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PG. 4

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PUBLIC PRIVATE PARTNERSHIPS

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Disclaimer: This Article does not form part of a Legal Opinion and is purely informative.

INTRODUCTION

On December 7th 2021, President Uhuru Kenyatta assented to the Public Private Partnership (PPP) Bill 2021. The new PPP Act 2021 seeks to repeal the PPP Act of 2013 by establishing an elaborate legal framework that covers both national and county level PPP projects.

In particular the PPP Act 2021 seeks to provide for private sector participation in the financing, construction, development, operation or maintenance of infrastructure or development projects through PPPs; to streamline and rationalize the regulatory framework for PPPs; and to give effect to Article 227 of the Constitution on procurement relating to PPPs. Further the Act seeks to enhance the efficiency in the regulatory process of engagement of private parties and the manner in which PPPs are conducted.

The Act applies to all project agreements for financing, design, construction, rehabilitation, operation, equipping or maintenance of a project or provision of a public service undertaken as a PPP.



The PPP Committee

Sections 6 to 19 of the PPP Act 2021 provide for the establishment of the PPP Committee, its composition, functions and powers. Such functions and powers include policy formulation; overseeing PPP contract implementation; approval of bid documents, feasibility studies, negotiated contract terms including the cancellation of procurements or termination of project agreements and their variation; monitoring implementation of the Act and carrying out any other pertinent functions.

The provisions under Sections 15 to 19 specifically provide for the establishment of the Directorate of PPPs, its staff, functions and powers. The Directorate serves as the lead institution in the implementation of PPP projects under the new PPP Act and is charged with the functions set out in Section 19 which include originating, guiding and coordinating selection, ranking and prioritization of PPP projects within the public budget framework; overseeing project appraisal and development activities of contracting authorities; leading contracting authorities in project structuring, procurement, tender evaluation, contract negotiation and deal closure; supporting development of PPPs country-wide; on its own accord originating and leading project structuring and procurement in liaison with a contracting authority and overseeing contract management frameworks for projects.

The Directorate is to be headed by the Director-General whose qualifications and tenure is provided for under the Act (Section 16).

PPPs

The provisions under Sections 20 to 29 generally provide for the procedures to be undertaken in PPPs. The Act also addresses the manner in which parties enter into and execute project agreements (Section 24). The contracting authority is required to implement the directions of the Directorate at every stage of the project. Additionally, where the project involves more than one contracting party, the Directorate is mandated to designate one of the contracting authorities to be the lead.

The duties of the contracting authority include reporting to the Directorate and implement their recommendations; comply with Directorate guidelines and submit any information required by the Directorate or Committee (Section 21(2)). Additionally, a contracting authority other than a county government or county corporation is required to prepare a project list it intends to undertake on a priority basis and submit it to the Directorate for approval (Section 25). A national list and priority list of projects is to be established and maintained by the Directorate (Section 26).

The PPP Act 2021 also provides for the determination of success fees and the cost of delivering a facility or service in relation to a project i.e. recoverable project development cost (Section 29). Additionally, the Act provides for the issuance of government support measures for a PPP including a bid undertaking; a letter of support; a letter of credit; a full or partial letter of guarantee; approval for issuance of partial risk guarantees and political risk insurance; or any other instrument that the Cabinet Secretary for Finance may determine (Section 28).



Project Identification and Selection of Private Parties

In consultation with the Directorate, contracting authorities are responsible for the conceptualization or identification of potential projects and undertaking the preparatory and tendering process (Section 30(1)). In doing so, the contracting authority is to consider the strategic and operational benefits compared to the development of the facility or provision of the service by the contracting authority (Section 30(2)).

The contracting authority must also constitute a project implementation team to oversee the structuring and implementation phases of the project (Section 31). Additionally, the 2021 Act provides for the carrying out and approval of a feasibility study which determines the viability of the project (Section 32). Further, the Directorate is required to assess the technical expertise of the contracting authority to procure a project (Section 34(1)). Where such expertise is lacking the contracting authority in consultation with the Directorate will appoint a transaction advisor (Section 34(2)).

PPP Procurement Methods

The procurement methods for PPPs include direct procurement, privately-initiated proposals and competitive bidding (Section 37(1)). Applicable procedures during the prequalification of bidders including the establishment of prequalification committees by a contracting authority for this purpose is also provided (Section 46 and 47). Consortiums may also be constituted by bidders intending to bid for a project (Section 52). Additionally, a competitive dialogue with each shortlisted bidder may be held by a contracting authority with the Directorate's approval, in order to define the technical or financial aspects of the project (Section 51(1)).

The new PPP Act also makes provision for the manner in which the evaluation of bids, negotiations and approval processes are to be handled (Section 54, 56, 58 and 59).

Section 61 of the 2021 Act further addresses the manner in which a tender may be cancelled and the publication of information on the results of a tender process.

PPPs by County Governments

Part IV of the PPP Act 2021 specifically addresses PPPs entered into by County Governments. Generally, county governments are responsible for the administration of the overall project development cycle for PPPs entered into with private parties (Section 63). Such PPP projects must undergo a detailed feasibility study (Section 63(3)) and each county must liaise with the Directorate during each phase of the project (Section 63(4)).

Written approval from the Committee and the Cabinet Secretary for finance is a requirement where the feasibility study indicates that a government support measure is required or exceeds the fiscal ability of the county government (Section 63(5)).

The 2021 Act further requires approval of PPP projects from the County Assemblies (Section 64). In addition, county governments are required to make lists of the projects and submit them to the Directorate (Section 65). Finally, the PPP Procurement methods in Part V of the Act apply, with the necessary modifications, to PPP projects undertaken by county governments (Section 66).



Project Companies, Disclosures and Project Agreements

Upon execution of the project agreement a project company is to be established in accordance with the provisions of the Companies Act 2015 (Section 67(1)).

Once the project agreement is executed, it must be published in at least two newspapers with nationwide circulation and electronic media the results of the tender process (Section 68). The Act further provides for the preparation and amendment or variation of project agreements between the parties (Section 71).

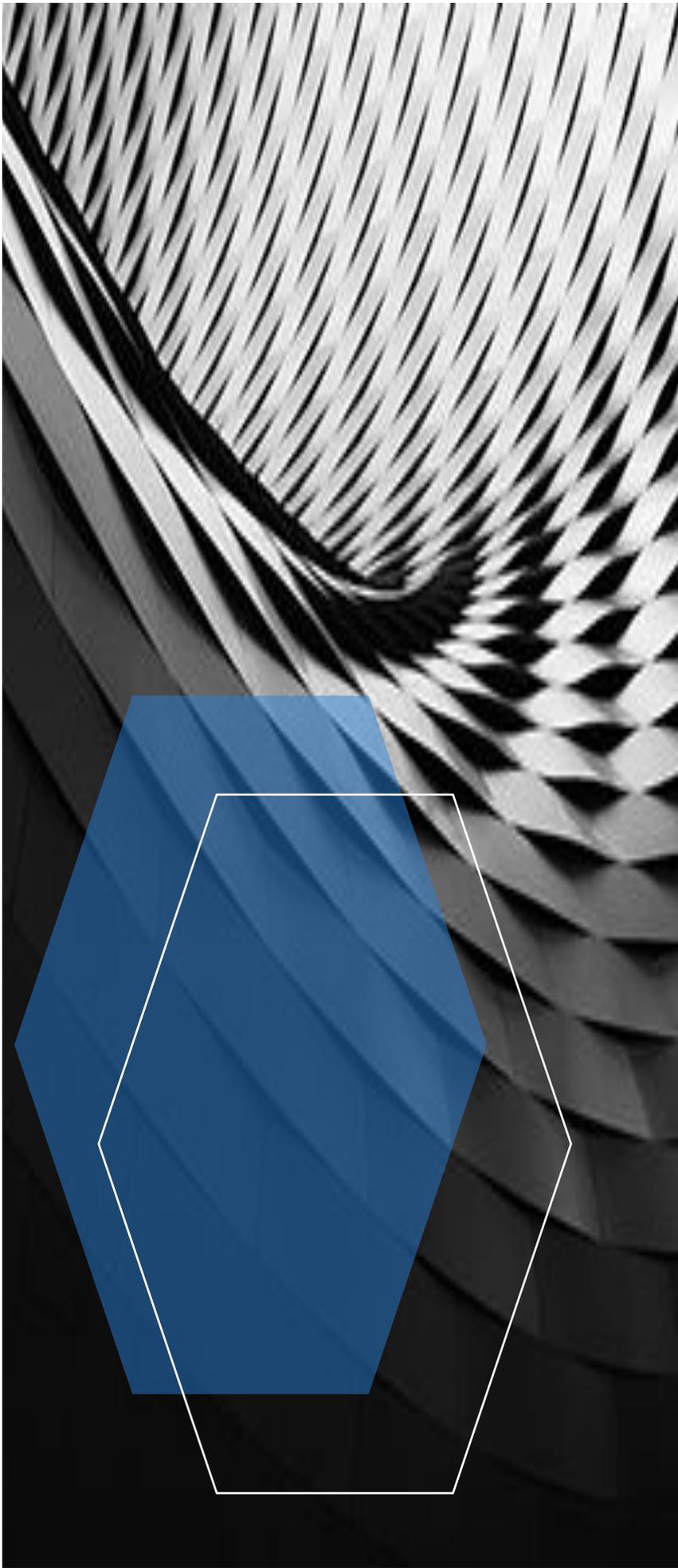
In addition, the Act contains provisions for the implementation and management of projects (Section 72) as well as the establishment of a Petition Committee to determine petitions and complaints in relation to a project (Section 74).

Financial and Miscellaneous Provisions

A PPP Project Facilitation Fund is established as a financing mechanism (Section 75). Sources for the Fund include grants, gifts, donations or other endowments accruing to the Fund; such levies or tariffs imposed on a project; success fees paid by a project company; appropriations-in-aid among others (Section 75(2)). The Fund is to be managed in accordance with Regulations made by the CS in accordance with the Public Finance Management Act 2012 (Section 75(4)).

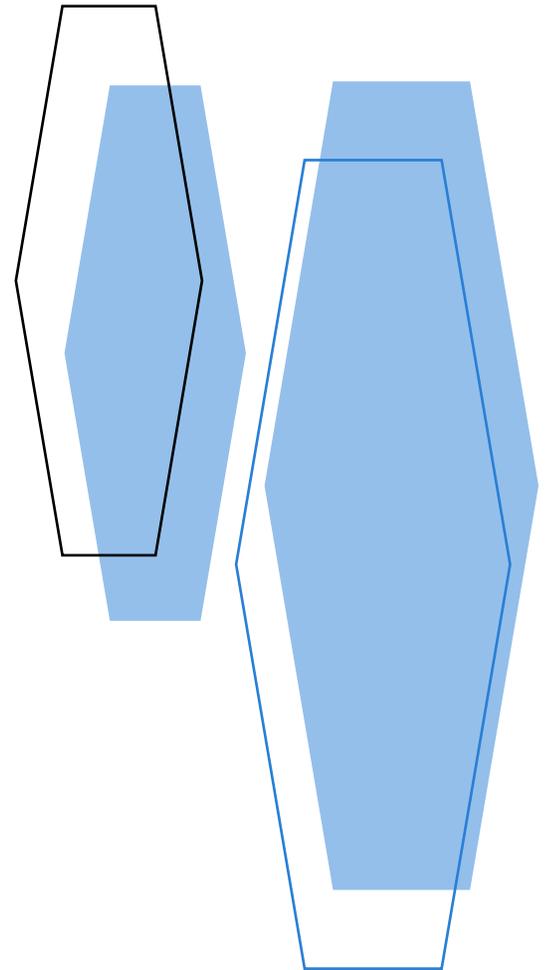
Section 76 specifically addresses the scrutiny of financial records of a project company or private party by the contracting party or the Directorate. This also entails requirements to prepare audited accounts and other information to the contracting authority or Directorate within 6 months after the end of each financial year (Section 76(3)).

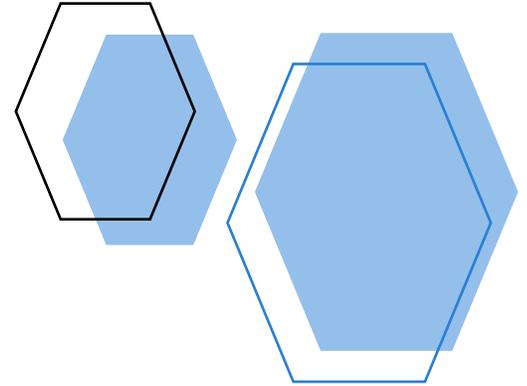
The miscellaneous provision addresses local content by including requirements such as the prioritization to services provided in Kenya (Section 77(1)). In addition offences and penalties are present for violations of the provisions of the Act including prohibitions on participation of state officers and public officers in PPP projects (Section 79); inspection of premises by contracting authorities and the Directorate (Section 80); the application of the Anti-Corruption and Economic Crimes Act 2003 to PPPs (Section 81); the preparation and submission of annual reports (Section 82) and the power of the Cabinet Secretary to make Regulations (Section 83).



CONCLUSION

The scope of the PPP Act 2021 provides a fairly comprehensive framework for the implementation of PPPs and addresses the gaps in the existing legal framework. The Act is available at: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2021/ThePublicPrivatePartnershipsAct_No.14of2021.pdf





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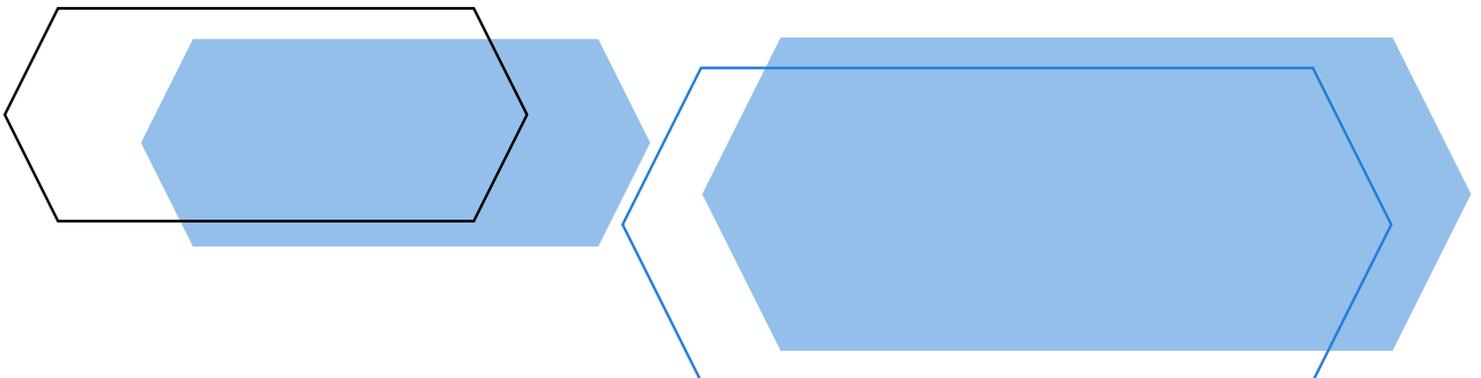
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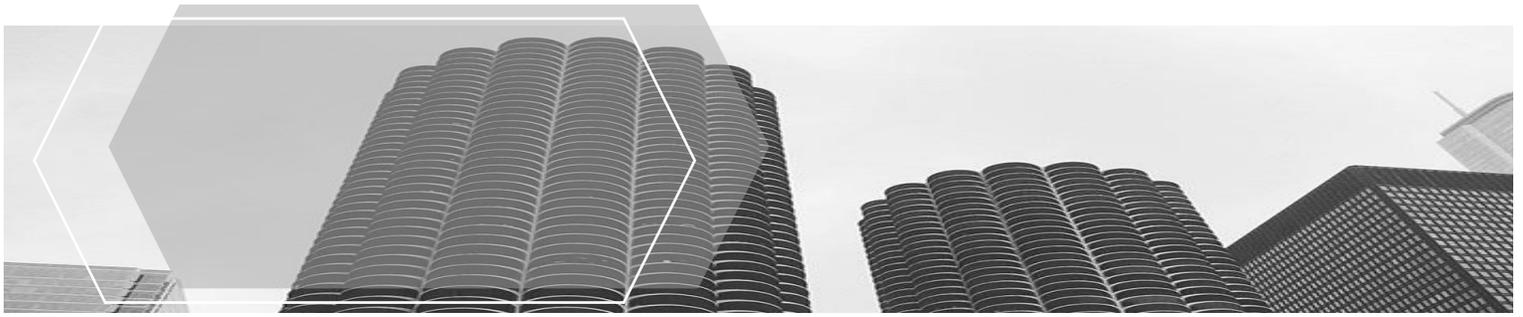


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