

LEGAL NOTICE NO. 38

THE PUBLIC PROCUREMENT AND DISPOSAL ACT

(No. 3 of 2005)

IN EXERCISE of the powers conferred by section 140 of the Public Procurement and Disposal Act, the Minister for Finance makes the following Regulations:—

THE PUBLIC PROCUREMENT AND DISPOSAL (PUBLIC PRIVATE PARTNERSHIPS) REGULATIONS, 2009

1. These Regulations may be cited as the Public Procurement and Disposal (Public Private Partnerships), Regulations 2008.
2. In these Regulations, unless the context otherwise requires—

Citation.

Interpretation.

“Act” means the Public Procurement and Disposal Act;

No.3 of 2005.

“affordability” means that the financial commitments to be incurred by a procuring entity in terms of public private partnership agreement can be met by funds—

- (a) designated within the procurement entity’s existing budget for its function for which the agreement relates; and
- (b) destined for the procurement entity in accordance with its relevant future budgetary allocation.

“private party ” means a party to a public private partnership agreement, other than—

- (a) a procuring entity to which the Act applies;
- (b) an enterprise or other entity controlled by one or more municipalities; or
- (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality, enterprise or entity referred to in paragraph (a) or (b).

“public private partnership” means an agreement between a procuring entity and a private party under which—

- (a) the private party undertakes to perform a public function or provide a service on behalf of the procuring entity;
- (b) the private party receives a benefit for performing the function, either by way of-
 - (i) compensation from a public fund;
 - (ii) charges or fees collected by the private party from users or customers of a service provided to them; or
 - (iii) combination of such compensation and such charges or fees.
- (c) the private party is generally liable for risks arising from the performance depending on the terms of the agreement.

“public private partnership agreement” means a written contract recording the terms of a public private partnership concluded between a procuring entity and a private party;

“procuring entity’s property” includes all movable and immovable property belonging to the procuring entity as well as intellectual property rights vested in the procuring entity;

“transaction advisor” means a person or persons appointed in writing by the procurement entity who has the appropriate skills and experience to assist and advise the procuring entity in connection with public private partnership, including the preparation and conclusion of a public private partnership agreement;

“value for money” means that the provision of the procuring entity function by a private party in terms of the public-private partnership agreement results in a net benefit to the procuring entity, defined in terms of cost, price, quality, quantity, timeliness, or risk transfer, or a combination thereof;

“public private partnership nodes” means units established by procuring entity under regulation 23 (1); and

“Steering Committee” means Public Private Partnership Steering Committee established under regulation 4.

3. (1) Subject to provisions of these Regulations and the Act, a procuring entity may enter into any of the following public private partnership arrangements—

- (a) management contract whereby a procuring entity awards a private party the responsibility to manage and perform a specific service, within well-defined specifications for a specified period of time not to exceed five years and the procuring entity retains ownership and control of all facilities and capital assets and properties;

Entering into public private partnership.

- (b) a lease whereby the private party pays the procurement entity rent and manages, operates and maintains the facility and receives fees or charges from consumers for the provision of the service for specified time not exceeding fifteen years;
- (c) a concession for a period not exceeding thirty years whereby the private party maintains, rehabilitates, upgrades and enhances the facility in question;
- (d) a Build- Own - Operate-Transfer scheme whereby a private party designs, constructs, finances, owns, operates and maintains the given infrastructure facility for a specified time period not exceeding thirty years, or such longer period as may be agreed, after which the facility is transferred to the procuring entity;
- (e) a Build-Own-Operate scheme whereby a private party designs, finances, constructs, owns, operates and maintains the infrastructure facility and provides services for an agreed time period; or
- (f) any other scheme as may be prescribed by the Public Private Partnership Steering Committee and approved by the Cabinet.

(2) Except as provided for under these Regulations all public private partnership projects shall be procured through a competitive bidding process as provided for under these Regulations or any other written relevant law.

(3) The preparation and approval process of all public private partnership agreements shall be as set out in the First Schedule.

(4) Where the procuring entity is not the Government, only the accounting officer or the accounting authority of such procuring entity may enter into a public private partnership agreement under paragraph (1) on behalf of that procuring entity.

(5) The procurement entity may where necessary consult the Minister with regard to the accounting for PPP activities and taxation aspects relevant to the project prior to issue of the invitation for bids.

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

- (a) the Permanent Secretary to the Treasury—Chairman;
- (b) the Attorney General or his representative;
- (c) the Permanent Secretary, Office of the Prime Minister;

Public Private
Partnership Steering
Committee.

- (d) Permanent Secretary for the Ministry responsible for Planning, National Development and Vision 2030;
- (e) other three members not being public servants appointed by the Minister from a list of nominees from private sector bodies approved by the Cabinet.

(2) The Public Private Partnership Secretary shall be the secretary to the Steering Committee.

5. The Steering Committee shall—

Functions of
Steering Committee.

- (a) spearhead the public private partnership process and promote understanding and awareness of PPP's among key stakeholder groups;
- (b) review challenges constraining participation or realization of full benefits expected from PPP's and formulate time bound solutions to address the challenges and to create an enabling environment;
- (c) establish public private partnership standards, guidelines and procedures including development of standard procedures for conceptualisation, identification, prioritisation, development, assessment of PPP projects and development of standardised bid documents;
- (d) review direct and indirect liabilities and assess contingent liability risk exposure of the Government and advise on the acceptable levels of direct and indirect liabilities;
- (e) ensure that all proposed public private partnership projects are consistent with the country's national priorities outlined in various policy documents;
- (f) coordinate with the Public Procurement Oversight Authority established under the Act to ensure that all tender phase activities of PPP projects conform to procurement best practices;
- (g) approve public private partnership projects submitted to the Committee in accordance with the provisions of these Regulations.

6. (1) The Steering Committee shall regulate its meetings and its own procedures and may co-opt members as it shall deem appropriate.

Meetings.

(2) The quorum of the Steering Committee meeting shall be two thirds of the members including the Chairman.

(3) The Steering Committee shall invite accounting officers responsible for the project under discussion to attend its meetings.

(4) The Steering Committee shall meet once every month or at such regular intervals as it may deem necessary.

7. There is established a Public Private Partnership Secretariat to be within the Ministry of Finance and headed by the Public Private Partnership Secretary which shall support and act as Secretariat to the Steering Committee.

Public Private
Partnership
Secretariat.

8. The Public Private Partnership Secretariat shall—

Functions of
Secretariat.

(a) serve as a resource centre for best public private partnership practice in Kenya including supporting capacity building in public partnership projects' planning, co-ordination and contract monitoring and working as the focal reference point for public private partnership advice;

(b) carry out any other functions as the Steering Committee may determine.

9. The Steering Committee shall determine the personnel of the Public Private Partnership Secretariat in consultation with the Ministry of State for Public Affairs.

Personnel of the
Public Private
Partnership
Secretariat.

10. (1) The price setting for public private partnership projects shall, to the degree possible, be based upon competition but where effective competition is not possible, prices shall be based upon fully allocated cost of service or goods determined in accordance with international best practice.

Price of service or
goods.

(2) Notwithstanding the provision of paragraph (1), the price for the public private partnership projects shall be affordable, and provide value for money for the procuring entities while allowing the private party to maintain its financial integrity, attract capital, operate efficiently and compensate investors for risks assumed.

11. (1) Where it is necessary to support private sector investments and reduce premiums factored for political risks, the Government where it is not a signatory to the agreement, may issue binding letters of comfort to private sector investors and their lenders to acknowledge the investment by the private sector, assure investors that they will be provided with reasonable assistance with acquiring authorizations and guarantee against risks arising from Government actions or omissions.

Government
investment
protection.

(2) The Steering Committee may recommend to the Minister the principles, procedures and standards for making decisions on investment protection and letters of comfort on public private partnership projects based on Cost Benefit Analysis, national priorities and available Government resources.

12. (1) In determining the duration of the public private partnership the procuring entity shall take into account the provisions of any relevant law, reasonable period required to recoup the investment, and flexibility that may be required to adapt to changes and new technologies.

Duration of the public private partnership.

(2) The duration shall ensure that the investment is economically and financially viable for the public private partnership, and the private party to meet service delivery standards and investment levels that require to be met and maintained throughout the duration of the partnership, while at the same time, being affordable and providing value for money to the procuring entity.

13. (1) When conceptualizing, identifying and prioritizing potential PPP projects, procuring entities shall consider the strategic and operational benefits of a public private partnership, compared to the continuing performance of the function by the procuring entity.

Conceptualization, identification and prioritization of Public Private Partnerships

(2) Planning for public private partnership's shall form an integral part of the national development planning whose requirements shall be presented by the Steering Committee

14. A procuring entity pursuing public private partnership projects shall ensure—

Performance indicators.

- (a) that they identify quantifiable measurable outputs that serve as the basis for project monitoring and evaluation and serve as the basis for remunerating the private party;
- (b) that contract management focuses upon monitoring the delivery and quality of service or goods rather than managing the execution of works or the delivery of goods.
- (c) that specific levels of maintenance and quality of service or goods is specified for the life of the PPP project and agreed with the private party; and
- (d) that payments are linked to specific indicators.

15. Procuring entity shall not restrict innovation with regard to the means that may include financing mechanisms, application of technologies and management approaches by which a potential private partner or a bidder may use to deliver the procured services or goods subject to the proposal being least cost and meeting the specified minimum technical requirements and delivery period.

Procuring entity not to restrict innovation.

16. (1) As soon as the procurement entity identifies a project that may be concluded as a public private partnership, the procurement entity shall, in writing, invite for prequalification or proposals from potential bidders through at least two newspapers with a national circulation and the same shall be posted on its website, if any.

Invitation for bids.

(2) In inviting bidding for pre-qualifications or proposals under paragraph (1), the procuring entity shall state the eligibility to bid for award of a public private partnership contract provided for under regulation 17 and may require bidders to provide signed statements or documentary evidence to certify their eligibility.

(3) Where a bidder is a foreigner the procurement entity shall permit the submission of equivalent documents from the relevant authorities in the bidder's country of origin and submission of statements certifying that equivalent documentation is not issued in the bidder's country of origin.

(4) All bidders shall be responsible for providing certified translations of all submitted documentation whose originals are not in English.

17. A person shall be qualified to bid for a public private partnership contract if—

Qualification criteria.

- (a) the person or the consortium members possess or have contracted persons with technical capability and necessary experience in development and operation of the facility or equipment and have access to necessary financial resources;
- (b) the person has the legal capacity to enter into a contract for the procurement;
- (c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;
- (d) the procuring entity is not precluded from entering into the contract with the person under the Act;
- (e) the person is not debarred from participating in procurement proceedings under the Act; and
- (f) the person satisfies other criteria that may be set by the Steering Committee through issued Circulars.

18. The procuring entity may only disqualify a person from bidding for a public private partnership contract where the person submits false, inaccurate or incomplete information about his qualifications, or if the person colludes, connives or is involved in fraudulent, corrupt and other dishonest practices or contravenes the provisions of the Act or any relevant provisions of a written law in order to get unfair advantage in the award of the public private partnership contract.

Disqualification of a bidder.

19. The procurement procedure shall—

Procurement procedure.

- (a) be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective; and
- (b) be for the period of not less than three months and not more than four months, unless otherwise approved by the Public

Private Partnership Steering Committee, for preparation and submission of proposals from potential bidders.

20. (1) Evaluation of public private partnership bids shall be carried out by the procurement entity in accordance only with the procedures and criteria set out in the tender documents including any margin of preference provided in the tender documents in accordance with section 39 of the Act and regulation 28(2) of the Public Procurement and Disposal Regulations.

Evaluation of bid proposals.

L.N.174 of 2006.

(2) The successful candidate shall be the bidder with the best ranked proposal based on evaluation carried out in accordance with the criteria set out in tender documents and relevant legislation provided for under paragraph (1).

(3) The evaluation shall be carried out within such period as is indicated in the tender documents, or if not indicated, a reasonable time as may be approved by the Steering Committee.

(4) After the evaluation of the bids, but prior to appointing the preferred bidder, the procuring entity shall prepare an evaluation report containing a summary of the evaluation criteria and how it was satisfied in the preferred bid in comparison to other bidders including any other relevant required information.

(5) The Steering Committee shall not be involved in the process of evaluating public private partnership bids in terms of this regulation.

21. Each public partnership contract shall clearly provide minimum contractual provisions including but not limited to—

Minimum contractual obligations.

- (a) duration of the contract;
- (b) description of services, goods or works and where the facility has to be constructed, time periods within which key milestone activities should have been completed;
- (c) payment arrangement and basis in relation to service or goods and output levels;
- (d) relationship between the procuring entity and the service provider and a clear allocation of risks and responsibilities between the procuring entity and service provider;
- (e) assessment, allocation and mitigation of risks set out in the Second Schedule;
- (f) a set of monitoring and evaluation program based on quantified and measurable outputs;
- (g) a defined method of dispute resolution;
- (h) protection where appropriate of each party's intellectual property ;

- (i) specific events that constitute a default such as the failure of a public private partnership service provider to attain the contractually prescribed quality standards by the specified date;
- (j) the remedies that may be exercised in the event of a default, such as penalties or specified liquidated damages to compensate either party for imputed costs or damages suffered as a result of default; and
- (k) relevant governing law which in this case shall be the Kenyan law.

22. (1) After the procurement procedure has been concluded but before the procuring entity concludes a public private partnership agreement the procurement entity shall obtain approval from the Steering Committee—

Contracting public private partnership agreements.

- (a) that the public private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfers;
- (b) for a management plan that explains the capacity of the procuring entity, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the public private partnership; and
- (c) that a satisfactory due diligence including a due legal diligence has been completed in respect of the procuring entity and the proposed private party in relation to matters of their respective competence and capacity to enter into the public private partnership agreement.

(2) If the Steering Committee determines that a procuring entity lacks the necessary expertise to proceed with the procurement of a public private partnership agreement, it shall require that the procuring entity appoints a transaction advisor for this purpose.

23. (1) The procuring entity that is a party to a public private partnership arrangement shall be responsible for ensuring that the PPP arrangement is properly implemented by establishing public private partnership nodes to be headed by accounting officers or a senior officers who shall be appointed within the ministry to—

Management of Public Private Partnership agreements.

- (a) measure the output of the public private partnership agreement;
- (b) monitor the implementation of the public private partnership agreement and the performances under the public private partnership agreement;

- (c) liaise with the private sector;
- (d) resolve disputes and differences within the private sector;
- (e) generally oversee the day-to-day management of the public private partnership agreement; and
- (f) report on the public private partnership agreement in the procurement entity's annual report;
- (g) carry out any other function assigned to it by procuring entity.

(2) A public private partnership agreement involving the performance of an institutional function does not divest the procuring entity of the responsibility for ensuring that its function is effectively and efficiently performed in the public interest or on behalf of public service.

(3) A public private partnership agreement involving the use of a public entity's property by the private party does not divest the procuring entity of the responsibility for ensuring that the procuring entity's property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

24. (1) Following the signing of the public private partnership agreement the procuring entity shall publish in at least one widely circulated national publication and posted on the website, if any, of the results of the public private partnership tender containing the following information-

Publishing of information after conclusion of PPP agreement.

- (a) name of the project;
- (b) winning bidder;
- (c) public private partnership price; and
- (d) duration of the public private partnership.

(2) The Steering Committee may prescribe a template to be used by the procuring entity when publishing the information under paragraph (1).

25. (1) The prior written approval of the Steering Committee shall be required for any material amendments to a public private partnership agreement including any material variations to the outputs therein, or any waivers contemplated or provided for in the public private partnership agreement.

Amendment and variation of public private partnership agreements.

(2) The Steering Committee shall approve a material amendment only if it is satisfied that the PPP agreement, if so amended, shall continue to provide—

- (a) value for money;
- (b) affordability;
- (c) substantial technical, operational and financial risk transfer to the private party; and
- (d) necessary service to the public.

26. (1) In addition to reporting requirements under any applicable law, the private party shall, within six months after the end of financial year, submit annual financial statements duly audited by a reputable auditor and any other information as it may reasonably be required to the procuring entity.

Financial reporting.

(2) The Minister may prescribe financial standards for disclosure for the public private partnership's by procuring entity.

27. All public private partnership programmes shall be audited annually in accordance with applicable law and standards.

Auditing.

28. The private party shall grant access to public private partnership premises, sites and storages as may be requested by the procuring entity for inspection in accordance with the public private partnership agreement.

Inspection of public private partnership premises etc.

29. (1) The Steering Committee shall issue standard contracts for public private partnership's and guidelines to standardize practice across the public sector.

Contract standardization.

(2) Standard documents may be prepared for each sector activity such as, but not limited to, building and public works, medical services delivery, education services delivery, telecommunications and energy.

30. (1) Procurement of unsolicited bids shall be authorized where—

Unsolicited bids.

- (a) innovative and related intellectual property associated with the proposed project's design and engineering costs incurred in developing the design has been considered and recognized; and
- (b) a feasibility study has been carried out and there is presently little interest in the private sector in the proposed project.

(2) The Minister shall issue detailed guidelines on the unsolicited bids under paragraph (1).

FIRST SCHEDULE

(r.3(3))

PPP PREPARATION AND APPROVAL STEPS

1. (a) Project conceptualisation, identification, prioritisation, and pre-feasibility analysis by procuring entity promoting or sponsoring the project. Prior to preparation of the concept paper, the public sector agency is expected to conduct a systematic screening on all of their planned, priority infrastructure projects to determine which ones might better be delivered through public private partnership arrangements.

Output: List of projects to be implemented through public private partnership framework and preliminary project concept and advise to the Steering Committee whether the procuring entity has required expertise to proceed with the public private partnership.

(b) Approval of the preliminary concept by the Steering Committee; registration of public private partnership by the Steering Committee, advise by the Steering Committee to the procuring entity to procure advisory services if the procuring entity does not have the necessary expertise.

Output: Approved and registered list of public private partnership's and instructions to hire transaction advisors if this is considered necessary.

2. Carrying out of feasibility study. The activities should include feasibility analysis and proposed risk allocation structure. This should clearly outline the project's required output levels of services or goods, demand analysis, technical feasibility analysis, financial feasibility analysis, economic feasibility analysis, as well as preliminary environmental, legal, and institutional analysis. The procuring entity should also identify and analyse all material risks to public private partnership, and especially the important proposed risk allocation structure for the project as a public private partnership. It should also clearly outline the public private partnership concept including specific functions to be carried out by the private party and the procuring entity and any assets belonging to the procuring entity to be transferred to public private partnership.

Output: Clearly defined project concept, preliminary environmental and social impact analysis.

3. Submission by the procuring entity of the project concept and feasibility study to the Steering Committee and evaluation by the Secretariat.

Output: Well defined project proposals.

4. Consideration of the project concept and feasibility study

including the risk sharing arrangements by the Steering Committee.

Output: Approval of the project concept including the risk sharing arrangements for public private partnership projects with an estimated value not exceeding US\$10 million and recommendations by the PPP Steering Committee to the Minister for Finance and sector Minister for public private partnership project with estimated value exceeding US\$ 10 million. If project concept is not accepted, procuring entity will be given further guidance on any other work required to be done.

5. Submission to the Cabinet of Joint Cabinet Memorandum by the Minister responsible for the sector and the Minister for Finance for projects of US\$10 million and above.

Output: Signed Cabinet Memorandum and Cabinet approval or guidance.

6. Preparation of bid documents including the Request for pre qualifications (RfQ), the Request for proposals (RfP) and the proposed PPP contract.

Output: Bid documents.

7. (a) Approval by the Steering Committee of the bid documents. Upon approval, authority will be granted to advertise for RfQ and or RfPs as necessary. Prequalified firms will be allowed to make comments on the RfPs. If there are any material changes to the RfPs and the proposed contract at this stage, further clearance will be required from the Secretariat. If the changes result in a material departure in the project concept and transaction structure from what had been approved by the Cabinet, Cabinet clearance will also be required.

Output: The Steering Committee approval for the bid documents; Short-listed bidders; final bid documents.

(b) Request for Proposals, receipt of bids, evaluation of bids and submission of bid evaluation report to the Steering Committee for approval.

Output: The Steering Committee approval for the procuring entity to negotiate contract with the winning bidder (including approval of business plan).

8. Contract negotiation by the procuring entity.

Output: Negotiated contract.

9. Review of negotiated contract and granting of approval by the Steering Committee for the procuring entity to sign the approved public private partnership contract.

Output: Approved contract.

SECOND SCHEDULE

(r.21(e))

MAJOR PUBLIC PRIVATE PARTNERSHIP RISKS

- (a) *Design risk:* The private party shall be responsible for designing the goods or services to meet a specified level. Contractually, this typically means that the private party accepts the design risk and must pay all redesign costs if the facility which does not meet the required performance standards.
- (b) *Construction risk:* The private party shall be required to construct a facility according to performance specifications and a time schedule. In the contract, this is often dealt with by letting the private party bear all costs of meeting specifications and schedule requirements.
- (c) *Site Risk:* The risk relates to underlying site conditions and soil contamination and results in clean up costs, addition construction costs or frustration of contract. The risk is borne by the procurement entity if it has provided the site or by the private party where such party has been responsible for obtaining the site.
- (d) *Operating risk:* The private party is allowed full control over operating costs, including staffing numbers and levels. Contractually, the private party shall be made responsible for all operating costs and shall be expected to absorb all increases except where such increased costs arise from discriminatory change in law or increase in tariffs and related taxes in regulated industries. The service provider shall bear all costs of meeting specifications and schedule requirements.
- (e) *Demand risk:* The private party's revenues depend on the willingness and ability of users to purchase its services or goods. Contractually, the private party shall be expected to identify and satisfy the demand for the services or goods. In situations where the PPP does not sell directly to end users, the demand risk shall vest in the procuring entity.
- (f) *Tariffs risk:* In regulated industries, payments for the goods or tariffs for the service are often set by the Government or the sector regulator. Contractually, the private party shall accept that tariffs may not be adjusted automatically and hence need to agree on measures to deal with situations such as tax increases that may affect the project's financial viability adversely.
- (g) *Collection risk:* In some public private partnership's, the private party collects tariff revenues without any collection

rate guarantee from the Government, while in others, the private party sells to the procuring entity. In the first scenario, contractually, the private party shall bear all the risks for collecting revenues from users of the goods or services, while the collection risk in the other scenario shall rest with the procuring entity offtaker.

- (h) *Credit risk:* The private party shall solely be responsible for paying its debt and the Government shall make no debt investment. The private party shall be responsible for its debt and debt service.
- (i) *Force Majeure Risk:* Force majeure refers to events or circumstances that affects either party to the public private partnership and are not within the reasonable control (directly or indirectly) of the party affected, and which cannot be prevented, avoided or removed by such party acting in accordance with prudent operating practice such as acts of war, acts of God, epidemics, explosions, national wide labour disputes like strikes or lockouts and change in. Generally, if a party is prevented from or delayed in performing an obligation by reason of *force majeure* the affected party shall be relieved from the consequences of its failure to perform that obligation; and shall be allowed time extension.
- (j) *Political Risk including discriminatory change in law:* Political risks include events or circumstances arising from an action or inaction of the government or any Governmental authority exercising authority over a party which adversely affect the public private partnership such as blockade, embargo, riots, discriminatory change in law, expropriation and non renewal or revocation of project licenses without default on the part of the private party. The political risks shall be best placed with the Government.

Made on the 27th February, 2009.

UHURU KENYATTA,
Minister for Finance.