



REPUBLIC OF KENYA

PARLIAMENT

NATIONAL ASSEMBLY BILLS

(Bill No. 21 of 2016)

**THE PUBLIC PRIVATE PARTNERSHIPS
(AMENDMENT) BILL, 2016**

(A Bill published in the Kenya Gazette Supplement No. 96 of 2016 and passed by the National Assembly, with amendments, on February 16th, 2017)

N.A./B/No. 21/2016

**THE PUBLIC PRIVATE PARTNERSHIPS
(AMENDMENT) ACT, 2017**

AN ACT of Parliament to amend the Public Private Partnerships Act, 2013

ENACTED by Parliament of Kenya, as follows—

1. This Act may be cited as the Public Private Partnerships (Amendment) Act, 2017.

Short title.

2. Section 2 of the Public Private Partnerships Act, 2013, in this Act, referred to as the “principal Act”, is amended by—

Amendment of section 2 of No. 15 of 2013.

(a) deleting the definition of the term “contracting authority” and substituting therefor the following new definition —

“contracting authority” means —

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

(ii) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;

(b) deleting the definition of the term “transaction advisor” and substituting therefor the following new definition —

“transaction advisor” means a person 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.

3. The principal Act is amended by repealing section 3 and replacing it with the following new section—

Amendment of section 3 of No. 15 of 2013.

Application.

3. The provisions of this Act shall apply to every contract for the design, financing, construction, operation, equipping, management or maintenance of a project or for the provision of public

services undertaken as a public private partnership.

4. The principal Act is amended by inserting the following new section immediately after section 3—

Insertion of section in No. 15 of 2013.

Exemption.

3A. The Public Procurement and Asset Disposal Act, 2015, shall not apply to contracts under this Act.

5. Section 15 of the principal Act is amended by inserting the words “the county government or” immediately after the words “Unit with”.

Amendment of section 15 of No. 15 of 2013.

6. The principal Act is amended by repealing section 20.

Repeal of section 20 of No. 15 of 2013.

7. Section 24 of the principal Act is amended—

Amendment of section 24 of No. 15 of 2013.

(a) by adding the following proviso at the end of subsection (1)—

Provided that the county priority list shall be subject to approval by the county government and be submitted to the Unit for publication alongside the national government priority list.

(b) by deleting subsection (2) and substituting therefor the following subsection—

(2) Upon receipt of the project lists from the national government contracting authorities, the committee shall consider the lists and the recommendations of the Unit and prepare and submit to the Cabinet for approval a national priority list which shall include county approved priority lists of public private partnership projects that have been submitted to the Unit.

8. Section 31 of the principal Act is amended in subsection (3) by deleting the word “Committee” and substituting therefor the word “Unit”.

Amendment of section 31 of No. 15 of 2013.

9. Section 36 of the principal Act is amended—

Amendment of section 36 of No. 15 of 2013.

(a) by deleting subsection (1) and replacing it with the following subsection—

(1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract

negotiation and management of a project under this Act.

(b) by deleting subsection (2) and replacing it with the following subsection—

(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, in consultation with the unit, appoint a transaction advisor to assist the authority in the preparation, procurement, contract negotiations and financial close phase of a project.

10. Section 49 of the principal Act is amended in subsection (2) by deleting the words “Committee for approval” and substituting therefor the words “Unit for concurrence”.

Amendment of
section 49 of No. 15
of 2013.

11. Section 51 of the principal Act is amended by renumbering the existing provision as subsection (1) and adding the following new subsections —

Amendment of
section 51 of No. 15
of 2013.

(2) A proposal evaluation team may reject all submissions by bidders where all bidders do not comply with the conditions and requirements specified in the tender documents or the rules made under section 44.

(3) Where a proposal evaluation team rejects a submission under this section, the proposal evaluation team shall prepare and submit to the accounting officer a report setting out the reasons for the rejection.

(4) The accounting officer shall inform the bidder of the decision of the contracting authority to reject the bid within fourteen days of receiving the report under subsection (3).

(5) A bidder whose bid has been rejected under this section shall not be entitled to compensation.

(6) Where all bids have been rejected under this section, the contracting authority may start the tender process anew.

12. Section 54 of the Public Private Partnerships Act, 2013, is amended—

Amendment of
section 54 of No. 15
of 2013.

(a) by deleting subsection (2) and substituting therefor

the following subsection—

(2) The Committee shall consider the reports submitted to it under subsection (1) and, if satisfied, approve the execution of the public private partnership agreement with the successful bidder.

(b) by deleting subsection (3).

13. The principal Act is amended by inserting the following new section immediately after section 54—

Insertion of section
in No.15 of 2013.

Procedures for county
government public
private partnership
projects.

54A. (1) A county government may enter into a public private partnership arrangement and shall be responsible for the management and administration of the overall project development cycle in accordance with this section.

(2) Where a county government intends to enter into a public private partnership arrangement, it shall cause its user departments or county corporations, as the case may be, to prepare and submit a project proposal to the Unit for consideration and recommendation detailing the strategic and operational benefits of entering into such an arrangement.

(3) Where the Unit recommends that a project may be developed as a public private partnership under this Act, the county government may grant its approval for the project and subject the project to a detailed feasibility study in accordance with section 33.

(4) For every county public private partnership project, the Committee shall—

(a) approve the feasibility study report prepared by the county government on each proposed public private partnership arrangement, in accordance with section 35;

(b) approve the negotiated commercial, financial and technical terms of a proposed public private partnership

project in accordance with section 54;

(c) approve any proposed variations to a project agreement in accordance with section 64; and

(d) exercise the powers vested in it under section 8 (c).

(5) A county government shall implement a public private partnership project if the project—

(a) provides value for money;

(b) is determined to be affordable; and

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

(6) The Cabinet Secretary may make regulations for the better implementation of public private partnership arrangements by county governments, including—

(a) projects that may be undertaken by county governments;

(b) the thresholds of contingent liabilities that may be approved for such projects;

(c) the management of the public private partnership procurement processes by county governments; and

(d) the negotiation of project terms by county governments.

14. Section 56 of the principal Act is amended by—

Amendment of
section 56 of No. 15
of 2013.

(a) deleting subsection (1) and substituting therefor the following subsection—

(1) The Committee shall, within a period of thirty days from the date of its decision of approving the project and financial risk assessment report, inform the contracting authority of its decision.

(b) deleting subsection (2) and substituting therefor the

following subsection—

(2) Where the Committee approves an undertaking of a project, the contracting authority shall finalise the project agreement for execution by the parties to the project.

(c) deleting the words “Cabinet or Parliament as the case may be,” appearing in subsection (3) and substituting therefor the word “Committee”.

15. The principal Act is amended by repealing section 57 and substituting therefor the following new section—

Amendment of section 57 of No. 15 of 2013.

Execution contract.

of 57. The contracting authority shall, following its finalisation of the project agreement and after all parties to the agreement have complied with all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder.

16. Section 67 of the principal Act is amended in subsection (2)—

Amendment of section 67 of No. 15 of 2013.

(a) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) not less than six but not more than eight other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the Unit, consider appropriate;

(b) by deleting paragraph (c).

The Public Private Partnerships (Amendment) Act, 2017

I certify that this printed impression is a true copy of the Bill passed by the National Assembly on Thursday, 16th February, 2017.



Clerk of the National Assembly

Endorsed for presentation to the Senate in accordance with the provisions of Standing Order 142 of the National Assembly.



Speaker of the National Assembly

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

This Bill has been submitted by the Cabinet Secretary for the National Treasury in line with the proposals announced in the Budget for 2016/2017. The object of this Bill is to amend the Public Private Partnerships Act, 2013, to recognise county governments as distinct contracting authorities for public-private partnerships projects. To achieve this, the Bill makes further provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnerships arrangements.

Statement of the delegation of legislative powers and the limitation of fundamental rights and freedoms.

The Bill does not delegate any legislative power nor limit any fundamental right or freedom.

Statement of how the Bill concerns county governments.

The Bill concerns county governments in terms of Article 109(4) of the Constitution as it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution.

The Bill is a money Bill within the meaning of Article 114 of the Constitution.

Dated the 9th June, 2016.

ADEN DUALE,
Leader of the Majority Party, National Assembly.