SPECIAL ISSUE

Kenya Gazette Supplement No. 27 (Acts No. 15)

NATIONAL COUNCIL FOR LAW REPORTING LIBRARY

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

ACTS, 2013

NAIROBI, 25th January, 2013

CONTENT

Act—

PAGE

The Public Private Partnerships Act, 2013 307

NATIONAL COUNCIL FOR LAW REPORTING
RECEIVED
11 MAR 2013
P. O. Box 10443 - 00100
NAIROBI, KENYA
TEL: 2719231 FAX: 2712694

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013

No. 15 of 2013

Date of Assent: 14th January, 2013

Commencement Date: See Section 1

ARRANGEMENT OF SECTIONS

Section

PART 1 - PRELIMINARY

1—Short title and commencement.

2—Interpretation.

3—Application.

PART II – ESTABLISHMENT OF THE PUBLIC PRIVATE PARTNERSHIP COMMITTEE

4— Establishment of the Public Private Partnership Committee.

5—Terms and conditions of service.

6—Vacation of office of member.

7—Functions of the Committee.

8—Powers of the Committee.

9—Delegation by the Committee.

10—Conduct of affairs of the business of the Committee.

PART III – ESTABLISHMENT OF THE PUBLIC PRIVATE PARTNERSHIP UNIT

11—Public private partnership unit.

12—Composition of the unit.

13—Vacation of office of Director and members of the unit.

14—Functions of the unit.

15—Rules for the framework of the unit.

PART IV–ESTABLISHMENT OF PUBLIC PRIVATE PARTNERSHIP NODES

16—Establishment of a node.

17—Functions of a node.

PART V – PUBLIC PRIVATE PARTNERSHIPS

18—Entering into a project agreement.

19—Public private partnership arrangements.

20—Sector diagnostic study and assessment.

21—Duration of a public private partnership.

22—Execution of a project agreement.

23—Submission of project lists.

24—Approval of projects by the Committee and Cabinet.

25—Publication of approved projects.

26—Prequalification procedures by contracting authority.

27—Guarantee or letter of comfort by the Government.
28—Price setting and success fees.

PART VI – PROJECT IDENTIFICATION AND SELECTION OF PRIVATE PARTY

29—Procurement through competitive bidding process.
30—Issuance of guidelines.
31— Project identification, selection and prioritization.
32— Project preparation and appraisal.
33—Feasibility study.
34–Report.
35—Approval of feasibility report by Committee.
36—Assessment of contracting authority's technical expertise to procure services.

PART VII – SOLICITED BIDS

37—Invitation of requests for qualification.
38—Qualification of private party.
39—Prequalification committee.
40—Disqualification of a private party.
41— Preliminary bidders meeting.
42—Alteration of specifications.
43— Invitation to bid.
44–Submission of bids.
45–Competitive dialogue.
46 – Bidding by a consortium.
47—Evaluation of technical bids.
48— Evaluation of financial bids.
49— Preparation of evaluation report.
50— Non-restriction on use of innovation.
51— Non-compliance by a bidder.
52—Negotiations.

53— Preparation and submission of project and risk assessment report.
54— Submission of memorandum to Cabinet for approval.
55— Ratification of projects for the exploitation of natural resources.
56— Approval of project.
57—Execution of a contract.
58—Cancellation of tender.
59—Establishment of project company.
60—Publishing information upon execution of project agreement.

PART VIII - PRIVATELY INITIATED INVESTMENT PROPOSALS

61—Non-compete process: Privately initiated investment proposal.

PART IX – PROJECT AGREEMENTS

62—Substantive provisions of a project agreement.
63—Applicable law.
64—Amendment and variation of project agreements.
65—Project management.
66—Secondment of employees of contracting authority to project company.
67—Petitions.

PART X – FINANCIAL PROVISIONS

68—Establishment of Project Facilitation Fund.

69—Financial reporting and audit.

PART XI – MISCELLANEOUS PROVISIONS

70— Inspection of public private partnership premises etc.

71— Regulations.

PART XII – SAVINGS AND TRANSITIONAL PROVISIONS

72— Interpretation.

73—Existing laws.

74— Staff.

75— Savings.

76— Amendments to Cap. 485 C.

77 – Amendment to Cap. 407.

78 – Amendment to Act No. 5 of 2005.

SCHEDULES

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 ACT, 2013

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 of the Government through concession or other contractual arrangements; the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects and for connected purposes

ENACTED by the Parliament of Kenya, as follows -

PART I – PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Public Private Partnerships Act, 2013 and shall come into operation on such date as the Cabinet Secretary may by notice in the Gazette, appoint, which date shall not be later than thirty days from the date of assent.

Interpretation.

2. (1) In this Act, unless the context otherwise requires-

"affordability" means that-

(a) the financial commitments to be incurred by a contracting authority in terms of a project agreement can 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:

Provided that the commitment shall be sustainable and shall not impose an unreasonable burden to the contracting authority; 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 4;

"concession" means a contractual licence formalised by a project agreement, which may be linked to a separate interest or right over real property, 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 State department, agency, state corporation or county government which intends to have a function undertaken by it performed 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;

"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;

"node" means a public private partnership node established by a contracting authority under section 16;

"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 investment proposal" means a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a 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, modernisation, 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 appraisal team" means a project appraisal team constituted under section 32;

"project company" means a special purpose vehicle company incorporated by a successful bidder under section 59 for the purpose of undertaking a project in accordance with a project agreement executed by the parties under this Act;

"proposal evaluation team" means a proposal evaluation team constituted under section 47;

"public private partnership" means an 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; and

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

"public private partnership agreement" means a contract concluded between the contracting authority and a project company under which the project company is entrusted to undertake a project;

"special purpose vehicle" means a company incorporated in Kenya by the successful bidder, the sole purpose of which shall be to execute the public private partnership contract awarded;

"transaction advisor" means a person appointed in

writing by a contracting authority who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership, including the preparation, accession and conclusion of a project agreement and the financial close;

"unit" means the public private partnerships unit established under section 11;

"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;

"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.

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression "Cabinet Secretary" and "State department" shall be construed to mean "Minister" and "Ministry" respectively.

pplication.

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

PART II – ESTABLISHMENT OF THE PUBLIC PRIVATE PARTNERSHIP COMMITTEE

stablishment of e Public Private rtnership ommittee.

4.(1) There is established a Committee to be known as the Public Private Partnership Committee which shall consist of-

(a) the Principal Secretary in the State department for the time being responsible for matters relating to finance who shall be the chairperson to the Committee;

(b) the Principal Secretary in the State

department for the time being responsible for the co-ordination of Government functions;

(c) the Principal Secretary in the State department for the time being responsible for matters relating to national planning;

(d) the Principal Secretary in the State department for the time being responsible for matters relating to lands;

(e) the Principal Secretary in the State department for the time being responsible for matters relating to county government;

(f) the Attorney General or a person deputized by him in writing;

(g) four persons not being public officers, who shall be appointed by the Cabinet Secretary; and

(h) the Director appointed under section 12, who shall be the secretary to the Committee.

(2) The persons under subsection (1)(g) shall hold office for a term of five years renewable for one further term.

(3) A person shall be qualified for appointment under subsection (1)(g) if that person-

(a) holds a degree from a university recognized in Kenya; and

(b) has at least ten years professional experience in the relevant field.

(4) The Committee shall be the successor to the Public Private Partnership Steering Committee existing immediately before the commencement of this Act and all rights and obligations which, immediately before the commencement of this Act, were vested in or imposed on the Public Private Partnership Steering Committee shall by virtue of this section, be deemed to be the rights and

obligations of the Committee.

Terms and conditions of service.

5. The members of the Committee shall be paid such allowances as the Cabinet Secretary shall determine in consultation with the Salaries and Remuneration Commission.

Vacation of office of member.

6. (1) The office of a member of the Committee appointed under section 4 (1) (g) shall become vacant if the member-

(a) is adjudged bankrupt;

(b) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;

(c) is convicted of an offence involving fraud or dishonesty;

(d) is absent, without reasonable cause, from three consecutive meetings of the Committee;

(e) resigns in writing addressed to the Cabinet Secretary;

(f) is removed from office by the Cabinet Secretary for -

(i) being unable to perform the functions of his office by reason of mental or physical infirmity; or

(ii) failing to declare his interest in any matter being considered or to be considered by the Committee; or

(g) dies.

(2) Before the removal of a member under subsection (1)(f), the Cabinet Secretary shall request the Committee to-

(a) investigate the circumstances giving rise to the proposed removal; and

(b) make recommendations on whether or not the member should be removed from office.

Functions of the Committee.

7. The functions of the Committee are to –

(a) ensure that each project agreement is consistent with the provisions of this Act;

(b) formulate policy guidelines on public private partnerships;

(c) ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships;

(d) approve project proposals submitted to it by a contracting authority;

(e) approve project lists submitted to it in under section 24;

(f) authorise allocations from the Fund established under section 68;

(g) formulate or approve standards, guidelines and procedures for awarding contracts and standardized bid documents;

(h) examine and approve the feasibility study conducted by a contracting authority under this Act;

(i) review the legal, institutional and regulatory framework of public private partnerships;

(j) approve the organisational structure of the unit;

(k) oversee the monitoring and evaluation by contracting authorities, of a public private partnership from the commencement to the post completion stage;

(l) ensure approval of, and fiscal accountability in the management of, financial and any other form of support granted by the Government in the implementation of projects under this Act;

(m) ensure the efficient implementation of any project agreement entered into by contracting authorities; and

(n) perform any other function as may be conferred on it by this Act or any other written law.

Powers of the Committee.

8. The Committee shall have all the powers necessary for the proper discharge of its functions under this Act and without prejudice to the generality of the

foregoing, shall have the power to-

(a) oversee the implementation of policies formulated under section 7(b);

(b) require any information from any party to a project on any matter relating to a public private partnership; and

(c) take custody of a project agreement made under this Act and monitor compliance with the terms and conditions of the agreement.

Delegation by the Committee.

9.(1) The Committee may establish such sub-committees as it may consider necessary for the better performance of its functions and the exercise of its powers under this Act.

(2) The Committee may co-opt into the membership of a sub-committee established under subsection (1), such persons whose knowledge and skills are found necessary for the performance of the functions of the sub-committee.

(3) The Committee may, by resolution either generally or in any particular case, delegate to any sub-committee or to any member, officer, employee or agent of the Committee, the exercise of any of the powers or the performance of any of the functions of the Committee under this Act or under any other written law.

Conduct of affairs of the business of the Committee.

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

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

PART III - ESTABLISHMENT OF THE PUBLIC PRIVATE PARTNERSHIPS UNIT

Public private partnerships unit.

11. There is established, within the State department responsible for matters relating to finance, a unit to be known as the public private partnerships unit.

Composition of the unit.

12. (1) The unit shall consist of-

(a) a Director; and

(b) such staff as the Cabinet Secretary may, in consultation with the Director, consider necessary for the performance of the functions

of the unit under this Act.

(2) The Director and staff of the unit shall be competitively recruited and appointed on such terms and conditions as Cabinet Secretary shall, in consultation with the Salaries and Remuneration Commission determine.

(3) A person shall be qualified for appointment as the Director of the unit if such person-

(a) holds a degree from a university recognized in Kenya in any of the following fields-

(i) finance;

(ii) economics;

(iii) engineering; or

(iv) law; and

(b) has at least ten years professional experience in the relevant field.

(4) The appointment of the Director under subsection (1) shall be by notice in the Gazette for a term of five years and shall be eligible for re-appointment for one further term.

Vacation of office of Director and members of the unit.

13. (1) The office of the Director and members of the unit shall become vacant if the member-

(a) is adjudged bankrupt;

(b) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;

(c) resigns in writing addressed to the Committee;

(d) is removed from office by the Committee for –

(i) being unable to perform the functions of his office by reason of mental or physical infirmity; or

(ii) failing to declare his interest in any matter being considered or to be considered by the unit or the Committee; or

(e) fails to perform his or her duties in accordance with the terms and conditions of appointment; or

(f) dies.

(2) Before the removal of a member under subsection (1), the Committee shall request the unit to-

(a) investigate the circumstances giving rise to the proposed removal; and

(b) make recommendations on whether or not the member should be removed from office.

Functions of the unit.

14. (1) The functions of the unit are to -

(a) serve as the secretariat and technical arm of the Committee; and

(b) provide technical, financial and legal expertise to the Committee and any node established under this Act.

(2) In the performance of its functions under subsection (1), the unit shall–

(a) serve as a resource centre on matters relating to public private partnerships;

(b) conduct civic education to promote the awareness and understanding of the public private partnerships process amongst stakeholders;

(c) provide capacity building to, and advise contracting authorities or other parties involved in the planning, co-ordinating, undertaking or monitoring of projects under this Act;

(d) rate, compile and maintain an inventory of public private partnership projects that are highly rated and which are likely to attract private sector investment;

(e) develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects;

(f) conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships;

(g) collate, analyse and disseminate information

including data on the contingent liabilities of the Government in relation to a project;

(h) make recommendations on the approval or rejection of projects prior to submission to the Committee for approval;

(i) assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritise, appraise, evaluate and negotiate projects;

(j) maintain a record of all project documentation;

(k) review and assess requests for Government support in relation to a project and advise the Committee on the support that should be accorded in relation to the project;

(l) assist the Committee in formulating guidelines and standard documentation required under this Act;

(m) liaise with and assist the contracting authorities in their roles in the various stages of a project cycle;

(n) ensure that the tendering process relating to a project conforms to this Act and to procurement best practices;

(o) put in place measures to eliminate constraints limiting the realisation of benefits expected from a public private partnership;

(p) monitor contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance; and

(q) carry out such other functions as may be conferred on it by the Committee and this Act.

(3) The unit shall prepare financial accounts and an inventory of any monies allocated to it, any financial support received by it and any success fees received by it from a private party or project company as the case may be, under this Act.

Rules for framework of the unit.

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

PART IV - ESTABLISHMENT OF PUBLIC PRIVATE PARTNERSHIP NODES

Establishment of a node.

16. (1) A contracting authority that intends to enter into a public private partnership arrangement with a private party shall establish a public private partnership node.

(2) A node established under subsection (1) shall be headed by the accounting officer of the contracting authority and shall consist of such financial, technical, procurement and legal personnel as that authority shall, in consultation with the unit, consider necessary for the performance of its functions in relation to a project under this Act.

Functions of a node.

17.(1) A node shall, on behalf of the contracting authority -

(a) identify, screen and prioritize projects based on guidelines issued by the Committee;

(b) prepare and appraise each project agreement to ensure its legal, regulatory, social, economic and commercial viability;

(c) ensure that the parties to a project agreement comply with the provisions of this Act;

(d) undertake the tendering process in accordance with this Act and any other written law;

(e) monitor the implementation of a project agreement entered into with the contracting authority;

(f) liaise with all key stakeholders during the project cycle;

(g) oversee the management of a project in accordance with the project agreement entered into by the contracting authority;

(h) submit to the unit, annual or such other period reports on project agreements entered into by the contracting authority ;

(i) maintain a record of all documentation and agreements entered into by the contracting

authority relating to a project under this Act;

(j) prepare projects in accordance with guidelines and standard documents issued by the Committee under this Act;

(k) ensure that the transfer of assets at the expiry or early termination of a project agreement is consistent with the terms and conditions of the project agreement, where the project agreement involves a transfer of assets; and

(l) carry out such other functions as may be assigned to it by the contracting authority.

(2) In performing its functions under subsection (1), a node shall report to the unit and shall –

(a) implement the recommendations and guidelines issued by the unit; and

(b) submit such information as shall be required by the unit or the Debt Management Office.

PART V – PUBLIC PRIVATE PARTNERSHIPS

Entering into a project agreement.

18.(1) A contracting authority that intends to finance, operate, equip or maintain an infrastructure facility or provide a service may enter into a project agreement with any qualified private party for the financing, construction, operation, equipping or maintenance of the infrastructure or development facility or provision of the service of the Government in accordance with the provisions of this Act

(2) A contracting authority under subsection (1) may, where it considers it appropriate, designate its assets 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.

Public private partnership arrangements.

19. Subject to the provisions of this Act, a contracting authority may enter into a public private partnership with a private party in accordance with the Second Schedule or in accordance with such other arrangement as may be approved by the Cabinet Secretary.

Sector diagnostic study and assessment.

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

(a) technical issues;

(b) legal, regulatory and technical frameworks;

(c) institutional and capacity status;

(d) commercial, financial and economic issues; and

(e) such other issues as the Cabinet Secretary may stipulate.

Duration of a public private partnership.

21. In determining the duration of a public private partnership, a contracting authority shall take into account the following factors-

(a) the provisions of any relevant written law;

(b) the life span of the technology to be employed;

(c) the investment standards that are required to be maintained by each party to the project

agreement throughout the duration of the partnership;

(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 contract; and

(f) the period of time that may be required by the parties to the partnership to-

(i) meet and maintain throughout the duration of the partnership, the service delivery standards and investment levels; and

(ii) recoup their investment.

Execution of a project agreement.

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

Submission of project lists.

23. (1) Each contracting authority shall prepare a list of projects that it intends undertake on a priority basis under this Act and shall submit the list to the unit for assessment.

(2) A contracting authority shall not submit a project list under subsection (1) unless the projects are part of the development program of that authority.

Approval of projects by the Committee and Cabinet.

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

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

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

Publication of approved projects.

25. The unit shall publish in the electronic and print media, the national priority list of projects that has been approved under section 24.

Prequalification procedures by contracting authority.

26. A contracting authority which intends to enter into a project agreement with a private party shall confirm that the private party has –

(a) the financial capacity to undertake the project;

(b) the relevant experience in undertaking projects of a similar nature; and

(c) the relevant expertise to undertake the project.

Guarantee or letter of comfort by the Government.

27. The Cabinet Secretary may, in consultation with the Debt Management Office and the Committee, where it considers it necessary to support a project and in order to reduce premiums factored for political risks, issue a guarantee, undertaking or binding letters of comfort in relation to a project.

Price setting and success fees.

28.(1) In setting the price for the purpose of determining the cost of delivering a facility or services in relation to a project under this Act, the parties to a public private partnership shall be guided by the prevailing market rates based on competition or, where it is not possible to determine the prevailing market rates, the setting of the price shall be based on the full allocation of cost of such facilities or services or on international best practices.

(2) The cost of delivering a facility or service determined under subsection (1) shall be affordable to the Government and provide value for money to the contracting authority while enabling the private party to maintain its financial integrity, attract capital, operate efficiently and compensate a private party for any assumed risk.

(3) The Committee may, where it considers it appropriate and in consultation with the unit, impose a success fee on a transaction to be paid by a successful bidder in accordance with the tender documents.

(4) The Cabinet Secretary shall make rules for determining the success fees under this section.

PART VI – PROJECT IDENTIFICATION AND SELECTION OF PRIVATE PARTY

Procurement through competitive bidding process.

29. (1) Except as otherwise provided for under this Act, all projects shall be procured through a competitive bidding process.

(2) In procuring and awarding a contract to a private party under this Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity in accordance with the guidelines made under this Act.

Issuance of guidelines.

30. The Committee shall issue guidelines for the identification, selection, pre-tender approval, tendering, negotiation, post-tender approval and monitoring processes of public private partnerships.

Project identification, selection and prioritization.

31.(1) A contracting authority which intends to implement a project through a public private partnership under this Act, together with the unit and the node, shall, subject to section 24, be responsible for conceptualizing or identifying potential projects and undertaking the preparatory and tendering process of the project.

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

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

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

Project preparation and appraisal.

32.(1) A contracting authority shall constitute a project appraisal team for the purpose of overseeing the preparation phase of the project in accordance with regulations made under this Act.

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

(3) A contracting authority shall include in the project appraisal team a member of the node established by that contracting authority under section 16 and such other persons as the authority shall consider necessary for the performance of the functions of the project appraisal team

Feasibility study.

33. (1) A contracting authority shall, in consultation with the unit and upon the approval of the project proposal by the Committee, undertake a feasibility study of the project it intends to implement under a public private partnership for the purpose of determining the viability of undertaking the project under this Act.

(2) In undertaking a feasibility study under subsection (1), a contracting authority shall consider-

(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; and

(d) the affordability, value for money and public sector comparator for the project as prescribed in the regulations made under this Act.

Report.

34. A contracting authority shall, upon conducting a feasibility study under section 33 prepare a report in the prescribed form not later than two months after the study.

Approval of feasibility report by Committee.

35. (1) The contracting authority shall submit the feasibility report prepared under section 33 to the unit for review and evaluation.

(2) The unit shall submit the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project.

(3) The unit shall submit the report together with its recommendations and the approval of the Debt Management Office to the Committee for approval.

(4) The Committee shall, in determining whether

the contracting authority should tender for a project under this Act, consider the report and the recommendations of the unit and the approval of Cabinet.

Assessment of contracting authority's technical expertise to procure services.

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

(2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall appoint a transaction advisor to assist the authority in the procurement process.

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

PART VII - SOLICITED PROPOSALS

Invitation of requests for qualification.

37.(1) A contracting authority shall, upon the approval by the Committee, invite requests for qualification by notice in at least two newspapers of national circulation and in the electronic media.

(2) A contracting authority shall, in the notice issued under subsection (1), specify the eligibility criteria of a bidder and may require bidders to provide such statements or documents as proof of their eligibility.

(3) The publication of any advertisement and the tendering process under this Part shall be undertaken by the contracting authority in consultation with the unit.

Qualification of private party.

38.(1) A person who intends to request for qualification for a project under this Act may constitute a consortium for that purpose.

(2) A person or consortium qualifies to request for qualification if the person or consortium -

(a) meets the criteria specified in the request for qualification issued by the contracting authority;

(b) has the technical capability and financial capacity to undertake the project;

(c) has the legal capacity to enter into a project agreement with the contracting authority under this Act;

(d) is not insolvent, in receivership, bankrupt or in the process of being wound up; and

(e) is not precluded by the contracting authority from entering into an agreement for the purpose of undertaking the project.

Prequalification committee.

39. (1) The contracting authority shall, upon issuing a notice under section 37, constitute a prequalification committee for the purpose of prequalifying bidders under this Part.

(2) A prequalification committee constituted under subsection (1) shall consist of a representative of the unit and the node and such technical, financial and legal experts as the contracting authority shall consider necessary.

(3) 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).

(4) The Cabinet Secretary shall make rules to regulate the prequalification process by the prequalification committee under this Part.

Disqualification of a private party.

40. (1) A prequalification committee shall consider the requests for qualification submitted to the contracting authority in accordance with the notice issued under section 37 and shortlist the qualified bidders.

(2) A prequalification committee shall disqualify a bidder if that bidder-

(a) submits false, inaccurate or incomplete information in relation to his or its qualifications;

(b) colludes, connives or is involved in any corrupt or dishonest practice;

(e) fails to meet the eligibility criteria; or

(f) 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 private party may object to the decision of the prequalification committee not to shortlist a bidder under subsection (1).

(4) An objection under subsection (3) shall be determined by the Petition Committee in accordance with section 67.

Preliminary bidders meeting.

41. (1) A contracting authority may, in consultation with the unit, hold a preliminary meeting with the bidders who are shortlisted under section 40.

(2) The contracting authority shall, during the preliminary meeting, deliberate on issues related to the project specifications and initial preliminary conditions and respond to any enquiry made by the bidders in relation to the project.

(3) Any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders.

Alteration of

42.(1) A contracting authority may alter the

specifications.

specifications of a project based on the deliberations of the preliminary meeting held under section 41.

(2) The alterations made by a contracting authority under subsection (1) shall not affect the prequalification criteria of the bidders under section 40 and shall be made prior to the issuance of an invitation to bid under section 43.

Invitation to bid.

43. (1) A contracting authority shall, in consultation with the unit, prepare an invitation to bid and tender documents in relation to a project in accordance with subsection (2) for the purpose of inviting bids.

(2) 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 a bid;

(b) specifications of the project including the technical and financial conditions that should be met by a bidder;

(c) specifications of the final product, level of services, performance indicators and such other requirements as the contracting authority and relevant regulatory bodies shall consider necessary including the safety, security and environment preservation requirements to be met by a bidder;

(d) basic terms and conditions of the project agreement including non-negotiable conditions;

(e) the criteria and method to be used in evaluating a bid;

(f) the forms and documents that are required to be filled and submitted by a bidder;

(g) the value of the bid security required to be submitted by a bidder; and

(h) the deadline and place for submission of the tender documents by a bidder.

Submission of bids.

44. (1) A bidder who intends to bid for a project under this Act shall complete and submit a technical and

financial bid and enclose each bid in a separate sealed envelope as may be specified by the contracting authority.

(2) A contracting authority shall not open the financial bid submitted by a bidder unless it has opened and approved the technical offer submitted by that bidder in accordance with section 47.

(3) The Cabinet Secretary shall make rules for the submission and opening of tender documents under this Part.

Competitive dialogue.

45. (1) A contracting authority may, in consultation with the unit and with the approval of the Committee, hold a competitive dialogue with each bidder to define the technical or financial aspects of the project in the manner prescribed under this Act.

(2) A contracting authority may require a bidder to submit to the authority, a technical and financial non-binding proposal for discussion with the authority.

(3) A competitive dialogue under subsection (1) shall be held with each bidder on the basis of equality and transparency.

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

(5) After concluding the competitive dialogue stage, the contracting authority may alter project specifications, risk matrix or structure and may re-open pre-qualification for the project, while keeping the initial pre-qualified parties qualified.

Bidding by a consortium.

46. (1) Where a bidder is a consortium constituted for the purpose of bidding for a project under this Act, the bidder shall submit the bid in the name of the consortium.

(2) A consortium under subsection (1) shall submit, together with the bid submission, proof that each member of the consortium has consented to join the consortium and participate in the bidding process.

(3) A consortium shall appoint a person from among its members to represent the consortium in any discussions held with the contracting authority and shall submit, together with its bid documents, a notice of the appointment of the representative.

(4) A person who is a member of a consortium shall not submit a bid, whether directly or indirectly or through another consortium or a company which submits a bid and in the case of a company, if that person owns a majority of the shares or has control over its management.

(5) The proposal evaluation team shall disqualify a consortium which submits a bid contrary to this section.

(6) A contracting authority may, where a member of a consortium withdraws from the consortium, disqualify that consortium from participating in the bidding process or review the terms and conditions of a project agreement entered into with the consortium.

(7) The provisions of subsection (6) shall not apply where the consortium replaces the member who withdraws with another party so as to ensure that the consortium remains eligible throughout the tender and implementation process except for construction and design criteria at the later stage of the project.

(8) Each member of a consortium which submits a bid under subsection (1) shall be bound jointly and severally by the terms and conditions of the project agreement and shall be jointly responsible for the performance of the obligations under the agreement.

Evaluation of technical bids.

47.(1) A contracting authority shall constitute a proposal evaluation team for the purpose of evaluating bids submitted to it by bidders under this Act.

(2) A proposal evaluation team constituted under subsection (1) shall consist of-

(a) at least one representative of the contracting authority nominated by the Cabinet Secretary in the relevant State department;

(b) a representative of the node established within the contracting authority;

(c) a representative from the relevant regulatory body;

(d) a representative of the unit; and

(e) a representative of the Attorney-General.

(3) The proposal evaluation team shall open and evaluate the technical bids submitted to the contracting authority under section 44 within the time and in

accordance with the procedure specified in the tender documents and rules made under section 44(3).

(4) The proposal evaluation team may constitute committees for the purpose of receiving bids and carrying out a technical and financial evaluation of the bids.

Evaluation of financial bids.

48. (1) The proposal evaluation team shall invite the bidders who have been prequalified on the basis of their technical bid under section 47 to attend a meeting for purpose of opening the bids on the financial offer.

(2) The proposal evaluation team shall evaluate the tenders on the financial bid and determine the bid that meets the requirements specified in the tender documents.

(3) In evaluating a bid under subsection (1), the proposal evaluation team shall take into account the economic advantage that would accrue to the contracting authority if the bid is accepted and the comparative balance for the financial and technical elements of the bid set out in the tender documents.

(4) The Committee shall not take part in the process of evaluating bids submitted to the contracting authority.

(5) The proposal team shall evaluate bids under this Part in accordance with regulations made by the Cabinet Secretary under this Act.

Preparation of evaluation report.

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

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

Non-restriction on use of innovation.

50. A contracting authority shall not restrict the use by a bidder of innovation with regard to the means of financing, the application of technology or the management approach that a bidder may use to deliver the procured facilities or services.

Non-compliance by a bidder.

51. A proposal evaluation team shall reject a

bidder's submission where he does not comply with the conditions and requirements specified in the tender documents or the rules made under section 44.

Negotiations.

52.(1) A contracting authority may, with the approval of the Committee-

(a) enter into negotiations with the successful bidder; and

(b) request the second ranked bidder to extend the validity of its bid pending the completion of negotiations with the successful bidder.

(2) The contracting authority shall constitute a negotiating committee consisting of-

(a) one person nominated by the unit from among its members;

(b) one person nominated by the node from among its members;

(c) such persons representing such State departments as the contracting authority may, in consultation with the unit, consider necessary; and

(d) where applicable, the transaction advisors appointed by the contracting authority under section 36.

(3) The negotiating committee shall enter into negotiations with the successful bidder on the technical and financial terms of the project agreement.

(4) The negotiations carried out under subsection (3) and the resolution of the parties to the negotiations shall not result in an increase in pricing and shall not affect the non-negotiable terms and conditions specified as non-negotiable conditions in the invitation to tender, the financial structure, or the conditions in respect of which there were no reservations raised by the bidder in the bid.

(5) The parties to a negotiation under this section shall not amend the negotiated terms and terms upon which the bid has been evaluated.

(6) Where the parties to the negotiations carried out with the successful bidder are unsuccessful, the

negotiating committee shall enter into negotiations with the second ranked bidder.

(7) The provisions of subsection (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 regulations made by the Cabinet Secretary under this Act.

Preparation and submission of project and risk assessment report.

53.(1) The negotiating committee shall, upon conducting negotiations under section 52, prepare and submit to the contracting authority, a project report specifying the negotiated terms together with its recommendations.

(2) The contracting authority shall review the project report submitted to it under subsection (1) and shall, where it is satisfied with the recommendations of the negotiating committee, submit the report to the unit.

(3) Where the unit is not satisfied with the recommendations of the negotiating committee, the contracting authority shall refer the project report back to the negotiating committee with its reasons and request for a review of the report.

(4) The unit shall review the project report submitted to it under this section and submit the report to the Debt Management Office for confirmation of its initial approval at feasibility stage based on final contract and preferred bidder submission.

Submission of memorandum to Cabinet for approval.

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

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

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

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

Ratification of projects for the exploitation of natural resources.

55. Where a concession granted under this Act is for the exploitation of natural resources under Article 71 of the Constitution, the project agreement shall be ratified by Parliament in accordance with the relevant written law.

Approval of project.

56. (1) The Committee shall, within a period of thirty days from the date of the decision of the Cabinet or Parliament as the case may be, inform the contracting authority of the decision of the Cabinet or Parliament.

(2) Where the Cabinet approves undertaking of a project or Parliament ratifies the project agreement, the contracting authority shall finalise the project agreement for execution by the parties to the project.

(3) The contracting authority shall communicate the decision of the Cabinet or Parliament as the case may be, in writing, to all bidders who participated in the bidding of the project.

Execution of a contract.

57. The contracting authority shall, where the Cabinet approves or Parliament ratifies the undertaking of a project as a public private partnership under this Act, execute the contract awarded to that bidder.

Cancellation of tender.

58.(1) A contracting authority may cancel a tender process at any time before the execution of the contract if fundamentally serious adverse consequences are likely to occur if the tender process is allowed to go on.

(2) A contracting authority shall not cancel a tender unless the Committee approves the cancellation and the proposal evaluation team submits its recommendations to the contracting authority on the cancellation of the tender.

(3) A cancellation by a contracting authority under subsection (1) shall be by notice in writing issued to the bidders of a tender advertised by the contracting authority and shall contain reasons for the cancellation of the contract by the authority.

(4) A notice issued by a contracting authority under subsection (3) shall include the reasons for the cancellation.

(5) The bidders of a tender that is cancelled under this section shall not be entitled to compensation for the cancellation of the tender.

Establishment of project company. Cap. 486.

59.(1) A successful bidder shall establish a project company in accordance with the Companies Act for the purpose of undertaking a project in accordance with a project agreement executed by the parties under section 57.

(2) A company established under subsection (1) –

(a) may include a public body as a minority shareholder in the company; and

(b) shall provide such performance security and fulfil such conditions as shall be specified in the project agreement and prescribed by the Cabinet Secretary under this Act.

(3) The directors of a project company established under subsection (1) shall not wind up the company, alter the legal structure or reduce the share capital of the company unless the directors have applied for, and obtained 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 a project company before the issuance by the contracting authority, of an acceptance certificate confirming its acceptance of the quality of the project undertaken in accordance with the project agreement executed by the parties under section 57.

(5) Notwithstanding the provisions of the Companies Act, where transfer of shares results in the transfer of the 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.

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

Publishing information upon

60.(1) A contracting authority shall, upon the

execution of project agreement.

execution of a project agreement by the parties, publish in at least two newspapers of national circulation and in the electronic media, the results of the tender together with the following information-

(a) the nature of the project;

(b) the scope of the project;

(c) the successful bidder;

(d) the project cost at net present value;

(e) the project value and tariff; and

(f) the duration of the project.

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

PART VIII - PRIVATELY INITIATED INVESTMENT PROPOSALS

Non-compete process: privately initiated investment proposals.

61.(1) A contracting authority may consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where—

(a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical:

Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority;

(b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial;

(c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or

(d) there exists any of the circumstance as the Cabinet Secretary may prescribe.

(2) A contracting authority shall, before commencing negotiations with a private party under this section –

(a) prescribe a criteria against which the outcome of negotiations shall be evaluated;

(b) submit the proposal to the unit for

consideration and recommendation;

(c) upon obtaining the recommendations of the unit, apply for and obtain approval from the Committee to negotiate the contract; and

(d) conduct the negotiations and award the tender in accordance with the prescribed process in the regulations to this Act.

(3) A contracting authority shall not consider a project for procurement under this section unless it is satisfied that-

(a) the project shall provide value for money;

(b) the project shall be affordable; and

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

PART IX – PROJECT AGREEMENTS

Substantive provisions of a project agreement.

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

(2) The Cabinet Secretary may by regulations, specify the manner in which a project agreement under this Act shall be drawn.

Applicable law.

63.(1) A project agreement entered into by a contracting authority under this Act shall be subject to the provisions of the Laws of Kenya and any provision in the agreement to the contrary shall be void.

(2) 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.

(3) Upon the approval of the Committee, it may be agreed to resolve disputes arising under the project agreement though arbitration, or any other non-judicial means of dispute resolution agreed upon in the project agreement as specified in paragraph 18 of the Third Schedule.

Amendment and variation of project agreements.

64.(1) A party who intends to make any amendment or variation to a project agreement in relation to the terms and conditions specified therein, the outputs of a project or any waivers specified in the agreement shall

apply for, and obtain the approval of the Committee.

(2) The Committee shall not approve an amendment, variation or waiver to a project agreement under subsection (1) unless it is satisfied that the agreement, if so amended or varied, shall ensure–

(a) the project continues to provide value for money;

(b) the project continues to be affordable as verified by the Debt Management Office, where such amendment, variation or waiver has a financial implication;

(c) the continued transfer of appropriate risks to the private party;

(d) the continued provision of efficient and effective service to the public; and

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

(3) The approval of the Committee under subsection (2) shall be in writing.

Project management.

65.(1) A contracting authority tnat is a party to a project agreement shall, together with sector regulators, where applicable ensure that the project agreement is properly implemented by–

(a) monitoring the implementation of the project agreement;

(b) measuring the output of the project;

(c) liaising with the private party, users of the facility or service and other relevant stakeholders;

(d) overseeing the management of the project agreement;

(e) preparing periodic reports on the project agreement implementation; and

(f) submitting reports on the project agreement implementation to the Committee in June and December in each year of the project.

(2) The contracting authority shall appoint an independent expert to manage, in consultation with the authority, the implementation of the project agreement by the parties.

(3) 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 its function is effectively and efficiently performed in the public interest or on behalf of public service.

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

(5) The Committee shall oversee the implementation of every project under this Act.

(6) The sector regulatory bodies shall play an active role in the project implementation phase through monitoring the performance of the contracting authority and the private party in accordance with the procedures prescribed by the Cabinet Secretary under this Act.

Secondment of employees of contracting authority to project company.

66. (1) A contracting authority may, upon the request by 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, on the same or improved terms of service.

(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.

Petitions.

67.(1) There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.

(2) The Petition Committee shall consist of -

(a) the chairperson who shall be a person qualified for appointment as a judge of the High Court of Kenya;

(b) four other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the unit, consider appropriate; and

(c) the unit director.

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

(4) Where a petition is based on an administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.

(5) The decision of the Committee shall be final and binding on both parties.

(6) The Cabinet Secretary may by regulations, provide for the procedure for determining a petition under subsection (1).

PART X – FINANCIAL PROVISONS

Establishment of Project Facilitation Fund.

68.(1)There is established a Fund to be known as the Public Private Partnership Project Facilitation Fund.

(2) There shall be paid into the Fund-

(a) grants and donations;

(b) such levies or tariffs as may be imposed on a project;

(c) success fees paid by a project company to the unit;

(d) appropriations-in-aid; and

(e) moneys from a source approved by the State department responsible for matters relating to finance.

(4) 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 unit under this Act;

(c) extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government;

(d) provide a source of liquidity to meet any contingent liabilities arising from a project;

and

(e) settle the transaction advisor's retainer fees.

(4) The Fund shall be administered in such a manner as the Cabinet Secretary shall prescribe.

Financial reporting and audit.

69. (1) A project company or private party shall keep proper books of accounts and records in relation to the project and shall be open for scrutiny by the contracting authority.

(2) A project company or private party shall submit the duly audited financial accounts and any other information as may reasonably be required by the contracting authority or the unit within six months after the end of each financial year.

PART XI – MISCELLANEOUS PROVISIONS

Inspection of public private partnership premises etc.

70. A private party shall, upon being requested to do so by a contracting authority, grant to an agent or employee of the authority, access to the project premises, site and storage facilities for the purpose of carrying out an inspection in accordance with the terms of the project agreement.

Regulations.

71. (1)The Cabinet Secretary, may make regulations generally for the better carrying out of functions under this Act and in particular, for prescribing–

(a) anything required to be prescribed under this Act;

(b) guidelines to be observed by a contracting authority in the entire project cycle;

(c) provide for the minimum value of investment cost and tenor for a public private partnership project less than which will not be subject to this Act;

(d) provide for the procedure of appointment of the Committee;

(e) the role of the unit and the State department responsible for finance after the execution of the project agreement by the parties;

(f) the maximum value of a performance security during the construction and

operation phases of a project; and

(g) financial and other forms of disclosure by a contracting authority under this Act.

(2) The Cabinet Secretary may –

(a) give general directions to the Committee relating to the execution of its functions under this Act; and

(b) provide policy guidelines to the Committee on the financing, construction, operation, equipping and maintenance of infrastructure or development projects under this Act.

PART XII - SAVINGS AND TRANSITIONAL PROVISIONS

Interpretation.

72. In this Part, unless the context otherwise requires, "former Committee" means the Public Private Partnership Steering Committee existing immediately before the commencement of this Act.

Existing laws.

73. Any regulations in force immediately before the commencement of this Act and applicable to public private partnerships shall, at the commencement of this Act, be deemed to be revoked.

Staff.

74.(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 under this Act for the remainder of that person's term.

(2) Every person who, immediately before the commencement of this Act, was a public officer seconded to the Public Private Partnership Secretariat shall, on the commencement of this Act, be deemed to be seconded to the unit.

Savings.

75. Any standards, guidelines, procedures or approvals relating to public private partnership projects made or issued by the former Committee before the commencement of this Act shall be deemed to have been made or issued under this Act.

Amendments to Cap. 485 C.

76. The Privatization Act is amended-

(a) in section 2 by deleting the definition of the term "privatization" and substituting therefor the following new definition-

"privatization" means a transaction or transactions that result in a transfer, other than to a public entity, of the assets of a public entity including the shares in a state corporation;

(b) in section 22 by

(i) deleting paragraph (b); and

(ii) renumbering paragraph (c) as paragraph (b);

(c) in section 24 by-

(i) deleting the words "or operations" appearing in paragraph (a); and

(ii) deleting the words "or operations" appearing in subparagraph (i);

(d) in section 25 by deleting paragraph (b); and

(e) in section 41 by deleting the word "operations" appearing in subsection (2)(a).

Amendment to Cap. 407.

77. Section 5 of the Public Roads Toll Act is amended by inserting the following new subsection immediately after subsection (3) -

"(4) Every order made under subsection (3) shall be laid before the Cabinet".

Amendment to Act No. 3 of 2005.

78. Section 92 of the Public Procurement and Disposal Act, 2005 is amended by-

(a) deleting the words "concessioning and" appearing in subsection (1); and

(b) deleting subsection (2)(a).

FIRST SCHEDULE s. 10(1)

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

Meetings.

1. (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 of the unit.

(4) The chairperson may, at his 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 and he 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.

Conflict of interest.

2. (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.

Quorum.

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

Voting.

4. 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.

Rules of Procedure and minutes

5. 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 s. 19

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 utilises 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. 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. 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.

11. 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.

12. 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.

13. 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 s. 62

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. Direct agreements and lenders rights where applicable.

23. Termination and expiry of the project agreement.

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

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