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DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

REPORT ON THE CONSIDERATION OF THE PUBLIC PRIVATE PARTNERSHIPS BILL
(NATIONAL ASSEMBLY BILL NO. 6 OF 2021)

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DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
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THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 11 MAY 2021	DAY: TUE
TABLED BY:	HON. W. NDIRANGU VICE-CHAIR
CLERK-AT THE-TABLE:	MA/NAH WANJIKU
MAY, 2021	



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CHAIRPERSON'S FOREWORD

This report contains the proceedings of the Departmental Committee on Finance and National Planning on its consideration of the Public Private Partnerships Bill (National Assembly Bill No. 6 of 2021) which was published on 26th February, 2021.

The Bill went through the First Reading on 25th March, 2021 and was thereafter committed to the Departmental Committee on Finance and National Planning pursuant to Standing Order 127.

Following placement of adverts in the print media on 20th April 2021 requesting for comments on the Bill from members of the public and relevant stakeholders pursuant to Article 118(1)(b) of the Constitution and Standing Order 127(3), the Committee received one written memorandum.

In order to extensively carry out public participation on the Bill, the Committee invited stakeholders vide letter REF: NA/DDC/F&NP/2021/08 dated 15th April 2021 for a stakeholder engagement meeting which was held on Wednesday, 21st April 2021 at Villa Rosa Kempinsky Hotel where four (4) stakeholders attended the meeting physically and virtually while the rest submitted written memoranda. The stakeholders proposed amendments to the Bill which are contained in Part III of the Bill. All the stakeholders' comments were put into consideration while preparing the proposed Committee's amendments and some of the proposals were adopted forming part of the proposed Committee's amendments.

The Bill has eighty-seven (87) clauses and seeks to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships and also streamline the regulatory framework for public private partnerships.

The Bill further proposes to enhance efficiency in the regulatory process of engagement of private parties and the manner in which public private partnerships are conducted so as to ensure the provision of high quality facilities and services. The Bill also provides a comprehensive framework for the implementation of public private partnerships and addresses the gaps in Public Private Partnerships Act, 2013.

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

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

The enactment of the Bill will repeal the Public Private Partnerships Act, 2013 and is expected to speed up project development by facilitating faster processing of Privately-Initiated Proposals, enabling direct negotiations through direct procurement where it is feasible as well as value engineering of open procurement options in line with the new directive to align public investment programmes into project prioritisation.

PPPs as a tool for development is targeted to unlock the funds held by private players in order to foster economic development by providing resources for infrastructural services including but not limited to roads, airports, ports, power, water, and solid waste treatment. In this case, PPPs will also provide funds for development that is not within the normal budgeting framework.

The Bill is repealing the Public Private Partnerships Act, 2012. Despite the Act being in place for close to eight (8) years only two (2) projects have achieved Financial Closure. These two projects are: Lot 33 of the Roads Annuity Programme (Ngong-Kajiado, Imaroro-Mashuru Road, 91km) whose construction was completed in October 2020 and the project is currently open to public use. It will be maintained for eight (8) years under the PPP contract, and will be handed back to Government with a residual life of eight (8) years. Another PPP project is the Nairobi Expressway Project which is currently under construction, with a target completion date of December 2021. Evidently, the slow implementation of PPPs is an indication that there are challenges chiefly attributable to the legal framework.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Public Private Partnerships Bill, 2021. The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank all the stakeholders who participated in the consideration of the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

It is my pleasure to report that the Committee has considered the Public Private Partnerships Bill (National Assembly Bill No. 6 of 2021) and have the honour to report back to the National Assembly with the recommendation that the Bill be **approved with amendments** as contained in the report.

Hon. Gladys Wanga, CBS, MP

Chairperson, Departmental Committee on Finance and National Planning

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under **Standing Order 216** whose mandates pursuant to the **Standing Order 216 (5)** are as follows:
 - i. To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
 - ii. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
 - iii. **To study and review all the legislation referred to it;**
 - iv. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - v. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - vi. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);
 - vii. To examine treaties, agreements and conventions;
 - viii. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - ix. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
 - x. To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following government Ministries and departments:
 - i. National Treasury and Planning
 - ii. State Department for Devolution
 - iii. Commission on Revenue Allocation
 - iv. Office of the Controller of Budget
 - v. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House in July, 2020 and comprises of the following Members:

Chairperson

Hon. Gladys Wanga, CBS, MP
MP for Homabay County

ODM Party

Vice-Chairperson

Hon. Isaac W. Ndirangu
MP for Roysambu Constituency

Jubilee Party

Members

Hon. Jimmy O. Angwenyi, MP
MP for Kitutu Chache North Constituency

Jubilee Party

Hon. Christopher Omulele, MP
MP for Luanda Constituency

ODM Party

Hon. Shakeel Shabbir Ahmed, MP
MP for Kisumu East Constituency

Independent Member

Hon. Daniel Nanok, MP
MP for Turkana West Constituency

Jubilee Party

Hon. (Dr.) Christine Ombaka, MP
MP for Siaya County

ODM Party

Hon. Andrew Okuome, MP
MP for Karachuonyo Constituency

ODM Party

Hon. David Mboni, MP
MP for Kitui Rural Constituency

CCU Party

Hon. Francis K. Kimani, MP
MP for Molo Constituency

Jubilee Party

Hon. Joseph Oyula, MP
MP for Butula Constituency

ODM Party

Hon. Joshua Kandie, MP
MP for Baringo Central Constituency

MCC Party

Hon. Stanley Muthama, MP
MP for Lamu West Constituency

Jubilee Party

Hon. Edith Nyenze, MP
MP for Kitui West Constituency

WDM-K

Hon. Catherine Waruguru, MP
MP for Laikipia County

Jubilee Party

Hon. James Mwangi, MP
MP for Tetu Constituency

Jubilee Party

Hon. (Prof.) Mohamud Muhamed, MP
MP for Wajir South Constituency

Jubilee Party

Hon. Peter Lochakapong, MP
MP for Sigor Constituency

Jubilee Party

Hon. Qalicha Gufu Wario, MP
MP for Moyale Constituency

Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following Secretariat:

Ms. Leah W. Mwaura
Senior Clerk Assistant/Head of Secretariat

Ms. Jennifer Ndeto
Principal Legal Counsel 1

Ms. Laureen Wesonga
Clerk Assistant II

Mr. Josephat Motonu
Senior Fiscal Analyst

Mr. Chelang'a Maiyo
Research Officer II

Mr. John Njoro
Serjeant-At-Arms

Ms. Christine Maeri
Audio Officer

Mr. Vitalis Augo
Office Assistant

Ms. Jeruto Kosgey
Intern

2 OVERVIEW OF THE PUBLIC PRIVATE PARTNERSHIPS BILL (NATIONAL ASSEMBLY BILL NO. 6 OF 2021)

2.1 INTRODUCTION

6. The main objective of the Bill is to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships; to repeal the Public Private Partnerships Act, 2013 and for connected purposes. The Bill proposes to enhance efficiency in the regulatory process of engagement of private parties and the manner in which public private partnerships are conducted so as to ensure the provision of high quality facilities and services. It provides a comprehensive framework for the implementation of public private partnerships and addresses the gaps in the existing legal framework.
7. The Bill also proposes timelines on key project processes and stages for a more efficient and predictable project development environment. Further, it reduces the number of oversight approvals required from the Committee in the course of project development and delegates to the Directorate extensive operational latitudes to guide and champion project development. Further, the Bill expands the scope of arrangements that qualify as public private partnerships and expands the scope of available procurement methods for public private partnerships introducing direct procurement as one of the approved methods. This allows for partnerships to be procured either competitively or single sourced through direct procurement or Privately-Initiated Proposals. The Bill simplifies procedural elements on the conduct of feasibility studies, tender evaluations, contract negotiations and approval applications.
8. The Bill is expected to speed up project development by facilitating faster processing of Privately-Initiated Proposals, enabling direct negotiations through direct procurement where it is feasible as well as value engineering of open procurement options in line with the new directive to align public investment programmes into project prioritisation.

2.2 ANALYSIS OF THE BILL

9. The Bill repeals the Public Private Partnerships Act, 2013 and has 87 clauses. It proposes the following amendments:
10. **PART I** of the Bill (**clauses 1 to 5**) provides for preliminary matters including the interpretation of key terms, the object of the Act, the application of the Act and the circumstances under which the Act shall prevail over any other written law.
11. **PART II** of the Bill (**clauses 6 to 19**) provides for the establishment of the Public Private Partnership Committee, its composition, functions and powers. It further provides for the establishment of the Directorate of Public Private Partnerships, its staff, functions and powers. It provides for the appointment of the Director General, his or her qualifications and tenure.
12. **PART III** of the Bill (**clauses 20 to 29**) provides for the manner in which public private partnerships are undertaken. It provides for the manner in which parties enter into and execute project agreements. It also provides for the preparation and submission of project lists by contracting authorities for approval by the Directorate, the publication of approved projects, the creation of a National List by the Directorate and the preparation of a list of prioritized projects that may be undertaken under the Act. It also provides for the determination of success fees and

the cost of delivering a facility or service in relation to a project. It further provides for the issuance of Government support measures to cover various kinds of risks.

13. **PART IV** of the Bill (**clauses 30 to 36**) provides for the process of project identification and prioritization by a contracting authority. It provides for the constitution of a project implementation team to oversee the implementation phase of a project. It also provides for the carrying out and approval of a feasibility study in relation to a project and the appointment of transaction advisors by a contracting authority where it does not have the technical expertise to procure a project.
14. **PART V** of the Bill (**clauses 37 to 62**) outlines the procurement methods for public private partnerships including direct procurement, privately-initiated proposal and competitive bidding. It provides for the applicable procedure during the prequalification of bidders and provides for the applicable procedure during the prequalification of bidders and provides for the establishment of prequalification committees by a contracting authority for this purpose. It also provides for the constitution of consortiums by bidders and the holding of competitive dialogues. This part provides for the manner in which the evaluation of bids, negotiations and approval processes are to be carried out. It provides for the establishment of a project company by a bidder for the carrying out of a project. It also provides for the manner in which a tender may be cancelled and the publication of information on the results of a tender process.
15. **PART VI** of the Bill (**clauses 63 to 66**) provides for public private partnership projects by county governments. It provides for project agreements by county governments; the approval of public private partnership projects by county assemblies; the preparation and submission of county project lists; and the application of Part V of the Act to county public private partnership projects.
16. **PART VII** of the Bill (**clauses 67 to 74**) provides for project agreements. It requires the establishment of project companies by the contracting authorities and private parties to undertake public private partnership projects. It also provides for the preparation and amendment or variation of project agreements entered into by parties in relation to a project. It also provides for the implementation and management of a project as well as the establishment of a Petition Committee to determine petitions and complaints in relation to a project.
17. **PART VII** of the Bill (**clauses 75 and 76**) sets out the financial provisions and provides for the establishment of a Public Private Partnership Project Facilitation Fund and the application of monies received into the fund. It also provides for the scrutiny of the financial records of a project company or private party and requires it to prepare audited accounts for submission to the relevant contracting authority.
18. **PART IX** of the Bill (**clauses 77 to 83**) sets out miscellaneous provisions of the Act including provision on local content; offences and penalties; a prohibition on the participation of state officers and public officers in public private partnership projects; the inspection of public private partnership premises by contracting authorities and the Directorate; the application of Parts V and VI of the Anti-Corruption and Economic Crimes Act, 2003, to public private partnerships; the preparation and submission of annual reports; and power for the Cabinet Secretary to make regulations.
19. **PART X** of the Bill (**clauses 84 to 87**) contains transitional and saving provisions including the repeal of the Public Private Partnerships Act, 2003; the transition of the Committee, Unit, Petition Committee, staff and subsidiary legislation made under the repealed Act.

20. **The First Schedule** contains provisions as to the conduct of the business and affairs of the Committee.
21. **The Second Schedule** provides for the public private partnership arrangements that a contracting authority may engage in with a private party.
22. **The Third Schedule** contains minimum contractual obligations that are required to be specified in a project agreement.
23. The Bill delegates legislative powers to the Cabinet Secretary but does not limit fundamental rights and freedoms.
24. The Bill affects the functions of county governments within the meaning of Article 110 of the Constitution and is therefore a Bill concerning counties for purposes of the Standing Orders.
25. Enactment of this Bill shall occasion additional expenditure of public funds to be provided for through the annual estimates.

3 PUBLIC PARTICIPATION/STAKEHOLDERS CONSULTATION

26. Following the call for memoranda from the public through the placement of adverts in the print media on 20th April, 2021 and vide a letter REF: NA/DDC/F&NP/2021/08 dated 15th April, 2021 inviting stakeholders for a meeting, the Committee received memoranda from the following stakeholders:

- i. National Treasury – Public Private Partnership Unit
- ii. Institute of Certified Public Accountants of Kenya (ICPAK)
- iii. Public Procurement Regulatory Authority
- iv. Council of Governors (CoG)
- v. Engineers Board of Kenya (EBK)
- vi. Kenya Association of Manufacturers (KAM)

The stakeholders submitted as follows:

3.1 NATIONAL TREASURY – PUBLIC PRIVATE PARTNERSHIP UNIT

In a meeting with the Committee held on Wednesday, 21st April 2021, Hon. Nelson Gaichuhie, Chief Administrative Secretary of the National Treasury submitted that as follows on the Bill:

27. The Bill will enable Kenya to achieve better quality infrastructure, reduce reliance on exchequer for development and create more job opportunities for Kenyans. It will also facilitate ministries and county governments to provide expertise to the Public Private Partnerships (PPP) agenda.
28. Additionally, the Bill introduces local content hence creating job opportunities for Kenyans, makes PPP a fully-fledged directorate giving it the authority to handle all matters touching on PPP and will reduce the need to seek for loans to undertake development projects.
29. Further, it will reduce bureaucracy as it reduces statutory approvals by the PPP Committee from twelve (12) to three (3) and it limits the cabinet's role in the PPP process to policy and not contract approval and this will make the approval process faster.
30. The Bill gives the Director General a four-year term. This is a strategic choice and is informed by the need to have the Director General in office for a reasonable period of time that is neither too short nor too long.
31. County governments have been properly defined as contracting authorities and a representative of the Council of Governors will be a member of the PPP Committee.
32. The Bill has provided for the procurement process for a PPP. This is because the Public Procurement and Asset Disposal Act, 2015 is designed for budget platformed procurements and does not apply to PPPs.
33. The Bill provides for foreign exchange, inflation and interest adjustment because it takes long for most of the projects to be completed. Most PPP projects are financed by foreign currency hence necessary to provide for foreign exchange adjustment. It is necessary to provide for inflation adjustment for projects funded locally and since most of the projects are financed through loans, it's important to provide for interest rate adjustment. This provision gives recognition to the commercial reality of PPP projects.

34. The Bill provides contract timelines for various PPP projects. It is important to note that the contract periods cannot be the same for different projects as this depends on the nature of projects. The National Treasury (PPP Unit) proposed the following amendments to the Bill:
35. Amend sub-clause 19(c) to read as follows; “(c) *guiding and advising contracting authorities in project structuring, procurement and tender evaluations*” and insert a new sub-clause to appear immediately after sub-clause (c) to read as follows; “(cc) *leading contracting authorities in contract negotiations and deal closure*”.

COMMITTEE'S COMMENT

The Committee adopted their proposal.

36. Amend clause 56 by adding the following new sub-paragraph (f) to sub-section 56(3); “(f) *result in an increase in bid prices save for changes resulting from permissible adjustment factors expressly set out in tender documents.*” Delete sub-clause 56(4) in its entirety.

3.2 INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK)

In a meeting with the Committee held on Wednesday, 21st April 2021, CPA. Edwin Makori, Chief Executive Officer of ICPAK proposed the following amendments to the Bill:

37. Amend sub-clause 4(2) to read as follows, “*The provisions of the Public Procurement and Asset Disposal Act, 2015, shall not apply to a public private partnership if all the monies/funds are from the private partner. Otherwise if counterpart funds (public funds) are involved, the provisions of Public Procurement and Asset Disposal Act, 2015 should apply to the extent of those funds*”. This is to prevent possible misuse of public funds.

COMMITTEE'S COMMENT

The Committee adopted their proposal.

38. Amend sub-clause 6(1) by inserting the following new paragraph (i) immediately after paragraph (h), “*representative of the Cabinet Secretary responsible for matters relating to energy*”. This is because the energy sector is a major beneficiary of the public private partnerships.

COMMITTEE'S COMMENT

The Committee proposed an amendment

39. Amend sub-clause 6(1)(g) to read as follows, “*four persons not being public officers, who shall be appointed by the Cabinet Secretary representing the following institutions: (i) Institute of Certified Public Accountants of Kenya; (ii) Kenya Private Sector Alliance; (iii) Institution of Engineers of Kenya; and (iv) a civil society organization*”. This is to build public confidence in the independence and objectivity of the PPP Committee. Specifying the professions will serve to avoid ambiguity in appointment of persons to serve in the Committee. It will also eliminate chances of dissatisfaction from members of other professions.
40. Amend clause 6 by providing that PSs should be allowed to delegate to senior officers with the required competence to attend Committee meetings in case of any emergencies. Currently, PSs are only allowed to designate in writing to an officer to represent them in sub-committee meetings. This is to make it possible for approvals to be done within the required timelines.

41. Amend sub-clause 8(1) by inserting the following new paragraphs (i) and (j) immediately after paragraph (h): "*(i) 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; and (j) Ensure competition, transparency, fairness and equity in the PPP transaction selection processes under this Bill*". This is in line with the best practice in other jurisdictions.

COMMITTEE'S COMMENTS

The proposed amendments are more of policies and therefore cannot be included as functions of the Committee.

42. Amend sub-clause 9(2) to read as follows, "*A member of the Committee may be removed from office on the ground of violating Chapter 6 of the Constitution or professional misconduct in case of members belonging to professional associations*". This is to enhance professionalism and strengthen the regulatory role of professional institutions.

COMMITTEE'S COMMENT

The Committee adopted their proposal.

43. Amend clause 9 by inserting the following new sub-clause (4) immediately after sub-clause (3), "*For purposes of clause 9(3) above, the committee shall establish an independent mechanism for fair hearing before removal*". This is to ensure that there is fairness in the event of removal from office.
44. Amend clause 10 by inserting the following new paragraph, "*The Committee should establish an Audit Committee, and a maximum of three other committees to discharge the following functions: Governance, Risk Compliance, Finance Technical Matters, Strategy and Human Resources*". This is to provide assurance that there is prudent use of funds in line with the Mwongozo Code of Conduct for the public sector.

COMMITTEE'S COMMENT

The Committee has specific functions and cannot therefore establish sub-committees of this nature.

45. Amend sub-clause 16(1) by including the following professional qualifications, "*project management; engineering; and accounting*". This is in line with the best practices in other jurisdictions like Tanzania.

COMMITTEE'S COMMENTS

- i. Project management and engineering were added to the list of professional qualifications**
- ii. Accounting was not added because it is covered in finance.**

46. Amend sub-clause 22(1) by inserting the following new paragraph (i) immediately after paragraph (h), "*Ensures there is public participation*". This is to ensure that public participation is provided for in the Bill.

COMMITTEE'S COMMENT

The Committee adopted their proposal

47. Amend sub-clause 25(2) to read as follows, "*A contracting authority shall not submit a project list unless the projects are part of the development agenda at the national level or for county governments the County Integrated Development Plan (CIDP)*". This is to align development at the county levels and agreed development blueprints.

COMMITTEE'S COMMENT

The Committee adopted their proposal

48. Amend sub-clause 25(1) by providing that county governments should also be allowed to prepare a list of projects that they intend to undertake on a priority basis. This is a disincentive to county governments in taking initiative in prioritizing projects and submitting the same.

COMMITTEE'S COMMENT

The Committee adopted their proposal

49. Amend sub-clause 25(4) to read as follows, "*The Directorate shall notify the Committee, the Cabinet Secretary and Cabinet, quarterly, on all projects it approves for implementation under the Act*". This is to provide predictability on when information on approved projects should be received.

COMMITTEE'S COMMENT

The Committee adopted their proposal but it was amended by deleting the word "*quarterly*" and replacing with the word "*biannually*".

50. Amend sub-clause 26(1) to read as follows, "*the Directorate shall establish, maintain and continuously update and publicise (through its website, e-Citizen and respective contracting authority website and platforms) a comprehensive and clear national list of projects that have been approved under sections 25 and 65 of this Act*". This is because the IMF defines transparency to include comprehensiveness, accuracy and availability of data.

COMMITTEE'S COMMENT

The Committee adopted their proposal

51. The lengthy prescribed PPP process should be shortened significantly and customized to the Kenyan environment to avoid the substantial delays affecting projecting implementation. This is because the PPP pipeline in Kenya has experienced very slow turnaround since its inception. This may discourage potential investors from opting to invest in these projects. They may regard them as high risk with suboptimal payback periods.
52. Amend clause 27 by inserting the following new paragraph (e) immediately after paragraph (d), "*disclose beneficial ownership information*". This is to ensure that the company has not been barred by any country or any international organization from participating in public private partnerships or similar arrangements.
53. Amend sub-clause 68(1) by including the following information, "(i) specification of goods and services, scope and schedule of works and contract value; (ii) technical and financial capacity of the successful bidder; and (iii) in case of a company, list of directors and/or beneficial owners". It is important to expand the information provided to include provisions enumerated under Executive Order No. 2 on Public Procurement. This will be important in cases where public funds have been utilized or allocated in a PPP framework.

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54. Amend sub-clause 72(1)(e) to read as follows, "*preparing quarterly reports on project implementation*". This is to provide predictability on when information on projects implementation should be received.
55. Amend sub-clause 74(2)(b) to read as follows, "*A person appointed as a member under sub-section (1) shall be nominated by the following professional bodies from amongst their members as follows: (a) One person nominated by the Law Society of Kenya; (b) One person nominated by the Kenya Institute of Supplies Management; (c) One person nominated by the Institute of Certified Public Accountants of Kenya; (d) One person nominated by the Institute of Engineers of Kenya; and (e) One person nominated by the Chartered Institute of Arbitrators, Kenya*". This is because specifying the professions would serve to avoid ambiguity in appointments of persons to serve in the Committee.
56. Amend clause 76 by inserting the following new sub-clause (3) immediately after sub-section (2), "*The Auditor General shall be the auditor of PPP projects and/or appoint the auditors of all PPP projects*". This is to be able to get proper assurance on all accounts.

COMMITTEE'S COMMENT

The Committee adopted their proposal

3.3 PUBLIC PROCUREMENT REGULATORY AUTHORITY (PPRA)

In a meeting with the Committee held on Wednesday, 21st April 2021, Mr. Henock Kirungu proposed the following amendments on behalf of the Public Procurement Regulatory Authority:

57. Supported the amendment proposed to sub-clause 4(2) because it is consistent with provision of Section (2)(e) of the Public Procurement and Asset Disposal Act, 2015 which states that '*For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies to procurement and disposal of assets under Public Private Partnership Act, 2013*'.

COMMITTEE'S COMMENT

The Committee adopted their proposal

58. Amend the Bill by inserting the following new sub-clause (3) immediately after sub-clause (2), "*The directorate shall issue standard bidding documents for use by contracting Authorities*" and re-number the current subsection (3) to (4). This is in line with provisions of section 8(1) (c) of the Bill. The Standard Bidding Documents will: (i) standardise and harmonise procurement of PPPs across all the contracting Authorities; and (ii) ensure that contracting Authority procure PPPs in accordance with the Act while guaranteeing value for money as well as providing an enabling environment and level playing field for potential contractor to submit competitive bids in a transparent and fair manner.
59. Amend sub-clause 37(1) by inserting the following new paragraph, "*(d) Restricted bidding*". This will provide the contracting authority with wide range of options to choose based on the prevailing circumstances. The restricted method will be best to procurement of PPPs relating to complex and specialized projects where the initial stage would be prequalification or expression of interested and competition for the PPPs will be restricted to firms found qualified to contract.
60. Amend clause 37 by inserting the following new sub-clause (3) immediately after sub-clause (2), "*The contracting Authority shall use standard bidding documents issued by the directorate in all PPPs procurement proceedings*". Re- number the current subsection (3) to (4). This is in line with provisions

of section 8(1)(c) of the Bill. The Standard Bidding Documents will: (i) standardise and harmonise of procurement of PPPs across all the contracting Authorities; and (ii) ensure that contracting Authority procure PPPs in accordance with the Act while guaranteeing value for money as well as providing an enabling environment and level playing field for potential contractor to submit competitive bids in a transparent and fair manner.

COMMITTEE'S COMMENT

The Committee adopted their proposal

3.4 COUNCIL OF GOVERNORS

In a letter, REF: COG/6/11 Vol. 2 (65) dated 28th April 2021, Council of Governors proposed the following amendments to the Bill:

61. Amend sub-clause 6(1)(f) to read as follows, "(f) two persons nominated by the Council of County Governors". This is to ensure better representation of forty-seven county governments in the committee.

COMMITTEE'S COMMENT

The Committee adopted their proposal

62. Amend sub-clause 74(2)(c) to read as follows, "two persons, not being members of county executive committees and possessing such relevant knowledge and experience as the Cabinet secretary shall consider appropriate, nominated by the Council of County Governors. This is to ensure better representation of forty-seven county governments in the committee.

3.5 ENGINEERS BOARD OF KENYA (EBK)

In a letter, REF: EBK/REG/COM/CS/001/VOL.VII (47) dated 23rd April 2021, Engineers Board of Kenya proposed the following amendments to the Bill:

63. Amend clause 16(1) by including engineers as persons qualified to be appointed as the Director General of the Directorate. This is because most projects carried out under PPP are engineering in nature.

COMMITTEE'S COMMENT

The Committee adopted their proposal as this will widen the scope of qualifications for the position of Director General.

3.6 KENYA ASSOCIATION OF MANUFACTURERS (KAM)

In a letter, KAM/10/27/rl/mb/jw/PW/2021 dated 23rd April 2021, Kenya Association of Manufacturers proposed the following amendments to the Bill:

64. Amend clause 30 by revising the dual role of the directorate where the directorate is judging a project (project proposals, feasibility studies and tender evaluation reports), that it has helped to prepare. This is because there is potential conflict of interest that would be faced by the Directorate in the implementation of the new PPP framework. On the one hand the Directorate is expected to lead the project structuring, procurement, tender evaluation, contract negotiation and deal closure. However, the same Directorate is mandated to review and approve project proposals, feasibility studies

65. Amend clause 40(6) by making the provision clear so as to provide for the contracting authority to include compensation to private parties should the project not pass through the development stage. The Privately initiated investment proposals (PIIPs) apply the Swiss challenge which requires a public authority which has received an unsolicited bid for a public project, or for services to be provided to the government, to publish the bid and invite third parties to match or better it. This serves as a disincentive to the private sector engaging in unsolicited bids, especially if the contracting authority does not exercise its discretion to include a compensation mechanism for the proponent in return for the costs it will presumably have incurred during the review & development phase. The exclusion of the local manufactured furniture products will ensure that the industry in Kenya is not affected from misinterpretations of the provisions and provide clarity on the imported targeted products.
66. Amend clause 43(7)(c) by redirecting the review fee (**zero-point-five per cent of the estimated project cost or fifty thousand United States dollars**) to fund the project development phase.

4 COMMITTEE OBSERVATIONS

In considering the Bill, the Committee observed that:

67. The Bill recognizes county governments as procurement authorities and this will enable them to enter into PPP agreements just like the National Government;
68. If enacted, the Bill will ease pressure on the exchequer as development projects will be funded through the PPP framework as opposed to the current scenario where funding for projects is done through the exchequer. Resultantly, the need for the Government to borrow will significantly reduce;
69. The Bill provides for the procurement process for PPPs which is not provided for in the Public Procurement and Asset Disposal Act, 2015;
70. The Bill has captured most of the amendments that were proposed by Parliament during mediation of the Public Private Partnerships (Amendment) Bill, 2017;
71. The Bill creates the Directorate of Public Private Partnerships which shall be the lead institution in the implementation of a PPP project. This will ensure proper service delivery as opposed to the current scenario where PPPs are managed by a unit under the National Treasury; and
72. The Bill provides for the secondment of staff from a contracting authority, county government, county corporation, development partner or strategic partner to the Directorate. This will ensure that the Directorate has the right expertise when negotiating for PPP projects.
73. The Bill also creates a fund to be known as Public Private Partnership Project Facilitation Fund. The fund so created will ensure that there is support for contracting authorities in the preparation phase of a project , the tendering process and project appraisal as well as supporting the activities of the Directorate and the Committee and also extending financial support to projects that are desirable but whose Government support is required for them to be implemented.
74. The formation of a project company as provided in Clause 67 will ensure that the interests of the contracting authority and private entities are safeguarded as both parties will have shares to the said project company and any transfer or dilution of such shares will have to go through certain approvals.

5 COMMITTEE RECOMMENDATION

75. The Committee having considered the Public Private Partnerships Bill (National Assembly Bill No. 6 of 2021) recommends that the House **approves the Bill with amendments** as proposed in the schedule in chapter 6.

6 SCHEDULE OF PROPOSED AMENDMENTS

76. The Committee proposed the following amendments to be considered by the House in the Committee Stage:

CLAUSE 4

77. Amend clause 4 of the Bill by inserting the following new sub-section immediately after subsection (2)-

“(3) Without prejudice to the generality of subsection (2), the provisions of the Public Procurement and Assets Disposal Act, 2015 shall-

- a) *not apply to a public private partnership project, if all the monies for the project are from the private party;*
- b) *apply if there is counterpart funding that is, including public funds, for the public private partnership project.*

Justification

The amendment provides that the Public Procurement and Asset Disposal Act will apply if there is government funding for a public private partnership project. This is to prevent loss of public funds.

CLAUSE 6

78. Amend clause 6 of the Bill by-

- a) deleting paragraph (c) of sub-section (1);
- b) deleting the word “one” appearing in paragraph (f) of subsection (1) and substituting therefor the word “two”;
- c) inserting the words “and an ex officio member of the Committee” at the end of paragraph (h) of subsection (1).
- d) inserting the following new subsections immediately after subsection 1-
 - (1A) The Committee shall co-opt the Principal Secretary responsible for the contracting authority whose public private partnership project is the subject of discuss at a meeting.
 - (1B) The Committee may co-opt any person or public officer whose knowledge or experience is necessary for the public private partnership under discussion.
 - (1C) A person who is co-opted shall not vote at a meeting and shall only be a member of the Committee for a period not exceeding one year.

Justification

To provide removal of the Principal Secretary for Industrialization from the Committee, because just like other Principal Secretaries, the State Department for Industrialization is a user department.

The amendment also enhances representation from the Council of Governors to two members as had been mediated previously and to make provision for co-option of members so as to avoid clogging the main Committee.

CLAUSE 9

79. Amend clause 9 of the Bill –

- (a) in subsection (1) –
 - (i) by deleting paragraph (b) and substituting therefor the following new paragraphs-
 - (b) is removed from office for breach of the provisions of chapter six of the Constitution;

- (ba) is deregistered by a professional body for professional misconduct;
- (ii) by inserting the following new paragraph immediately after paragraph (d)-
 - (da) is convicted of an offence under section 78 of this Act;

Justification

The amendments are to make additional provisions for removal from office, including for breach of Chapter 6 of the Constitution, where a member is deregistered by their professional body and also if a person is convicted for an offence under this Act.

CLAUSE 16

80. Amend clause 16 of the Bill by-

- (a) inserting the following new paragraphs immediately after paragraph (c) appearing in subsection (1)-
 - (ca) engineering;
 - (cb) project management;
- (b) deleting the words "*as the Cabinet Secretary may determine.*" appearing in subsection (1) paragraph (d).
- (c) inserting the following subsection immediately after sub-section (1)-
 - (1A) The Director General shall be recruited and appointed by the Public Service Commission.

Justification

The amendment adds engineering and project management as qualifications for appointment as the Director General. It also provides that the Director General shall be appointed by the Public Service Commission.

CLAUSE 17

81. Amend section 17(1) by deleting the word "*The*" and substituting therefor the words "*Subject to section 31 and 37 of the Public Service Commission Act, the*".

Amend section 17 by deleting subsection (2).

Justification

The amendment provides that the power of appointment in the public service which resides in the Public Service Commission, shall be delegated to the Cabinet Secretary and the Director General.

CLAUSE 19

82. Amend section 19-

- (a) by deleting paragraph (c) appearing in subsection (1) and substituting therefor the following new paragraphs-
 - (c) guiding and advising contracting authorities in project structuring, procurement and tender evaluations;
 - (ca) leading contracting authorities in contract negotiations and deal closure;
- (b) by inserting the following subsection immediately after subsection (2)-
 - (2A) The Directorate shall issue standard bidding documents for use by contracting authorities.

Justification

The amendment cleans up paragraph (c) to recognise that the role of the Directorate is advisory.

CLAUSE 21

83. Amend clause 21 by-

- (a) renumbering the existing provision as subsection (1);
- (b) inserting the following new subsection-
 - (2) Without prejudice to the periods specified under the Second Schedule, a contracting authority shall not enter into a public private partnership arrangement for a period exceeding thirty years.

Justification

The amendment puts a cap on the period for the different public private partnership arrangements under the Second Schedule.

CLAUSE 22

84. Amend clause 22 (1) by inserting the following paragraph immediately after paragraph (j)-

- (ja) ensure there is public participation in a project;

Justification

The amendment provides that contracting authorities shall ensure public participation in a project

CLAUSE 25

85. Amend clause 25 –

- (a) by deleting subsection (2) and substituting therefor the following new subsection-
 - (2) A contracting authority shall not submit a project list unless the projects are part of the national development agenda.
- (b) in subsection (4) by deleting the word "*periodically*" and substituting therefor the words "*bi-annually*".

Justification

The amendment provides that the projects should be within the national development agenda. Further, the amendments are also to specify that the Directorate shall report on the projects it approves biannually.

CLAUSE 26

86. Amend clause 26 by deleting subsection (1) and substituting therefor the following new subsections-

- (1) The Directorate shall establish and maintain an up-to-date national list of projects that have been approved under section 25 and 65 of this Act.
 - (1A) Subject to subsection (1), the national list shall be published on the Directorate's website and the contracting authority's website.

Justification

The amendment requires that the national project list should be published on the Directorate website and the contracting authority's website.

CLAUSE 33

87. Amend clause 33 by inserting the following subsection immediately after subsection (1)-
“(1A) The Directorate shall submit an evaluation report together with its recommendations to the Committee”.

Justification

The amendment is to clean up clause 33 to link the Directorate evaluation and the Committee’s approval of the project.

CLAUSE 37

88. Amend clause 37(1) by inserting the following-
- (a) new paragraph immediately after paragraph (c)-
“(d) restricted bidding.”
 - (b) new subsection immediately after subsection (2)-
(2A) The contracting authority shall use standard bidding documents issued by the Directorate in all public private partnership procurements.

Justification

The amendment includes restricted bidding as a procurement method under this Act. It also provides that contracting authorities shall use standard bidding documents issued by the Directorate.

NEW CLAUSE

89. Amend the Bill by inserting the following new section immediately after section 46-

Restricted bidding

- 46A. (1) A contracting authority may use restricted tendering if any of the following conditions are satisfied-
- a) competition for contract, because of the complex or specialized nature of the works and services is restricted to prequalified tenderers;
 - b) the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the, works or services to be procured;
 - c) if there is evidence to the effect that there are only a few known suppliers of the whole market of the works or services;
 - d) an advertisement is placed, where applicable, on the procuring entity website regarding the intention to procure through limited tender.
- (2) A contracting authority may engage in procurement by means of restricted tendering in such manner as may be prescribed.

CLAUSE 56

90. Amend clause 56 of the Bill by -
- a) deleting the numbers “38, 40 or 45” appearing in subsection (1) (a) and substituting therefor the following numbers “38, 40, 45 or 46A”;
 - b) deleting the expression “or a change due to inflation” appearing in subsection (4).

Justification

The amendment cleans up the cross referencing to recognise the new clause 46 A.

CLAUSE 60

91. Amend clause 60 by -

- a) renumbering the existing provision as subsection (1);
- b) inserting the following new subsections immediately after existing subsection-
 - (2) A private party that executes a contract under subsection (1) shall commence the project within six months from the date of execution of the contract.
 - (3) If the private party fails to commence the project in accordance with subsection (2), the contracting authority shall terminate the contract and no liability shall be attached to the contracting authority or the Government.

Justification

The amendment provides that after execution of the contract a private party should commence work within six months.

CLAUSE 65

92. Amend clause 65 of the Bill by-

- a) renumbering the existing provision as (1);
- b) inserting the words "*for inclusion in the published national list of projects under section 26*".
- c) inserting the following subsection immediately after subsection (1)-
 - (2) A county government or county corporation shall not submit a project list unless the projects are part of the County Integrated Development Plan.

Justification

The amendment provides that a county government or corporation must ensure that the projects are part of the County Integrated Development Plan.

CLAUSE 69

93. Amend section 69 by inserting the following subsection immediately after subsection (1)-

"(1A) Notwithstanding subsection (1), every project agreement shall make provision for revenue sharing mechanisms and thresholds between a project and the Government where a project's revenue performance meets and exceeds the target return on investment negotiated under a project agreement."

Justification

The amendment requires that the parties to a project agreement should make provision for revenue sharing.

CLAUSE 72

94. Amend clause 72 (1) (e) by deleting the word "periodic" and substituting therefor the word "bi-annual".

Justification

The amendment requires that the reports should be prepared bi-annually as opposed to periodic which was vague.

CLAUSE 76

95. Amend clause 76 of the Bill by inserting the following subsection immediately after subsection (2)-

"(2A) The Auditor General shall audit the accounts of a project company."

Justification

The amendment is to provide that the Auditor General should audit the accounts of a project company.

CLAUSE 82

96. Amend clause 82 of the Bill by-

- a) inserting the following paragraph in subsection (1) immediately after paragraph (g)-
(ga) the financial reports of projects that are complete and are being operated by a private party;
- b) inserting the following subsection immediately after subsection (2)-
(3) The Cabinet Secretary shall submit a copy of the annual report to Parliament.

Justification

The amendment provides that the annual report should contain the financial reports of projects that are complete and being operated. This will make it easy to track the revenues being collected under the public private partnership project. The amendment also provides that the report should be submitted to Parliament.

SECOND SCHEDULE

97. Amend the Second Schedule-

- a) by inserting the words "for a specified period of time not exceeding thirty years" in item 4 immediately after the word "authority";
- b) in item 8 by inserting the words "not exceeding thirty years" immediately after the words "specified period".
- c) in item 9 by inserting the words "for a specified period not exceeding thirty years" immediately after the words "contracting authority";
- d) in item 10 by inserting the words "for a specified period not exceeding twenty years" immediately after the words "contracting authority";
- e) in item 12 by inserting the words "not exceeding 15 years" immediately after the words "specified period";
- f) in item 14 by inserting the words "not exceeding twelve years" immediately after the words "specified period of time";
- g) in item 16 by inserting the words "but not exceeding thirty years" immediately after the words "over time".

Justification

The amendments to the Second Schedule are to provide specific time periods for the different public private partnership arrangement which had been omitted.

SIGNED..... DATE 11TH MAY, 2021
 HON. GLADYS WANGA, CBS, MP
 CHAIRPERSON
 DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

DATE: 11 MAY 2021		DAY: TUE
TABLED BY:	HON W. NDIRANGU VICE-CHAIR	
THE TABLE	MAINAH WANGIUKU	

REPUBLIC OF KENYA



NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE

ADOPTION SCHEDULE FOR THE REPORT ON THE CONSIDERATION OF THE PUBLIC PRIVATE PARTNERSHIP BILL (NATIONAL ASSEMBLY BILL NO. 6 OF 2021)

DATE: 7TH MAY, 2021

NAME	SIGNATURE
1. HON. GLADYS WANGA, CBS, MP – CHAIRPERSON	
2. HON. ISAAC W. NDIRANGU – VICE-CHAIRPERSON	
3. HON. JIMMY O. ANGWENYI, MGH, MP	
4. HON. CHRISTOPHER OMULELE, CBS, MP	
5. HON. SHAKEEL SHABBIR AHMED, CBS, MP	
6. HON. DANIEL E. NANOK, MP	
7. HON. (DR.) CHRISTINE OMBAKA, MP	
8. HON. ANDREW A. OKUOME, MP	
9. HON. DAVID M. MBONI, MP	
10. HON. FRANCIS KURIA KIMANI, MP	
11. HON. JOSEPH M. OYULA, MP	
12. HON. JOSHUA KANDIE, MP	
13. HON. STANLEY M. MUTHAMA, MP	
14. HON EDITH NYENZE, MP	
15. HON. CATHERINE WARUGURU, MP	
16. HON. JAMES GICHUHI MWANGI, MP	
17. HON. PROF. MOHAMUD SHEIKH MOHAMED, MP	
18. HON. PETER LOCHAKAPONG, MP	
19. HON. QALICHA GUFU WARIO, MP	

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