval shall include approval of contingent liability estimates in a proposed project; and
- (b) approved project report and financial risk assessment report.

(4) Where a variation to a project agreement being undertaken is implemented and the variation results in a change to the project's financial risk and contingent liability profile, the prior approval of the debt management office shall be sought and obtained to preserve the project's eligibility under these Regulations.

(5) In addition to any other requirement under these Regulations, a project shall qualify for support under the viability gap funding window of the Fund where —

- (a) it relates to a project which is based on a project agreement between a contracting authority on the one side and a private party on the other side, for delivering a project on payment of user charges;
- (b) the private party holds and controls fifty one per centum or more of the subscribed and paid up equity in the project company;
- (c) the private party was selected on the basis of open competitive bidding and is responsible for financing, construction, maintenance and operation of the project; and

(d) the project provides a service against payment of a tariff or user charge.

(6) Despite any provision in these Regulations but subject to paragraph (7), viability gap funding for any one project shall not exceed fifty per centum of the total project capital cost, whether the support is funded entirely by the Fund or co-funded by the sponsoring contracting authority.

(7) Despite paragraph (6), the Cabinet Secretary may, in exceptional circumstances, approve higher thresholds of support for any one project under the Fund.

12. Prioritization criteria

In making a determination on which of the eligible applications to the Fund should be funded, the Fund shall apply the principle of first come-first serve, and in addition the following selection criteria —

- (a) the extent to which a contracting authority is able to co-fund the requested support;
- (b) potential economic impact of the project;
- (c) potential value for money impact of the support;
- (d) equitable application of support under the Fund;
- (e) any specific requirements applying to the resources available within the Fund;
- (f) a contracting authority's compliance history under the Act and track record of effective use of the Fund support; and
- (g) quantum of the viability gap funding and its impact on the continued availability of the Fund to support other eligible projects.

13. Prior planning

Contracting authorities shall adopt prior planning strategies to support a clear and efficient budgetary process for purposes of enabling the Fund to be efficient in meeting requests for support.

14. Forms for applications

(1) A request to the Fund with respect to project preparation funding support shall be made as follows —

- (a) on a form provided by the secretariat which application shall be supported by the relevant documents; and
- (b) evidence of Committee approval of a project proposal and approval of an application for funding by a contracting authority for support by the Fund of the activity specified.

(2) A request to the Fund with respect to funding support to the Unit shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by evidence of the Unit's annual approved budget estimates.

(3) A request to the Fund with respect to viability gap funding support shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by a signed project agreement and evidence of the approved viability gap funding requirement.

(4) An application to the Fund with respect to contingent liability liquidity support shall be made as follows —

- (a) on the prescribed form;
- (b) evidence of Committee approval of the Contingent Liability Funding requirement;

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- (c) evidence that the Contingent Liability was notified to the Fund upon execution of a project agreement or as a consequence to agreement variation during project implementation; and
- (d) evidence that the Contingent Liability has materialised.

15. Disbursements

(1) Except as provided for in this Regulation, all disbursements under the Fund shall be made in accordance with the Funding Agreement.

(2) Disbursements relating to acquisition of land, compensation and resettlement shall be made to the contracting authority.

(3) Disbursements relating to obligations that are co-funded by the contracting authority shall be made to the contracting authority.

(4) Viability gap funding shall be disbursed in accordance with the disbursement schedule set out in the project agreement.

16. Funding agreement

(1) The Officer Administering the Fund shall prepare a funding agreement for each funding support provided under the Fund.

(2) The funding agreement shall be a tripartite instrument between the Fund, the contracting authority and the project company where such agreement relates to viability gap funding.

(3) The Officer Administering the Fund shall, subject to any guidelines that may from time to time be issued by the Committee, establish standards, practices and documents to be utilised in documenting financing arrangements between the Fund and all applicants, other than applications for viability gap funding.

(4) A disbursements from the Fund shall not be effected in the absence of an appropriate agreement made under this Regulation.

PART III –MANAGEMENT OF THE FUND

17. Responsibility or the Committee

(1) The Committee shall, pursuant to section 7 of the Act, oversee the operations and management of the Fund.

(2) In discharging its mandate, the Committee may delegate its functions under these Regulations to a sub-committee in accordance with section 9 of the Act.

(3) The Committee shall meet at least once in every quarter to exclusively consider matters relating to the Fund and the conduct of its business at such meetings shall be in accordance with the Act.

18. Functions of the Committee

The functions of the Committee in relation to the Fund shall Functions of the be to —

- (a) inform the Cabinet Secretary on the funding requirements for the Fund;
- (b) approve the estimates of annual revenue and expenditure of the Fund and recommend the estimates to the Cabinet Secretary for approval;
- (c) ensure that the annual estimates of revenue and expenditure for all funding window include cumulative commitments for the financial year under review;
- (d) ensure that only eligible projects are authorised for funding under these regulations;
- (e) approve all funding application for the fund;
- (f) inform the Cabinet Secretary on amounts and, timing for Exchequer transfers into the Fund;
- (g) approve and review the investments of surplus funds in the fund; and
- (h) advise the Cabinet Secretary on additional sources of funds for the Fund.

19. Power of the Committee

The Committee shall have power to —

- (a) authorise allocations from the Fund;
- (b) approve proposals for re-allocations of funds not earmarked for specific purposes within the Fund;
- (c) approve all operational and management procedures of the Fund;
- (d) approve the criteria for the selection and evaluation of projects for funding;
- (e) approve all reporting policies;
- (f) approve financial statements and management reports;
- (g) adopt the financial statements prepared by the Officer Administering the Fund before submission to the Auditor General; and
- (h) adopt the non-financial reports of the Fund and submit them to the Cabinet Secretary.

20. Officer Administering the Fund

The Director of the Unit shall be the Officer Administering the Fund.

21. Functions of Officers Administering the Fund

(1) The functions of the Officer Administering the Fund shall be to —

- (a) act as secretariat and technical arm of the Committee;
- (b) supervise and control the administration of the Fund
- (c) prescribe all forms and prepare all funding documentation necessary for the proper administration of the Fund;
- (d) prepare estimates of annual revenue and expenditure of the Fund relating to the public private partnerships programme and the Funds' operational expenses and submit it to the Committee for adoption;
- (e) cause to be established proper systems of control and oversight over the operations of the Fund;
- (f) advise and consult the Committee on matters relating to the administration of the Fund;
- (g) advise and consult with the Cabinet Secretary on matters relating to the administration of the Fund as may, from time to time, be necessary;
- (h) keep and maintain complete financial records of all projects supported under the Fund;
- (i) advise the Committee on trends and projections relating to the financing requirements under the Fund;
- (j) prepare non-financial performance report of the Fund and submit it to the Committee for adoption;
- (k) cause to be kept proper books of accounts and other books and records relating to the Fund and to the activities financed under the Fund;
- (l) prepare, sign and submit to the Auditor-General in respect of each financial year and within three months after the end of the financial year, a statement of accounts relating to the Fund in such form as the Public Sector Accounting Standards Board may from time to time prescribe, and in accordance with Public Finance Management Act, 2012, a copy of which statement of account shall be filed with the National Treasury, Commission on Revenue Allocation and the Controller of the Budget; and
- (m) furnish any additional information which is proper and sufficient for the proper discharge of the mandate of the Auditor-General.

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(2) The Officer Administering the Fund shall comply with the ordinary budget cycle in the preparation of estimates for the Fund, especially with regard to components supported through the Exchequer.

(3) The Officer Administering the Fund shall submit estimates of revenue and expenditure to the Cabinet Secretary each year for approval.

(4) For purposes of paragraph (3), and with respect to viability gap funding and project preparation activities, contracting authorities and the Unit shall prepare and submit to the Officer Administering the Fund estimates of project preparation funding requirements in accordance with the annual budget cycle in each year.

(5) For purposes of paragraph (3), and with respect to contingent liabilities, the debt management office shall prepare and submit to the Officer Administering the Fund estimates of contingent liability liquidity funding requirements by the thirtieth day of September in each year.

22. Powers of Officer Administering the Fund

The Officer Administering the Fund shall have power to —

- (a) access any project related data that may be required from contracting authorities in furtherance of its functions;
- (b) call for any additional information with respect to requests for payments out of the Fund; and
- (c) in consultation with the National Treasury, issue financial management guidelines relating to the Fund.

23. Secretariat support for Officer Administering the Fund

(1) The Officer Administering the Fund shall be supported by a secretariat.

(2) The secretariat shall consist of such staff from the Unit as the Officer Administering the Fund shall, in consultation with the chairperson of the Committee, consider necessary for the proper performance of its functions under these Regulations.

24. Functions of the Secretariat

The functions of the Secretariat shall be to —

- (a) provide support to the Officer Administering the Fund in the discharge of its functions;
- (b) notify every eligible contracting authority of the Fund and the Fund's mandate;
- (c) develop and publish, with the approval of the Committee, standardised documentation requirements for use in making applications to the Fund;
- (d) develop and publish, with the approval of the Committee, guidelines and procedures for making and processing applications made under the Fund by contracting authorities and the Unit;
- (e) prepare all funding agreements and documentation necessary to effectuate disbursements from the Fund;
- (f) ensure that every applicant that has received an allocation from the Fund reports to the Officer Administering the Fund every six months, or within such other frequency as set out in the documents executed for the funding, on the use of the allocation; and
- (g) monitor the progress of projects that have received an allocation from the Fund.

PART IV — FINANCIAL PROVISIONS

25. Accounts of the Fund

(1) The Officer Administering the Fund shall cause accounts in the name of the Fund to be opened and maintained for the Fund in a bank within Kenya, in accordance with any financial management rules that for the time being govern public funds in Kenya.

(2) All monies payable into the Fund shall be received into the relevant bank account of the Fund, in accordance with the funding windows under these Regulations.

(3) The Fund's accounts shall be operated by the Officer Administering the Fund and two other persons from the Secretariat.

26. Payments into the Fund

(1) Upon opening of the accounts of the Fund pursuant to regulation 25, the Cabinet Secretary shall cause to be paid into the Fund such amounts of money as the Cabinet Secretary shall determine, with the view to operationalizing the Fund.

(2) For each financial year, amounts appropriated by Parliament shall be paid into the Fund on a quarterly basis.

(3) The earnings of, or accruals to the Fund shall be retained in the Fund, and shall be spent only for the purposes for which the Fund is established.

27. Withdrawals from the Fund

(1) Withdrawals from the Fund shall only be for purposes of payment of approved obligations of the Fund.

(2) The Officer Administering the Fund shall ensure the accounts of the Fund are not overdrawn at any time.

28. Records

The records of expenditure relating to the Fund shall be kept and maintained in accordance with the provisions of the Public Finance Management Act, 2012 (No. 18 of 2012.)

29. Financial and procurement Regulations

In addition to these Regulations, the Fund shall conform to the requirements of all other applicable public financial management laws and regulations for the time being in operation.

PART V — MISCELLANEOUS AND TRANSITIONAL PROVISIONS

30. Publication

The Officer Administering the Fund shall publish annually on its website the following minimum categories of information —

- (a) the amount and source of money received into the Fund, divided by each funding window;
- (b) total number of projects supported under each window of the Fund provided by the sector and region; and
- (c) any information specifically required to be published in accordance with the requests of the partners supporting the Fund.

31. Review on the performance of the Fund

(1) The Cabinet Secretary shall at the lapse of ten years from the date of commencement of these Regulations cause a review to be conducted on the performance of the Fund in accordance with the requirements of the Public Finance Management Act, 2012 (No. 18 of 2012).

(2) The review shall determine whether the Fund has met the objectives for which it was established.

(3) The report on the review shall be submitted to the Cabinet for approval.

32. Winding up of the Fund

(1) The Cabinet Secretary may wind up the Fund with the approval of the National Assembly where the Cabinet Secretary considers that the Fund has successfully completed the specific objective for which it was established.

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(2) On the winding up of the Fund —

the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the National Government;

- (a) the Cabinet Secretary shall pay any deficit into the Fund from funds of the National Government in the National Exchequer Account with the approval of the National Assembly;
- (b) assets other than cash of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to finance; and
- (c) if at the time of winding up of the Fund there are outstanding obligations, such obligations shall be transferred to the National Treasury.

(3) The Cabinet Secretary shall submit a final statement of accounts to Parliament and to the Auditor-General for audit within nine months from the date of the decision to wind up the Fund.

33. Projects concluded outside of the Act

(1) Contingent liabilities arising from projects that were initiated and concluded outside of the Act, but for which project agreements are subsisting as at the date of effectiveness of these Regulations shall be eligible for liquidity support as prescribed under these Regulations, subject to contracting authorities submitting to the Officer Administering the Fund the following documents within three calendar months from the date of effectiveness —

- (a) a copy of the signed project agreement;
- (b) a copy of the project feasibility study report; and
- (c) a copy of the project's approved financial model.

(2) Submissions outside of the timelines provided in this Regulation shall not be accepted by the Officer Administering the Fund.

34. Amendment of L. N 171 of 2014

The Public Private Partnership Regulations, 2014 are amended in the provisions specified in the first column of the Schedule, in the manner respectively specified in the second column of the Schedule.

SCHEDULE

<i>Regulation</i>	<i>Amendment</i>
2 (2) (a)	Delete the word "more" appearing immediately before the words "than eighty-five million shillings" and substitute thereof with the word "less".
2 (2) (b)	Delete the word "more" appearing immediately before the words "than five million shillings" and substitute thereof with the word "less".
2 (2) (c)	Delete the word "more" appearing immediately before the words "than five million shillings being life cycle costs" and substitute thereof with the word "less".
61	revoked
62	revoked
63	revoked
64	revoked

