

LEGAL NOTICE NO.....

The Public Private Partnerships Act

(No.15 of 2013)

IN EXERCISE of the powers conferred by section 71 of the Public Private Partnerships Act, the Cabinet Secretary makes the following Regulations: -

THE PUBLIC PRIVATE PARTNERSHIPS (COUNTY GOVERNMENTS) REGULATIONS, 2014

PART I – PRELIMINARY

Citation	1. These Regulations may be cited as the Public Private Partnerships (County Governments) Regulations, 2014
Interpretation	2. In these Regulations, words and phrases bear the same meaning as in the Act and except where the context otherwise requires -
No. 15 of 2013	"Act" means the Public Private Partnerships Act, 2013; "Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to finance; "Chief Finance Officer" means the chief finance officer of the county government; "Debt Management Office" means the office by that name for which provision is made in the Public Finance Management Act, 2012; "County government" means the county government as defined in the Constitution of Kenya of 2010 and includes an entity of the county government established pursuant to the provisions of the County Governments Act (No 17 of 2012); "PPP" means public private partnership as defined in the Act; "Fund" means the Public Private Partnership Project Facilitation Fund established under the Act; "Unit" means the PPP Unit established under the Act; "User department" means the department or unit of the county government whose functions or part of whose functions are to be performed through the PPP which the county government is considering undertaking;
Application	3. (1) These Regulations shall apply to every project undertaken by a county government in which the responsibility to mobilize financing for: (a) the construction, operation, equipping or maintenance of assets or infrastructure belonging to the county government is to be placed wholly or partly on the private party; or (b) the provision of public services or performance of functions which it is the constitutional mandate of the county government to provide or perform is to be placed wholly or partly on the private party.

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(2) The Regulations shall not apply to a procurement to which the Public Procurement and Disposal Act (No 3 of 2005) applies on account of the fact that the county government is wholly responsible under the contract between the parties for financing the procurement.

PART II - COUNTY GOVERNMENT PPP INSTITUTIONS

Establishment of a Node

4. (1) The county executive committee shall establish a Node.

(2) The Node shall comprise of the following members:

(a) the County Chief Finance Officer who shall be the chair;

(b) the head of the county procurement department, who shall be the secretary;

(c) the County Attorney or his representative;

(d) the head of the county public works department;

(e) the head of the county planning department; and

(f) the head of the user department whose functions are to be discharged through the proposed PPP.

(3) The Node shall be a standing organ of the county government charged with the responsibility to perform the functions of the contracting authority as stipulated in section 17 of the Act for all PPP projects of the county government.

Project appraisal team

5.(1) The Chief Finance Officer shall constitute for each PPP project that it intends to undertake a project appraisal team.

(2) The project appraisal team shall consist of:

(a) a representative of the user department who shall be the chair;

(b) a representative of the procurement department, who shall be the secretary;

(c) a representative of the Unit;

(d) a representative of the node;

(e) one technical expert;

(f) one financial expert; and

(g) one legal expert.

(3) The appointment to the project appraisal team shall be in writing and shall subsist until such time as the prequalification committee is appointed in respect to the PPP project or it is transformed into the prequalification committee.

(4) The project appraisal team may from time to time co-opt other persons, whether or not employees of the county government, to advise it either generally or with respect to particular matters.

(5) The function of the project appraisal team shall be to oversee the preparation phase of the project including the preparation of the

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feasibility study but it may perform any other functions in relation to the PPP project with respect to which it was constituted as the Chief Finance Officer may from time to time determine.

(6) Where the county government determines that it does not have adequate technical capacity internally the members appointed in their capacity as experts may be appointed from among persons who are not employees of the county government.

Transaction advisors

7(1) A county government which proposes to undertake a PPP project may procure transaction advisors to advise it in the project.

(2) The procurement of transaction advisors shall be undertaken under the Public Procurement and Disposal Act, 2005 and the rules made thereunder.

(3) The Unit may, where the county government meets criteria set by the Fund, pay the fees and expenses of the transaction advisors procured under this rule out of the Fund established under the Act.

(4) Where the Unit has agreed to pay the fees of the transaction advisors it may appoint the transaction advisors on behalf of the county government or enter into an agreement with the county government to pay the transaction advisors' fees on behalf of the county government.

Prequalification committee

8.(1) Unless, in the view of the Chief Financial Officer, there are exceptional reasons justifying the constitution of a prequalification committee of a project the project appraisal team shall perform the functions of the project prequalification committee under the Act.

(2) The duration of appointment of the prequalification committee shall subsist until such time as the proposal evaluation team is appointed whereupon its term shall expire.

Proposal evaluation team

9.(1) The Chief Finance Officer shall constitute a proposal evaluation team in accordance with section 47 of the Act.

(2) The Chief Finance Officer may in writing appoint additional persons to the proposal evaluation team if this is necessary to enhance the technical capacity of the proposal evaluation team to evaluate the technical and financial proposals.

(3) The appointment of the members of the proposal evaluation team shall subsist until such time as a negotiating committee is appointed or, where no such committee is appointed, until such time as the project agreement is executed in respect to the PPP project or if no such agreement is executed until such time as the PPP project terminates in accordance with the provisions of section 58 of the Act.

Negotiations committee

10.(1) The Chief Finance Officer may appoint a negotiations committee with respect to a particular PPP project in accordance with section 52(2) of the Act.

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(2) In addition to a representative of the Unit and of the Node, the members of the negotiating committee shall comprise a representative of the county finance department, the county attorney, a representative of the department responsible for county planning and a representative of the department responsible for county public works and infrastructure.

Fees and expenses

11.(1) The Fund may, on an application made by the county government, support the county government by making a contribution towards the payment of the fees and other expenses of the PPP units established under these regulations.

(2) The PP Committee shall issue, and may from time to time amend, guidelines on the criteria and other requirements for receiving funding out of the Fund to support the activities of the PPP activities and institutions for which provision is made under these regulations.

PART III –REQUIREMENTS FOR COUNTY PPP PROJECTS

County PPP project list

12.(1) A county government that is desirous of undertaking a PPP project shall submit the project to the PPP Committee through the Unit for the inclusion in the national priority list of projects approved by the Cabinet under section 24 of the Act.

(2) A county government may only submit to the PPP Unit for consideration for inclusion in the national priority list PPP projects:

(a) in respect to which a sector diagnostic study has been undertaken under the provisions of section 20 of the Act; or

(b) which form part of its development programme in its five year integrated development plan formulated in accordance with the provisions of the County Governments Act (No 17 of 2012).

(3) The Unit shall only recommend a county government PPP project to the PPP Committee for approval if the Project addresses a function of the county government under the Fourth Schedule to the Constitution.

(4) The PPP Committee will develop and publicize criteria for approval of projects for inclusion in the national priority list of projects.

(5) A PPP project which is not approved for inclusion into the national priority list may only be undertaken by the county government if it falls below the threshold prescribed in these regulations for approval of projects or if it does not pose contingent liabilities to the national government or county government.

Project proposal

13.(1) Following the inclusion of a project in the national priority list the Chief Finance Officer shall constitute a project appraisal team in respect to that project.

(2) The project appraisal team shall prepare a project proposal in which it provides a justification for undertaking the project as a PPP.

(3) The Chief Finance Officer shall submit the project proposal to the Unit for the approval of the PPP Committee under section 31(3) of the Act allowing the project to be undertaken as a PPP project.

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(3) When submitting the project proposal to the Unit for the approval of the PPP Committee the Chief Finance Officer shall, if the county government desires the technical support of a transaction advisor to enable it prepare the PPP project, request for such financial support from the Fund.

Feasibility study

14(1) Following the approval of the project proposal by the PPP Committee the project appraisal team shall, on behalf of the Node, and where a transaction advisor is procured, with the technical support of the transaction advisor, conduct a feasibility study in accordance with the provisions of section 33(2) of the Act to determine the viability of undertaking the project as a PPP.

(2) The report of the feasibility study shall:

- (a) address all the matters stipulated in section 33(2) of the Act;
- (b) state whether, in the opinion of the project appraisal team, the project is viable as a PPP project with reasons for the conclusion; and
- (c) identify the legal, economic, social, environmental issues to be addressed if the project is to be successfully implemented as a PPP project, a timeframe for addressing the issues and the public entity responsible for taking the required action.

Affordability

15(1) For the purposes of section 33 of the Act ðaffordabilityö shall mean that the cost, price or other tariff to be imposed by the private party is affordable to:

- (a) the county government, where under the proposed PPP structure, the cost is to be borne by the county government; or
- (b) by end users of the service to be offered where, under the proposed PPP structure, the price or tariff is to be paid directly by end users of the service.

(2) In considering whether the price is affordable to end users account shall be taken of the income levels of the end users as well as willingness to pay for the service at the projected price while affordability to the county government shall be decided on the basis of rule section 2(10(a) of the Act.

(3) Where the cost is not affordable to the county government or in the case where the price is to be paid directly by end users of the service, the price is not affordable to end users the feasibility study shall address whether and, if so, the extent of the viability gap financing to be extended to the project from the Fund or other source.

(4) The feasibility study shall also address whether and if so, the form of support, either by way of a guarantee, undertaking or letters of comfort, which should be extended to the project by the National Treasury to reduce premiums which the feasibility study has identified as likely to be factored in by the private party for political risks, if any.

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Value for money

16. For the purposes of section 33 of the Act òvalue for moneyö shall mean that undertaking the project as a PPP delivers superior economic, environmental and social value to the county government relative to other delivery options available to the county government and the opportunities foregone by the county government in undertaking the project as a PPP.

Public sector comparator

17.(1)For the purposes of section 33 of the Act òpublic sector comparatorö shall mean the total cost to the county government and users of delivering the facility or the public service through a PPP as compared to the all in cost of delivering the facility or service by the county government.

(2) For purposes of this rule total cost means:

(a) the estimate of the cost of constructing, operating, equipping or maintaining the facility or providing the service based on the prevailing market rates of delivering such facilities or service as derived from competitive bidding, market research or international best practice; and

(b) a margin to enable the private party operate efficiently and compensate investors for the risks assumed.

Approval to tender

18.(1) In deciding whether or not to give its approval under section 35 of the Act for the tendering of the project the PPP Committee shall take account of the feasibility study; the approval by the Debt Management Office of the fiscal risk and contingent liabilities of the project; and the recommendations of the Unit.

(2) The PPP Committee may approve the Project for tendering either conditionally or unconditionally.

(3) A PPP project which is not approved for tendering by the PPP Committee following a consideration of the feasibility study may only be undertaken by the county government if it does not pose contingent liabilities to the national government or county government.

PART IV –PROCUREMENT OF COUNTY GOVERNMENT PPP PROJECTS

Procurement of the private party

19.(1) Procurement of a private party to undertake a PPP project shall be by an open tender.

(2) The procurement shall be undertaken using standard tender documents issued by the Unit with such modifications to suit the particular PPP project as the Node considers necessary.

Requests for qualification

20(1) Following the receipt of approval to tender by the PPP Committee the Chief Finance Officer shall initiate the procurement of a private party by inviting requests for qualification.

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(2) The invitation for requests for qualification shall be by notice in at least two newspapers of national circulation and electronically on the website of the Unit and the county government.

(3) The notice shall contain all the information necessary for the potential candidates to prepare and submit applications for qualification and in particular:

- (a) the name, address and contact details of the contracting authority;
- (b) a brief description of the PPP project;
- (c) the deadline for submission of the application for qualification which shall be not less than 21 calendar days from the date of the invitation;
- (d) the physical and postal address for submission of the application for qualification;
- (e) instructions on the requirements to be met to qualify including the supporting documents to be submitted by applicants;
- (f) instructions on the sealing and labeling of applications;
- (g) information on the evaluation criteria which will be used to evaluate applicants; and
- (i) an indication of the approximate date by when applicants will be informed of the outcome of the evaluation.

Shortlisting

21. (1) The prequalification committee shall evaluate the applications received within the time frame and on the basis of the evaluation criteria stated in the notice and prepare a shortlist of qualified bidders and a written report on the evaluation, with reasons for its findings.

(2) The prequalification committee will submit its report to the Chief Finance Officer who will review the report and authorize notification of each bidder of the outcome of its application.

(3) In the event that, upon review, the Chief Finance Officer is not satisfied with the report he may refer the report back to the prequalification committee with specific issues to be addressed by the prequalification committee.

Preliminary bidders meeting

22. (1) Prior to issuing the invitation to bid the Node may, if it considers it appropriate, hold a preliminary meeting with the shortlisted bidders.

(2) The purpose of the preliminary bidders meeting, if held, would be to discuss the project specifications and preliminary conditions and respond to any inquiries that bidders may have in relation to the project and to aid bidders in understanding the project.

(3) The invitation to the meeting shall contain a preliminary version of the proposed information memorandum.

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(4) Following the preliminary bidders meeting the Node may alter the project specifications but not so as to affect the prequalification criteria of the bidders.

Invitation to bid

23. (1) The County Secretary shall issue the invitation to bid to only the shortlisted bidders.

(2) The invitation shall be sent out electronically to the email addresses of the shortlisted bidders and shall contain particulars of the website from which bidders can download the tender documents.

(3) The tender documents used shall be based on the standard tender documents, if any, issued by the Unit and shall include at a minimum all the information specified in section 43(2) of the Act.

Pre-bid conference

24 (1) The contracting authority may hold a pre-bid conference before the date for the submission of bids to provide bidders with an opportunity to seek clarifications on the project specifications and other pertinent issues arising out of the tender documents.

(2) The invitation to the pre-bid conference shall be sent to all the bidders who have been shortlisted and shall name the venue and date of the pre bid conference.

(3) Following the pre-bid conference the contracting authority may, by written notice to all shortlisted bidders with a copy to the Unit, amend the tender documents, and where appropriate, the deadline for submission of the bids.

Competitive dialogue

25.(1) The Node may only hold a competitive dialogue with shortlisted bidders under 45 of the Act with the approval of the Committee and the participation of a representative of the Unit.

(2) The competitive dialogue procedure will involve discussions held between the Node and each of the bidders separately with a view to seeking from each bidder a non-binding technical and financial proposal for discussion to enable the Node better define the project specifications.

(3) Upon the conclusion of the competitive dialogue process the contracting authority may alter the project specifications, risk matrix or structure or reopen the prequalification for the project.

Consortia

26.(1) Where a bid is submitted by a consortium which is constituted for the purposes of bidding for the project, the bid shall name the member of the consortium that is its leader.

(2) The person appointed as the representative of the consortium shall be drawn from the member of the consortium that has been named as the leader of the consortium.

(3) Where the member of the consortium withdrawing is its leader the consortium shall not be eligible to proceed with the remaining stages of the

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bid, unless the project agreement has already been executed by the parties in which case the provisions of the project agreement will govern the withdrawal of a member, including the leader of the consortium, from the project agreement.

(4) Where a member of the consortium other than the leader of the consortium withdraws from the consortium before the contract award the leader of the consortium may apply to be allowed to substitute the withdrawing member with another member who brings to the consortium comparable credentials.

(5) Where the consortium had submitted to the contracting authority a consortium agreement as proof that each member of the consortium has consented to join the consortium, the application for permission to substitute the withdrawing member shall not be granted unless it conforms to the terms and conditions governing withdrawal and substitution, if any, stipulated in the consortium agreement.

(6) For the purposes of section 46(8) the form of contract to be entered into between the contracting authority and the consortium shall clearly state the role of each member of the consortium under the project agreement and make provision for each member of the consortium to execute the project agreement.

Technical and financial bids

27 (1) A bid shall comprise a technical and financial bid both of which shall be submitted by a bidder for the bid to be considered responsive.

(2) Depending on the project specifications and the anticipated period before completion of bid evaluation the tender documents may stipulate that bidders shall submit the technical bid first or evaluation before those who score the minimum technical scores are invited to submit a financial bid.

Bid submission

28. (1) With the exception of instances in which the Node has, with the permission of the Unit decided that that the technical and financial bids be submitted separately, bids shall be submitted in two sealed envelopes being -

(a) Technical Bid in one envelope, which comprises the detailed proposal to meet the level of service or output specifications for the project according to the requirements specified in the tender documents; and

(b) A Financial proposal in a second envelope in accordance with the standard form provided in the tender documents.

(2) The prices listed in the financial bids shall be stated in both numbers and words, and in case of any ambiguity or discrepancy between the prices listed in words and the prices listed in numbers, the prices listed in words shall prevail.

(3) Only financial envelopes of bids that pass the minimum score specified in the tender documents for the technical evaluation shall be opened and financially evaluated.

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(4) The envelopes of the financial and technical offers shall be tightly sealed and the envelopes shall each indicate on its face any information that may be prescribed by the contracting authority.

(5) Bids shall be hand delivered to the Contracting Authority, at the place, time and date stated in the tender document.

(6) Upon receipt the bids shall be registered by the proposal evaluation team and each bidder shall be given a receipt indicating the time, place and date of bid submission and number of envelopes submitted.

(7) Bids not received at the specified date, time, and place shall be rejected.

(8) The proposal evaluation team shall prepare a record of the bid opening session.

(9) Bids shall be kept in a locked location that guarantees the security and confidentiality of each bid.

(10) Bidders may not withdraw or amend their bids once submitted provided that bidders will be allowed to amend their bids prior to the bid submission date.

Tender validity and tender security

29.(1) Bids shall be deemed to be valid throughout the period of bid validity stated in the tender documents.

(2) Bidders shall provide tender security either in the form of a guarantee by a locally registered bank or an insurance bond by a locally registered insurance company.

(3) The tender security shall be valid for a period of at least thirty (30) days after the expiry of the tender validity period.

(4) The contracting authority may extend the tender validity period and request bidders to extend the validity of the tender security.

Bid evaluation

30. (1) The proposal evaluation team shall evaluate the technical and financial bids in accordance with sections 48 and 49 of the Act and strictly on the basis of the evaluation criteria set out in the tender documents.

(2) The scope of the terms of reference of the transaction advisor, if any, shall include technical advice to the proposal evaluation team but not to participate in the decision making on the bids.

(4) Bids shall be ranked on the basis of the best evaluated bidder being the bidder whose technical and financial bid represents the best economic advantage to the contracting authority.

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(5) For the purposes of section 48(3) of the Act the bid that represents the best economic advantage shall be the bid that gives the contracting authority the best economic advantage on the basis of affordability, value for money and public sector comparator.

(6) The proposal evaluation team shall take its decision by a majority and each member of the team shall sign the report.

(7) The Chief Finance Officer shall submit the report of the proposal evaluation team to the Committee for approval and following the approval of the Committee the County Secretary shall notify all bidders simultaneously about the outcome of the bids.

(8) Any bidder who is aggrieved by the decision of the contracting authority on the bidding process may lodge a petition with the Petition Committee in accordance with the rules governing the filing of petitions.

Negotiations

31. Following the conclusion of the bid evaluation the contracting authority may with the approval of the PPP Committee enter into negotiations with the first ranked bidder and, in the event that the negotiations are unsuccessful, the second ranked bidder in accordance with section 52 of the Act.

Formation of project company

32 (1) Following the conclusion of the negotiations and before the execution of the project agreement the successful bidder shall establish a project company in accordance with the Companies Act, Chapter 486 of the Laws of Kenya.

(2)The project company formed pursuant to the provisions of section 59 of the Act shall be a party to the project agreement executed between the successful bidder and the contracting authority and shall assume the obligations of the private party under the project agreement.

Execution of the project agreement

33(1) The contracting authority and the successful bidder shall execute the project agreement once:

- (a) the Cabinet has approved the recommendation of the PPP Committee that the project should be undertaken as a PPP;
- (b) if the project involves a concession for the exploitation of natural resources, Parliament has ratified the project agreement;
- (c) not less than fourteen (14) days have lapsed following the communication by the contracting authority of the decision of the Cabinet and Parliament if need be to all bidders;
- (d) there is no pending petition before the Petitions Committee challenging the award of the contract;
- (e) the contracting authority has undertaken, financial, technical, and legal due diligence on the private party to confirm that it meets the requirements of section 26 of the Act and the report of the due diligence exercise has been approved by the county executive committee.

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(f) the parties have fulfilled all conditions precedent to the execution of the project agreement.

(2) In the event that the parties propose to make a material change to the project agreement following its execution but before effectiveness the contracting authority shall seek the approval of the PPP Committee through the Unit before effecting such change.

Cancellation of tender

34. (1) A contracting authority may cancel a tender under section 58(1) of the Act if:

- (a) None of the bids received is compliant in terms of section 51 of the Act;
- (b) None of the bids received meets the test of affordability, value for money or public sector comparator on the basis of which PPP Committee approved the feasibility study;
- (c) The Cabinet has not approved the execution of the contract by the contracting authority as a PPP contract;
- (d) Where the ratification of the contract by Parliament is required, Parliament has not ratified the contract;
- (e) The circumstances under which the feasibility study was approved and the tender process undertaken have changed in material aspects;
- (f) The successful bidder has failed to reach financial close or otherwise failed to meet the conditions precedent to contract execution;
- (g) Where the successful bidder is a consortium the leader of the consortium has withdrawn from the consortium or the composition of the consortium has changed so significantly that it does not represent the originally pre-qualified consortium;
- (i) Both the first and the second ranked bidders have withdrawn from the tender process;
- (j) The contracting authority and the successful bidder have otherwise mutually agreed to terminate the tender;
- (k) An order of the court or other tribunal has prohibited proceeding with the tender;
- (l) the occurrence of a change in law or Government policy or *other force majeure* event which makes the execution of the contract impracticable; or
- (m) for any other reason the contracting authority is of the view that proceeding with the tender would cause fundamentally serious adverse consequences.

(2) Bidders shall execute and submit with the bid documents a confirmation that the bidder understands and accepts that the contracting authority has the legal right to cancel the tender on the basis of one or more of the reasons stipulated in this regulation and that the bidder shall not be entitled to compensation in the event that the tender is cancelled.

PART V – PPP PROJECTS NOT ENTAILING CONTINGENT LIABILITY OR OTHERWISE FALLING BELOW THE THRESHOLD

Thresholds

35.(1) Pursuant to the provisions of section 24(3) of the Act, the Cabinet Secretary may from time to time, and following the approval of the PPP Committee, by notice

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in the Gazette, define thresholds of PPP projects which, notwithstanding that they may pose contingent liability to the national or county government, a county government may undertake under this Part.

(2) The thresholds defined under this regulation may be with respect to the value of any one the PPP project to be undertaken or the combined value of the sum of PPP projects which the county government may undertake under this Part in any one five year integrated development plan period or both.

Contingent liability

36(1) A county government which desires to undertake a PPP project that does not pose any contingent liabilities to the national government of the county government may do so under this Part.

(2) A PPP project shall be deemed not to pose any contingent liability to the national government or the county government if it does not:

- (i) expose the national government or county government to fiscal risk or likely fiscal exposure arising from any of a guarantee, undertaking or public payment obligation required by the private party to the project;
- (ii) require viability gap financing;
- (iii) require the national government or county government to assume contractual obligations to the private party or lenders of the project that creates the risk of exposure to contractual liability;
- (iv) require the national government or county government to underwrite termination obligations;
- (v) require the national government to underwrite political risk;
- (vi) require the county government to dedicate or otherwise ring fence some of the finances available to it from its budget to meet its payment obligations under the project agreement.

Approval to undertake a project not posing contingent liability

37(1) A county government which intends undertake a PPP project under this Part shall submit the report of the feasibility study on the project which has been carried out pursuant to section 33 of the Act to the Unit for the approval of the PPP Committee.

(2) The report shall provide justification for the conclusion that the project does not pose any contingent liability on the basis of the criteria stipulated in rule 36(2) to the Regulations.

(3) Before approving the report the PPP Committee shall submit the report to the Debt Management Office for assessment and shall not approve the report to be undertaken under this Part unless the Debt Management Office has given its approval of the conclusion that the project does not pose contingent liability to the national government or county government or that, notwithstanding that it does, the project falls within the threshold, if any, defined by the Cabinet Secretary under rule 35.

County government PPP Committee

38(1) The county government shall establish a PPP Committee to be the steering committee of PPP projects undertaken by the county government

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which do not pose contingent risk to the national government or the county government or which falls within the defined thresholds, if any.

- (2) The county government PPP Committee shall comprise:
- a. the county executive committee member responsible for finance who shall be the chairperson;
 - b. The county executive committee member responsible for planning;
 - c. The county government executive member responsible for infrastructure and public works;
 - d. The county government executive member responsible for land management;
 - e. Three persons not being public officers who are competent in matters relating to public private partnerships who shall be appointed by the Governor of the county government under the provisions of the County Governments Act, 2012 for a term of three years renewable once; and
 - f. The county officer for finance who shall be the secretary to the committee.
- (3) The county government PPP Committee shall, in relation to projects falling under this Part, perform the functions of the PPP Committee under section 7 of the Act.

Other county government institutions

39(1) Following the approval of the PPP Committee and the Debt Management that the county government may undertake the PPP project under this Part the county government shall establish a Node to perform the functions of the Node under section 17 of the Act.

- (2) Following the approval of the PPP Committee and the Debt Management Office that the county government may undertake the PPP project under this Part the county government shall establish a proposal evaluation team to perform the functions of the proposal evaluation team under section 47 of the Act.

Tendering for projects under this Part

40(1) A county government which desires to undertake a PPP project under this Part shall do so through an open tender and in accordance with section 43 of the Act.

- (2) Where there are reasons justifying undertaking the project without using the open tender process the county government PPP Committee shall seek the approval of the county executive committee before proceeding with the project and the county executive committee, if it grants its approval, shall as soon as practicable thereafter make a report to the county assembly and provide the reasons for undertaking the project other than through an open tender process.

Approval of project agreement

41. A county government which proposes to enter into a project agreement to undertake a PPP project under this Part shall not execute the project agreement unless:

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- (i) The county Attorney has issued a written opinion recommending the execution of the project;
- (ii) The county executive committee has approved the execution of the project;
- (iii) The county assembly has passed an affirmative vote in favour of entering into the project agreement; and
- (iv) The county government has undertaken technical, financial and legal due diligence on the private party to confirm that it meets the requirements of section 26 of the Act and the report of the due diligence has been approved by the county executive committee.

Petitions

- 42(1)** Any person who participated in the tender for the PPP project undertaken by the county government under this Part may lodge a petition or complaint with the Petitions Committee established under the Act.
- (2) The Petitions Committee shall determine any petition lodged in relation to a project intended to be undertaken by a county government under this Part on the basis of the rules applicable to other petitions lodged before the Committee.

PART VI – MISCELLANEOUS

Ongoing PPP projects

- 43.(1)** Upon the coming into effect of these regulations all PPP transaction whether or not ongoing shall be continued under the present Act and regulations unless the procurement of the private party had reached the stage of tender award.

Financial and administrative sanctions

- 44.** A contracting authority which undertakes a PPP project contrary to the provisions of the Act and these regulations shall not qualify for any of:
- (a) A guarantee, undertaking, letter of comfort or other credit enhancement issued by the National Treasury in relation to the project;
 - (b) Financial support from the Fund in project preparation, tendering, appraisal or transaction advisor's fees;
 - (c) Viability gap financing to the project; and
 - (d) Technical support from the Unit in relation to the project.

Petitions

- 45.(1)** The decisions of the contracting authority with regard to a PPP tender process undertaken under these regulations shall be subject to the administrative review by the Petition Committee established under section 67 of the Act.
- (2) Petitions shall be filed and determined on the basis of such regulations as the Cabinet Secretary may make from time to time and the administrative directives issued by the Petition Committee.

Dated the 2014

HENRY ROTICH
Cabinet Secretary for the National Treasury