

LEGAL NOTICE NO.....

The Public Private Partnerships (Project Facilitation Fund) Regulations 2015
(No.15 of 2013)

IN EXERCISE of the powers conferred by section 68(4) of the Public Private Partnerships Act, the Cabinet Secretary makes the following Regulations: -

THE PUBLIC PRIVATE PARTNERSHIPS (PROJECT FACILITATION FUND) REGULATIONS, 2015

PART I – PRELIMINARY

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| 1 | These regulations may be cited as the Public Private Partnerships (Project Facilitation Fund) Regulations, 2015. | <i>Title</i> |
| 2 | In these regulations, the following terms shall have the following meanings –

“approved transaction advisor” means a transaction advisor selected competitively with the guidance and advice of the Unit;

“capital grant” means a financial contribution to construction costs of a project;

“committee” means the Public Private Partnerships Committee;

“eligible projects” mean projects that meet the requirements for support under the Fund in these Regulations;

“eligible services” mean services for which payments out of the Fund are supportable;

“Fund” means the Public Private Partnerships Project Facilitation Fund;

“Funding Agreement” means an agreement entered into under these Regulations as a condition precedent to disbursements from the Fund;

“funding window” means the category of support facilities available to projects under the Fund;

“implementation” means development, procurement, construction, operation and maintenance of a public private partnership project;

"project" means the design, development, construction, operation, or maintenance of a new infrastructure, asset or facility or the rehabilitation, modernisation, expansion, | <i>Definitions</i> |

operation or management of an existing infrastructure, asset or facility;

“private party” means a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority under the Act;

“secretariat” means the secretariat notified under these Regulations to support the officer administering the Fund;

“reimbursable land acquisition costs” mean monetary advances made by the Fund to a contracting authority to support that contracting authority’s shortfalls in land acquisition costs, but which are refundable to the Fund by the contracting authority within the immediate next budgeting cycle, and includes the cost of land acquisition, compensation, resettlement, and environmental remediation;

“Unit” means the Public Private Partnerships Unit under the Act;

“viability gap funding” is a payment that is made under these Regulations to a project as a grant and which may in nature be a capital grant for construction or a recoverable advance toward such costs to promote the financial viability of a project;

<i>Object and Purpose</i>	3	The object of the Fund is to provide financial support for the implementation of public private partnership projects under the Act.
<i>Facilitation under the Fund</i>	4	The Fund shall be applied to the giving of grants, recoverable advances, as well as guarantees to eligible projects under these Regulations.

PART II – ELIGIBILITY AND APPLICATIONS

<i>Uses of the Fund</i>	5	The Fund shall be applied to the following purposes with respect to eligible projects under these Regulations – <ol style="list-style-type: none">a) support to contracting authorities’ third party costs in the preparation of public private partnership projects;b) support to the activities of the Unit;c) provision of viability gap finance to projects;d) provision of a source of liquidity to meet any contingent liabilities arising from a project; ande) settlement of transaction advisory costs where the services are provided by third parties.
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Support to Contracting Authorities

- 6 In supporting contracting authorities in project preparation, the Fund may be applied to meet the cost of -
- a) recoverable land acquisition costs;
 - b) consultancy services related to the public private partnerships programme including the conduct of sector diagnostic and sector partnerships strategy studies, project proposal, and feasibility studies;
 - c) conduct of tender processes including project advertisements, marketing and communications, project structuring and preparation of tender documentation, as well as due diligence;
 - d) transaction and associated advisory services,
 - e) other project preparation activities as may be approved from time to time by the Committee.

- 7 In supporting the Unit in project related activities, the Fund may be applied to fund the budget of the Unit including costs relating but not limited to -
- a) consultancy services;
 - b) capacity building programmes;
 - c) purchase of office equipment, systems and associated software;
 - d) research activities;
 - e) establishment of knowledge management systems and frameworks;
 - f) recurrent operation and maintenance costs for the Secretariat

Support to the Unit

- 8 (1) In supporting the provision of viability gap finance for eligible projects, the Fund may, among others, be applied to finance –
- a) capital grants during construction;
 - b) recoverable advances made to a contracting authority.

Viability Gap Finance

(2) The Office Administering the Fund shall regularly advise the Oversight Committee on new categories of viability gap funding necessary to enable the Fund better support the objectives for which it has been established.

- 9 (1) As a source of liquidity to meet short term liquidity gaps, the Fund shall be used to finance contingent liabilities where the liability –
- a) cannot be handled by the Debt Management Office;
 - b) cannot be handled under the national government Contingency Fund;
 - c) does not arise from a contracted obligation of a contracting authority under a Project Agreement for which a budgetary allocation has been made by that contracting authority.
- (2) Without prejudice to paragraph (1) –
- a) contingent liabilities materialising out of national government default under a project agreement shall

Liquidity for Contingent Liabilities

be eligible for settlement under the Fund and shall not be recoverable;

- b) contingent liabilities arising out of contracting authority default under a project agreement shall remain the responsibility of the contracting authority to settle, but as a last resort under exceptional circumstances, a contracting authority may apply to the Fund for a recoverable advance in settling such liabilities.

(3) The Officer Administering the Fund shall establish and maintain a separately designated revolving Contingent Liability Reserve Account within the Fund for purposes of this Regulation.

(4) For purposes of sub-regulation (3), contracting authorities shall budget for the contingent liabilities arising from their eligible projects, provided that the Fund may, subject to sub-regulation (4), finance short-term liquidity gaps in support of a project.

(5) Where payments out the Fund are made towards satisfying materialised contingent liabilities under a project at the request of a contracting authority, the contracting authority shall refund the Fund in its immediate subsequent budget cycle.

(6) The officer administering the Fund shall base the annual estimates of expenditure under this Regulation on the assessment of the Debt Management Office with respect to payments in any given financial year.

(6) The Debt Management Office shall assess, manage and monitor all contingent liabilities arising from projects under the Act.

<i>Exclusions</i>	10	The following shall not be eligible for support under the Fund - <ul style="list-style-type: none">a) viability gap funding for privately initiated investment proposals;b) projects initiated outside the Act;c) projects procured before the Act came into effect.
<i>Eligibility for support under project preparation</i>	11	Contracting authorities shall satisfy the following eligibility requirements when seeking support for project preparation under the Fund – <ul style="list-style-type: none">a) for sector diagnostic studies and preparation of project proposal documentation, the contracting authority shall have established a node under the Act, and provided evidence of a function capable of performance by a private party;b) for feasibility study preparation, evidence that the project is included in the approved list of projects under the Act, and the contracting authority

- engages an approved transaction advisor to undertake the study;
- c) for land acquisition, evidence of an approved feasibility under the Act, and land acquisition, compensation and resettlement plans;
- d) for procurement of a private party under the Act, evidence of an approved feasibility study and the contracting authority engages an approved transaction advisor.

Eligibility for viability gap finance and contingent liability support

- 12
- (1) Viability gap funding shall only be available to support project capital costs and recoverable expenses.
 - (2) When seeking support for viability gap financing and contingent liability liquidity support under the Fund, contracting authorities shall be required to provide to the Fund –
 - a) an approved feasibility study report;
 - b) Approved Project Report and Financial Risk Assessment Report.
 - (3) Where a variation to a project agreement being undertaken is implemented and the variation results in a change to the project’s financial risk and contingent liability profile, the prior approval of the Debt Management Office shall be sought and obtained to preserve the project’s eligibility under these Regulations.
 - (4) In addition to any other requirement under these Regulations, a project shall qualify for support under the viability gap funding window of the Fund where –
 - a) it relates to a Public Private Partnership project which is based on a project agreement between a contracting authority on the one side and a private party on the other side, for delivering a project on payment of user charges;
 - b) the private party holds and controls 51 percent or more of the subscribed and paid up equity in the project company;
 - c) the private party was selected on the basis of open competitive bidding and is responsible for financing, construction, maintenance and operation of the project;
 - d) the project provides a service against payment of a pre-determined tariff or user charge.
 - (5) A project shall not be eligible for more than one form of viability gap funding support under this Regulation.
 - (6) Notwithstanding anything in these Regulations, viability gap funding for any one project shall not exceed fifty per cent (50%) of the total project capital cost, whether

the support is funded entirely by the Fund or co-funded by the sponsoring contracting authority. Provided that in exceptional circumstances, the Cabinet Secretary may approve higher thresholds of support for any one project under the Fund.

*Prioritization
Criteria*

- 13 In making a determination on which of the eligible applications to the Fund should be funded, the Fund shall apply the principle of first come-first serve, in addition the following selection criteria –
- a) the extent to which a contracting authority is able to co-fund the requested support;
 - b) potential economic impact of the project;
 - c) equitable application of support under the Fund;
 - d) any specific requirements applying to the resources available within the Fund;
 - e) a contracting authority's compliance history under the Act;
 - f) quantum of the viability gap.

- 14 Contracting authorities shall adopt forward planning strategies to support a clear and efficient budgetary process for purposes of enabling the Fund to be efficient in meeting requests for support. *Prior Planning, Caps*

- 15 (1) An application to the Fund with respect to project preparation support shall be made as follows - *Procedures on Applications to Fund*
- a) on a prescribed form with prescribed supporting documents;
 - b) evidence of Committee approval for support by the Fund of the activity indicated;

- (2) An application to the Fund with respect to support to the Unit shall be made as follows -
- a) on the prescribed form;
 - b) supported by evidence of the Unit's annual approved budget estimates.

- (3) An application to the Fund with respect to viability gap financing support shall be made as follows -
- a) on the prescribed form with prescribed supporting documents;
 - b) evidence of Committee approval of the viability gap funding requirement during project preparation, project procurement or project implementation, as the case may be.

- (4) An application to the Fund with respect to contingent liability support shall be made as follows –
- a) on the prescribed form;
 - b) evidence of Committee approval of the contingent liability funding requirement
 - c) evidence that the contingent liability was notified to the Fund upon execution of a project agreement

- or as a consequence to agreement variation during project implementation;
- d) evidence that the contingent liability has materialised.

- Disbursements* 16 (1) Except as provided for in this Regulation, all disbursements under the Fund shall be made in accordance with the Funding Agreement.
- (2) Disbursements relating to acquisition of land, compensation and resettlement shall be made to the contracting authority.
- (3) Disbursements relating to obligations that are co-funded by the contracting authority shall be made to the contracting authority.
- (4) VGF shall be disbursed only after the project company has subscribed and expended the equity contribution required for the project and will be released in proportion to debt disbursements remaining to be disbursed thereafter.
- (5) VGF shall be released to the Lead Financial Institution as and when due.

- Funding Agreement* 17 (1) The officer administering the Fund shall prepare a funding agreement for each funding support provided under the Fund.
- (2) The funding agreement shall be a tripartite instrument between the Fund, the contracting authority and the project company where such agreement relates to viability gap funding or contingent liability underwriting.
- (3) the funding agreement shall be a bilateral agreement instrument between the Fund and a contracting authority where the agreement relates to project preparation support.
- (4) No disbursements from the Fund shall be effected in the absence of an appropriate agreement under this Regulation.

PART III – INSTITUTIONAL FRAMEWORK

- Oversight Committee* 18 (1) The Public Private Partnerships Committee shall be the Oversight Committee for the Fund.
- (2) In discharging its mandate, the Public Private Partnerships Committee may delegate its functions under these Regulations to a sub-committee in accordance with the Act.
- (3) The Oversight Committee shall meet at least once in every quarter to exclusively consider matters relating to the Fund and the conduct of its business at such meetings shall be in accordance with the Act.

*Functions of
Oversight
Committee*

- 19 The functions of the Committee in relation to the Fund shall be to –
- a) inform the Cabinet Secretary on the funding requirements for the Fund;
 - b) approve the estimates of annual revenue and expenditure of the Fund and recommend them to the Cabinet Secretary for approval
 - c) ensure that the annual estimates of revenue and expenditure for all funding windows of the Fund include cumulative commitments for the financial year under review;
 - d) ensure that only eligible projects are promoted for funding under these regulations;
 - e) inform the Cabinet Secretary on amounts and timing for Exchequer transfers into the Fund;
 - f) approve and review the investment of surplus funds in the Fund;
 - g) advise the Cabinet Secretary on additional sources of funds for the Fund;

- 20 The Oversight Committee shall have power to –
- a) authorise allocations from the Fund;
 - b) approve proposals for re-allocations of funds not earmarked for specific purposes within the Fund;
 - c) approve all operational and management procedures of the Fund;
 - d) approve the criteria for the selection and evaluation of projects for funding;
 - e) approve all reporting policies;
 - f) approve financial statements and management reports;
 - g) adopt the financial statements prepared by the officer administering the Fund before submission to the Auditor-General
 - h) adopt the non-financial reports of the Fund and submit them to the Cabinet Secretary.

*Powers of the
Oversight
Committee*

- 19 The Director of the Unit shall be the officer administering the Fund.

*Officer
administering
the fund*

- 20 (1) The functions of the officer administering the Fund shall be to –
- a) act as secretariat and technical arm of the Oversight Committee;
 - b) supervise and control the administration of the Fund;
 - c) prepare estimates of annual revenue and expenditure of the Fund relating to the PPP Programme and Fund operational expenses and submit it to the Oversight Committee for adoption;
 - d) cause to be established proper systems of control and oversight over the operations of the Fund;
 - e) advise and consult the Oversight Committee on matters relating to the administration of the Fund;

*Functions of
Officer
Administering
the Fund*

- f) advise and consult with the Cabinet Secretary on matters relating to the administration of the Fund as may, from time to time, be necessary;
- g) keep and maintain complete financial records of all projects supported under the Fund;
- h) advise the Oversight Committee on trends and projections relating to the financing requirements under the Fund;
- i) prepare non-financial performance report of the Fund and submit it to the Oversight Committee for adoption;
- j) cause to be kept proper books of accounts and other books and records relating to the Fund and to the activities financed under the Fund;
- k) prepare, sign and transmit to the Auditor-General in respect of each financial year and within three months after the end thereof, a statement of account relating to the Fund in such form as the Public Sector Accounting Standards Board may from time to time prescribe, and in accordance with Public Finance Management Act, 2012, a copy of which statement of account shall be filed with the National Treasury.
- l) Furnish any additional information which is proper and sufficient for the proper discharge of the mandate of the Auditor-General.

(2) The officer administering the Fund shall comply with the ordinary budget cycle in the preparation of estimates for the Fund, especially with regard to components supported through the Exchequer.

(3) The officer administering the Fund shall submit estimates of revenue and expenditure to the Cabinet Secretary each year for approval.

(4) For purposes of sub-regulation (3), and with respect to viability gap financing and project preparation activities, contracting authorities shall prepare and submit to the officer administering the Fund estimates of project preparation funding requirements in accordance with the annual budget cycle in each year.

(5) For purposes of sub-regulation (3), and with respect to contingent liabilities, the Debt Management Office shall prepare and submit to the officer administering the Fund estimates of contingent liability funding requirements by the thirtieth day of September in each year.

- 21 The officer administering the Fund shall have power to –
 - a. access any project related data that may be required from contracting authorities in furtherance of its functions;

Powers of officer administering the fund

- b. call for any additional information with respect to requests for payments out of the Fund;
 - c. in consultation with the National Treasury, issue financial management guidelines relating to the Fund.
- 22 (1) The officer administering the Fund shall be supported by a secretariat. *Secretariat support for officer administering the fund*
- (2) The secretariat shall consist of such staff from the Unit as the officer administering the Fund shall consider necessary for the proper performance of its functions under these Regulations.
- 23 The functions of the Secretariat shall be to – *Functions of the Secretariat*
- a) provide support to the officer administering the Fund in the discharge of its functions;
 - b) notify every eligible contracting authority of the Fund and the Fund’s mandate;
 - c) develop and publish, with the approval of the Oversight Committee, standardised documentation requirements for use by contracting authorities in making applications to the Fund;
 - d) develop and publish, with the approval of the Oversight Committee, guidelines and procedures for making and processing applications made under the Fund by contracting authorities and the Unit;
 - e) prepare every Funding Agreement between the Fund and a contracting authority;
 - f) ensure that every contracting authority that has received an allocation from the Fund reports in accordance with the Funding Agreement on the use of the allocation;
 - g) monitor the progress of projects that have received an allocation from the Fund

PART IV – FINANCIAL PROVISIONS

- Accounts of the fund* 24 (1) The officer administering the Fund shall cause accounts in the name of the Fund to be opened and maintained for the Fund in a bank within the Republic of Kenya.
- (2) All monies payable into the Fund shall be received into the relevant bank account of the Fund, in line with the funding windows under these Regulations.
- (3) The Fund’s accounts shall be operated by the officer administering the Fund and two other persons from the Secretariat.
- Payments into the fund* 25 (1) Upon establishment, there shall be paid into the Fund an initial amount of Kenya shillings seven hundred and fifty million as appropriated in the Financial Year 2014/2015, to be held for the purposes of the Fund.

(2) For each financial year, amounts appropriated by Parliament shall be paid into the Fund on a quarterly basis.

(3) The earnings of, or accruals to the Fund shall be retained in the Fund, and shall be spent only for the purposes for which the Fund is established.

Accounts of the fund 26

The officer administering the Fund shall ensure the accounts of the Fund are not overdrawn at any time.

27 Withdrawals from the Fund shall only be for purposes of payment of approved obligations of the Fund.

Withdrawals from the fund

28 The records of expenditure relating to the Fund shall be kept and maintained in accordance with the provisions of the Public Finance Management Act and regulations thereunder.

Records

29 In addition to these Regulations, the Fund shall conform to the requirements of all other applicable public financial management laws and regulations for the time being in full force and effect.

Financial and procurement regulations

PART V – MISCELLANEOUS AND TRANSITIONAL

30 The officer administering Fund shall publish annually on its website the following minimum categories of information –

Miscellaneous Disclosures

- a) the amount of money received into the Fund, broken down by each funding window;
- b) total number of projects supported under each window of the Fund and broken down by sector and region;
- c) any information specifically required to be published in accordance with the requests of the partners supporting the Fund.

31 (1) The Cabinet Secretary shall at the elapse of ten years from the date of commencement of these regulations cause a review to be conducted on the performance of the Fund in accordance with the requirements of the Public Finance Management Act and regulations thereunder.

Review on the performance of the fund

(2) The review shall determine whether the Fund has met the objectives for which it was established.

(3) The report on the review shall be submitted to the Cabinet for approval.

Winding up of the Fund 32

(1) The Cabinet Secretary may wind up the Fund with the approval of the National Assembly where the Cabinet

Secretary considers that the Fund has successfully completed the specific objective for which it was created.

(2) On the winding up of the Fund –

- a. the officer administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the national government;
 - b. the Cabinet Secretary shall pay any deficit in the Fund from funds of the national government in the National Exchequer Account with the approval of the National Assembly.
 - c. assets other than cash of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to finance.
- (3) the Cabinet Secretary shall submit a final statement of accounts to Parliament and to the Auditor-General for audit within nine months from the date of the decision to wind up the Fund.

*Projects
Concluded
Outside of the
Act*

33

- (1) Contingent liabilities arising from projects that were initiated and concluded outside of the Act, but for which project agreements are subsisting as at the date of effectiveness of these Regulations shall be eligible for management and satisfaction as prescribed under these Regulations, subject to contracting authorities submitting to the Secretariat the following documents within three calendar months from the date of effectiveness –
- a) a copy of the signed project agreement;
 - b) a copy of the project feasibility study report;
 - c) a copy of the project’s approved financial model.

(2) Submissions outside of the timelines set in this Regulation shall not be accepted by the Fund.

*Amendment of
LN.171 of 2014*

34

Part XI of the Public Private Partnership Regulations is hereby repealed *in toto*.

Made on the _____ day of _____ 2015

HENRY K ROTICH

Cabinet Secretary for the National Treasury