



REPUBLIC OF KENYA

THE NATIONAL TREASURY

TERMS OF REFERENCE

Selection of Transaction Advisors for Pre-qualification

1. INTRODUCTION

The Government of Kenya (GOK) has made Public Private Partnerships (PPPs) a priority mechanism that can help in the development of assets and provision of services to address the major infrastructure gaps in the country. In November 2011, GOK issued a National PPP Policy and in February 2013, through the enactment of the PPP Act, established an institutional framework to attract private sector participation in the provision of public services through PPPs i.e. the establishment of a PPP Committee, responsible for developing and implementing PPP policy initiatives; the PPP Unit (PPPU), housed within the National Treasury, to function as a national centre for PPP expertise and for facilitating project development and implementation; and PPP Nodes in contracting authorities at national and county level.

A number of project proposals and feasibility studies have been approved by the PPP Committee and as of today there is a substantial pipeline of projects just entering the feasibility stage, as well as a small, but growing number of projects entering transaction stage. For several projects Transaction Advisors have been appointed to assist contracting authorities with the preparation of Feasibility Studies and the implementation of PPP transactions, as provided for under the Act.

Because of the growing number of PPP projects in the pipeline, and the gathering pace of the PPP program, the PPP Unit, in accordance with Section 20 of the National PPP Regulations wishes to pre-qualify a number of Transaction Advisors with the qualifications and experience necessary to support the various Contracting Authorities and the PPP Unit in implementing PPP projects. Appointment of Transaction Advisors for specific PPP projects will subsequently be based on a restricted tender amongst a shortlist (typically of 3 to 6) drawn up from those pre-qualified through this process based on an assessment of each of the prequalified consultants suitability for the particular project being procured.

Transaction Advisors will be engaged by Contracting Authorities, or occasionally, by the PPP Unit itself.

Contracting Authorities reserve the right, for specific projects, to engage Transaction Advisors from outside of this process through a full competitive bidding process. Prequalified organisations from this process will not be restricted from participating in any such tenders.

1.1. Background of PPP in Kenya

Addressing the infrastructure deficit and improving the quality of public services has been an important component of the Government economic agenda. Government has, therefore, developed a legal and regulatory framework for the private sector to play a greater role in the provision of infrastructure, whilst ministries and other public authorities will focus on planning and structuring projects in coordination with the PPPU. The private sector will be contracted to manage some public services, and to design, build, finance and operate some infrastructure on both national and county government levels.

It is the Government's expectation that private participation in infrastructure development through PPP will enhance efficiency, broaden access, and improve the quality of public services. In this connection, Government will take steps to ensure that private investment is used, where appropriate, to address the infrastructure deficit and improve public services in a sustainable way. In line with the Government's commitment to transparency and accountability, it will ensure that the transfer of responsibility to the private sector follows best international practice.

The PPP framework was initially established under the Public Procurement and Disposal (Public Private Partnership) Regulations, 2009 and in 2013 a PPP Act was approved by Parliament and assented into law by the President. The National PPP regulations were gazetted on 19th December 2014 while the County PPP regulations and the PPP manual are currently under preparation.

The following institutions have been created under the PPP Act, 2013:

- i. PPP Committee;
- ii. PPP Petition Committee;
- iii. PPP Unit; and
- iv. PPP Nodes within the Ministries, Departments and Government Agencies

PPP Committee

The PPP Committee, assisted by its Secretariat (PPPU) has the responsibility to:

- Develop and implement PPP policy initiatives;
- Champion the PPP Agenda;
- Ensure compliance with the PPP Act 2013;
- Approve/recommend PPP projects to the Cabinet;

- Ensure the compliance of the PPP Act 2013;
- Ensure efficient execution of the PPP Agreements;
- Ensure PPPs are consistent with national priorities;
- Authorize allocations of the Project Facilitation Fund; and
- Issue PPP standards, guidelines & procedures, & bid documents

PPP Petition Committee

The PPP Petition Committee is set up as a tribunal to adjudicate on all petitions and complaints submitted by a private party during the process of tendering and entering into a PPP project agreement.

PPP Unit

The PPP Unit, as the resource center for best practice and guardian of the integrity of the PPP process, has a large role to play in identifying problems, and making recommendations to the PPP Committee regarding potential solutions. In addition, it will be the specific responsibility of the PPP Unit to assist each Contracting Authority to identify, select, appraise, approve, negotiate and monitor PPP projects throughout their life cycle. Moreover, the PPP Unit is also tasked to improve capacity and skills in the public sector and to manage PPP projects more effectively.

Contracting Authorities

The PPP Act of 2013 recognizes Contracting Authorities (CA) as Ministries/Government Departments, County Governments and Statutory Corporations. Their main responsibilities with respect to PPP are to identify, develop, implement and monitor projects. To discharge their responsibilities, procuring entities are required to conduct feasibility studies, prepare bidding documents and seek necessary approvals.

Each Contracting Authority undertaking a PPP project is required to establish a PPP Node, staffed with officers with the ability to carry out day-to-day management of a PPP project. Given that Contracting Authorities do not have in-house expertise on PPP, they may have to appoint Transaction Advisors to assist them in the development of projects.

Scope and Application of the PPP Program

The scope of the Government's PPP program is the creation of new infrastructure, and the expansion and refurbishment of existing assets such as:

- power generation plants and transmission/distribution networks;
- roads and bridges;
- ports;
- airports;

- railways;
- inland container depots and logistics hubs;
- petroleum infrastructure, such as storage depots and distribution pipelines etc.;
- water supply, treatment and distribution systems;
- solid waste management;
- social infrastructure for health care, prisons, education

2. SERVICES TO BE RENDERED

2.1. Objective of the Assignment

The objective of this assignment is to provide Transaction Advisory support to contracting authorities and the PPP Unit to develop and procure PPP projects in accordance with the PPP legislation in the country.

2.2. Scope of Work

The detailed Terms of Reference for Transaction Advisors will be prepared on a project-by-project basis, but typically would include the following:

a) Preparation of Feasibility Studies designed to answer the following questions:

- Is the project viable – from a technical, financial, economic, legal, social and environmental perspective? This should include an assessment of affordability – for the end user and the public sector, including an assessment of the potential fiscal commitment and contingent liability impact, and whether the project will deliver value for money.
- What is the preferred technical solution to achieving the Project’s objectives vs. other options which will need to be considered?
- What is the best way to procure the project – through the traditional public sector procurement, for example a Build or Design and Build contract, or through some form of PPP?
- If PPP, then what is the most appropriate form of PPP for the project as defined by the proposed responsibilities of the private sector, and the key risk allocation?

and covering the following elements:

- Needs Analysis
- Technical Solutions Options Analysis
- Project Due Diligence
- Procurement Options and PPP Structure Analysis
- Financial Modelling
- PPP Agreement Term Sheet
- Project Implementation Schedule

- b) Transaction Advisory support to the implementation of PPP procurements, including, inter alia:
- Tender Process Design
 - Preparation of Prequalification and Bid documents
 - Preparation of PPP contracts and related agreements and schedules
 - Development of performance standards and output specifications
 - Design of detailed Payment Mechanisms and tariff setting regimes
 - Support to the Prequalification process including PQ evaluation
 - Support to the Bid process including bidder communications and Bid evaluation
 - Amendments to bid documents and contracts throughout the process
 - Financial Modelling to support Bid Evaluation and Value for Money assessment
 - Support to negotiations
 - Support to legal and financial close processes
 - Advice on institutional framework and capacity needs for post-procurement contract management

3.0. QUALIFICATIONS OF TRANSACTION ADVISORS

The PPP Unit is looking for financial, legal and technical advisors with relevant skills and experience in preparing PPP Feasibility Studies and in designing and implementing PPP procurements across the following range of sectors:

- Transport, including roads & bridges, rail, ports, airports, pipelines, and logistics
- Energy, including power generation, transmission, supply and distribution, renewables, oil and gas exploration, development, processing, storage and distribution
- Mining
- Environmental including water supply (bulk and distribution), sanitation and solid waste
- Telecommunications/ ICT
- Accommodation including housing, mixed use developments and public buildings
- Healthcare including hospitals, diagnostic centres and equipment
- Education including schools, university infrastructure and equipment
- Prisons including facilities and services
- Municipal Services
- Rural infrastructure services

Interested parties may seek to pre-qualify for some or all of these sectors. Interested parties may do so, either by submitting separate EOIs for each sector they are interested in, or one EOI divided into sections covering each sector they are interested in. Interested parties must clearly state the sectors they are seeking to prequalify for.

It is expected that Transaction Advisors selected for specific PPP projects will comprise a consortium of not more than three (3) organisations providing the requisite combined financial, legal, technical and sectoral experience. Please note that within the consortium, a lead member needs to be specified. This lead member will not only represent the consortium in all discussions with the PPP Unit or CA, but will also be the entity that will be responsible for all deliverables, with the expected quality and on time.

In submitting Expressions of Interest, interested parties should complete the following matrix to indicate which sectors they are seeking to pre-qualify for:

Sector/ Competency	Lead	Financial	Legal	Technical
Roads & Bridges				
Rail				
Ports				
Airports				
Energy				
Mining				
Environmental				
Telecommunications/ ICT				
Accommodation				
Healthcare				
Education				
Prisons				
Municipal Services				
Rural Infrastructure				
Other ¹				

3.1. Corporate Experience

In submitting their Expressions of Interest, interested parties, together with each of its consortium member, should demonstrate their experience in:

¹ Bidders are free to illustrate experience in other PPP sectors, not included above

- Carrying out PPP Project Feasibility Studies in accordance with the PPP Act, 2013 and the attached template;
- Acting as Transaction Advisors on PPP Project procurements; and
- Each of the sectors for which they wish to be considered for prequalification

Interested parties who wish to be prequalified should also submit their Audited Balance Sheet for the previous 3 years.

Project experience should be presented in the following format for each sector in which the bidder is seeking to prequalify. Only experience in the last ten (10) years will be evaluated – experience prior to that should not be provided.

Date	Country	Client	Project Description	Detailed description of services provided	Did project reach Financial Close whilst consultant was advising? Yes or No

It is recognised that interested parties may be a part of a larger consulting organisation. Experience of other members of that consulting organisation may be included under the following conditions:

- The experience of the interested entity is clearly identified separately from the experience of other entities within the consulting organisation/ group
- Letters of support are provided from each member of the consulting organisation whose experience is included in the Expression of Interest

3.2. Curriculum Vitae

It is recognised that project teams will be put together in response to the terms of reference for specific projects. At this stage, interested parties should provide CVs of experts who will be available to work on Kenya's PPP programme.

In submitting CVs interested parties should note the following:

- Only CVs of personnel who are full time employees, or exclusively contracted to interested parties or other members of interested parties' larger consulting organisations accompanied by a letter of support should be submitted
- CVs of independent consultants who work as subcontractors to interested parties on a periodic basis will not be evaluated and should not be included

- CVs of personnel appearing in more than one Expression of Interest will lead to both interested parties being disqualified
- Interested parties should submit no less than 5 and no more than 20 CVs of experts, depending upon the number of sectors they wish to express interest in

3.3. Evaluation

Expressions of Interest will be evaluated against the following criteria, for each sector in which interested parties are seeking to pre-qualify:

Corporate Experience (50 points)

- Experience of conducting PPP Feasibility Studies:
 - In sub-Saharan Africa (10 points)
 - Internationally (10 points)
- Experience of acting as Transaction Advisors on PPP procurements:
 - In sub-Saharan Africa (15 points)
 - Internationally (15 points)

Quality of CVs (50 points)

- Experience of conducting PPP Feasibility Studies:
 - In sub-Saharan Africa (5 points)
 - Internationally (5 points)
- Experience of acting as Transaction Advisors on PPP procurements:
 - In sub-Saharan Africa (10 points)
 - Internationally (10 points)
- Professional and academic qualifications (10 points)
- Experience of working in the region (sub-Saharan Africa) and relevant language skills (English) (10 points)

Once pre-qualified, the consortia will be selected for the shortlist of advisors for specific projects on the basis of the extent to which their corporate and personnel experience matches the specific requirements of the project under consideration. Interested parties are therefore encouraged to provide clear and concise descriptions of the projects they have worked on – failure to do so will make matching more difficult.

Once pre-qualified, bidders will be eligible for shortlisting for specific PPP projects for a period of one year, after which another prequalification exercise will be undertaken. During this period the PPP Unit may remove organisations from the prequalified list if it concludes that they are not capable of providing the required services. The PPP Unit also reserves the right, at its sole discretion, to carry out a further prequalification exercise in order to add new organisations for some or all of the sectors, if it is of the view that the initial prequalified list is not strong enough.