REPUBLIC OF KENYA

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PARLIAMENT

THE SENATE

TWELFTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON FINANCE AND BUDGET

PAPERS LAID	
DATE	14/9/2021
TABLED BY	Sen. Ayacko
COMMITTEE	FINANCE
CLERK AT THE TABLE	U. ADJIBOARE

ON

THE PUBLIC PRIVATE PARTNERSHIP BILL (NATIONAL ASSEMBLY BILLS NO. 6 OF 2021)

① COS
Recommended for approval for tabling.
09/09/21

② Hon. Speaker
You may approve.
9/9/21

CLERK CHAMBERS
THE SENATE
PARLIAMENT OF KENYA
NAIROBI

SEPTEMBER 2021

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PREFACE

Mandate and Functions of the Committee

Article 124 of the Constitution of Kenya, provides for the establishment of Committees by either House of Parliament. Committees are central to the workings, roles and functions of Parliament as set out in Article 94 and more specifically in Article 96 of the Constitution in regard to the Senate.

Parliamentary Committees consider policy issues, scrutinize the workings and expenditure of the national and county governments and examine proposals for legislation. The end result of any process in Committees is the report, which is tabled in the House for consideration.

The Standing Committee on Finance and Budget is established pursuant to standing order 218(3) of the Senate Standing Order and is mandated -

a) To investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to examine -

i) the Budget Policy Statement presented to the Senate;

ii) report on the Budget allocated to Constitutional Commissions and independent offices;

iii) the Division of Revenue Bill, County Allocation of Revenue Bill, and cash disbursement schedule for county governments.

iv) to consider all matters related to resolutions and Bills for appropriations, share of national revenue amongst the counties and all matters concerning the National Budget, including public finance and monetary policies and public debt, planning and development policy; and

b) To pursuant to Article 228 (6) of the Constitution, to examine the report of the Controller of Budget on the implementation of the budgets of county governments.

Further, the Public Finance Management Act, 2012 section 8 (1)(b) on the responsibility of the Senate Budget Committee in public finance matters provides that- *The Committee of the Senate established to deal with budgetary and financial matters has responsibilities to review the County Allocation of Revenue Bill and the Division of Revenue Bill in accordance with Article 218(1)(b) of the Constitution at least two months before the end of the financial year*.

Membership of the Committee

The Standing Committee on Finance and Budget was constituted by the House on Thursday, 14th December, 2017 during the First Session of the Twelfth Parliament. The Committee was later reconstituted on Wednesday, 24th June, 2020, during the Fourth Session of the Twelfth (12th) Parliament. The Committee as currently constituted, comprises the following Members-

1. Sen. Charles Kibiru, MP - Chairperson
2. Sen. (Dr.) Ochillo Ayacko, EGH, MP, - Vice Chairperson
3. Sen. Wetang'ula Moses Masika, EGH, MP - Member
4. Sen. Kimani Wamatangi, MP - Member
5. Sen. Mutula Kilonzo Junior, CBS, MP - Member
6. Sen. Aaron Cheruiyot, MP - Member
7. Sen. Rose Nyamunga, CBS, MP - Member
8. Sen. CPA Farhiya Haji, MBS, MP - Member
9. Sen. Milicent Omanga, MP - Member

BACKGROUND AND EXECUTIVE SUMMARY

Public Private Partnerships, which are generally referred to as PPPs, are arrangements between a contracting authority and a private entity. Kenya's Vision 2030 blueprint seeks to make the country an industrialized middle income economy. Pursuant to blueprint, the Government has planned to put up infrastructure whilst relying on PPP arrangements to achieve that goal. The Government has therefore been working on providing the right environment for implementation of PPPs by creating the legal and regulatory framework through the enactment of laws and regulations that promote and encourage PPPs.

It is in this regard that Parliament enacted PPP Act, No. 15 of 2013 to provide for the participation of the private sector in the financing, construction, development, operation and maintenance of infrastructure projects through contractual arrangements. However, the PPP Act 2013 has been seen to suffer key constraints which have partly contributed to a low project success rate since its promulgation in 2013. The PPPs arrangement under this Act have been hampered by an over bureaucratic institutional structure, complex regulatory processes, absence of timelines for various processes, limited, complex and rigid procurement processes, absence of enforcement mechanisms, and absence of local content principles. The Act further did not recognize county government level as entities which would venture into PPPs arrangement.

The Public Private Partnership (PPP) Bill, 2021 intends to repeal the current PPP Act, No. 15 of 2013 and substitute it with new regulatory framework for PPPs. The PPP Bill aims to enhance efficiency through reducing the number of oversight approvals and providing timelines on key project processes. The Bill is important for both National and County Governments since it provides alternative financing of projects.

One of the key features of the Bill is that the Bill proposes to replace the PPP Unit with the Directorate of Public Private Partnerships, headed by a Director General, and shall be the lead institution mandated to facilitate implementation of a PPP projects in Kenya. The

Directorate will be overseeing project appraisal, providing technical expertise in the implementation of projects and overseeing PPP contract management framework.

The main objects of the Bill are to enhance the legal and regulatory framework governing PPPs, harmonize the institutional framework for the implementation of PPP projects, streamline the regulatory, implementation and monitoring mandates of relevant agencies and to provide for a project selection process and reduced regulatory approvals to promote private sector investment. It is therefore hoped that Kenya's economy will improve greatly through the increased use of PPPs in infrastructure development and providing services to its citizens. Under this law, the respective county governments will also have a mechanism for entering into PPPs for projects which deem viable and promoting service delivery to the citizens.

Committee's Recommendations

The Committee recommends that the Bill be approved with amendments.

Acknowledgements

The Committee acknowledges all the public institutions and members of public including the National Treasury, the Council of County Governors, the Judiciary, the Public Private Partnership Petitions Committee and Mr. Daniel Mutegi Giti, PhD who made insightful contributions and recommendations. Further, the Committee thanks the Offices of the Speaker and Clerk of the Senate for the support extended to the Committee in execution of its mandate.

Appreciations to the Members of the Committee for their patience, sacrifice and commitment to public service, which enabled the Committee complete the assigned task within the stipulated time.

It is now my pleasant duty and privilege, on behalf of the Standing Committee on Finance and Budget, to present to the Senate, this Report of the Committee on the Public Private Partnership Bill (National Assembly Bills No. 6 of 2021).

SIGNATURE: ____________________

SEN. CHARLES KIBIRU, MP.
(CHAIRPERSON, STANDING COMMITTEE ON FINANCE AND BUDGET)

DATE: 9th September, 2021

CHAPTER ONE

1.0 BACKGROUND

The enactment of the Public Private Partnerships Act, No. 15 of 2013, provided for the participation of the private sector in the financing, construction, development, operation and maintenance of infrastructure projects of the government. The Act intended to enhance, improve and haste in completion of infrastructure projects.

Prior to its enactment, Kenya had only witnessed significant private sector participation in public sector activities in the energy sector through the involvement of Independent Power Producers (IPPs). Since then the completion of a number of Public Private Partnerships (PPP) projects have been observed.

In spite of the above, several gaps still exist in the Act. Some of the issues identified include role of county governments in PPPs, bureaucratic in approval processes and the level of citizen involvement in such undertakings. The legal framework governing PPPs has performed poorly in terms of tapping into resources and innovation within the private sector since only a few projects have been concluded under the existing regime. It is in this regard that the Public Private Partnership Bill has been introduced seeking to seal the gaps and streamline the framework in relation to Public Private Partnerships and enhance efficiency through reducing the number of oversight approvals and providing timelines on key project processes.

HIGHLIGHTS OF THE PUBLIC PRIVATE PARTNERSHIP BILL, 2021

1. The purpose of the Bill is to enhance the legal and regulatory framework governing PPPs. It seeks to provide a legislative framework to —
   (a) Prescribe the procedures for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships;

(b) harmonize the institutional framework for the implementation of public private partnership projects;

(c) give effect to Article 227 of the Constitution on procurement relating to public private partnerships;

(d) streamline and rationalize the regulatory, implementation and monitoring mandates of relevant agencies; and

(e) provide for a transparent project selection process, clear procurement procedures, reduced regulatory approvals and expanded contractual models in order to promote private sector investment.

2. The Bill proposes to replace the PPP Unit with the Directorate of Public Private Partnerships which shall be the lead institution in the implementation of a PPP project. The Directorate will be overseeing project appraisal, providing technical expertise in the implementation of projects and overseeing PPP contract management framework. The Directorate will also be in charge of originating, guiding and coordinating the selection, ranking and prioritization of PPP projects and overseeing project appraisal and development activities of contracting authorities. The establishment of the Directorate with greater responsibilities seeks to centralize PPP processes and functions.
3. The Bill provides for role of the National and county governments in relation to project agreements by county governments. A county government may enter into a public private partnership agreement with a party to undertake a public partnership project without seeking approval from the national government. This is contrary to what was provided for in the PPP Act of 2013. The county government shall then be responsible for the administration of the overall project development cycle.
4. The Bill establishes the Public Private Partnerships Committee whose functions include the formulation of policies, overseeing of implementation and approval of PPP contracts. This departs from the Public Private Partnership Unit that was provided under

the Act to provide technical, financial and legal expertise to the public private partnership Committee.

5. The Bill mandates for the publication, in at least two newspapers of national circulation, of the details of an executed project agreement regarding a PPP. This will ensure public participation as provided for in Article 118 of the Constitution which grants every citizen the right to access public information hence promoting transparency in the procuring and award of PPP projects. Contracting authority has been tasked with and reporting to the Directorate unlike under the Act which established a PPP Node to act on behalf of a contracting authority and prepare project agreements to be entered into between a contracting authority and a private entity.
6. The Bill introduces several procurement methods including direct procurement which must be done in consultation with the Directorate and reserved for exceptional circumstances such as urgency or where the direct procurement shall lower the cost of delivering a project. It further specifies projects that qualify for direct procurement which include projects linked to specific parties on account of national interest, bilateral or international cooperation or external trade. The Bill also sets out clear circumstances in which Privately-Initiated Proposals are initiated such as if the project is aligned with national infrastructure priorities and meets a demonstrated societal need and provide value for money. On the other hand, the Act only provided two methods for PPPs which were competitive bidding and privately-initiated proposals.
7. The Bill provides that county governments may enter into PPP agreements with private entities. However, they will be required to liaise with the Directorate and obtain written approval from the PPP Committee and the Cabinet Secretary responsible for matters relating to finance. County governments will also be required to obtain approval of the county assembly before embarking on a PPP project. Approval for county projects by the national government will only be required in special circumstances such as where a county requires support e.g. where the project exceeds the fiscal ability of the county. This is in support of the principles of devolution as enshrined in Article 175 of the Constitution.

8. The Bill introduces a new aspect concerning local content. Parties to a project agreement are required to give priority to services provided in Kenya and mechanisms for technology transfer are to be put in place. In order to ensure this, the Committee, on the advice of the Directorate, shall issue guidelines, standards and practice notes on local content.
9. The Bill expands the ability to enter into contract with private entities to facilitate greater participation by private entities in public projects. This has been done by introducing new structures to be considered for PPP arrangements such as annuity-based design, building, finance and operate, venture partnerships and strategic partnerships.
10. The Bill also gives the Directorate power to impose mandatory success fee of not more than 1% of the total project cost, payable into the Public Private Partnership Facilitation Fund, on a private entity that achieves financial close on a project. Unlike in the Act, the Bill defines financial close to mean the date when all conditions precedent required to be met to achieve first drawdown or senior debt under a project arrangement are met. It is also not mandatory for the private entity to pay the success fee under the Act.
11. The Bill introduces a non-renewable review fee payable into the Fund by the private entity for Privately-Initiated Proposals failure to which may attract a penalty.

CHAPTER TWO

2.0 SUBMISSIONS FROM STAKEHOLDERS

This Chapter presents the deliberations of the Committee with various stakeholders. It highlights the views and recommendations submitted to the Committee.

This section contains submissions by the following stakeholders-

i. The National Treasury,

ii. The Judiciary

iii. The Council of Governors

iv. The Public Private Partnerships Petitions Committee

v. Dr. Daniel Mutegi Giti, PhD

1. **Submission by the National Treasury**
2. The Director General, Public Private Partnerships Directorate submitted that on 2nd July 2020, Cabinet directed the National Treasury to strengthen the institutional framework supporting PPP's and address bottlenecks that impeded the optimal development of sustainable PPP Projects through, amongst other measures, the formulation of amendments to the Public Private Partnerships Act, 2013.
3. The PPP Act, No.15 of 2013 suffered the following constraints that contributed to a low project success rate since its promulgation and set up of the PPP Unit in 2013:
   (i) An over regimented and bureaucratic institutional structure that has not supported project development and investment promotion;
   (ii) Complex regulatory processes making it difficult to comply with and implement projects under the Public Private Partnerships Act, 2013;
   (iii) Absence of timelines for various processes under the Act;
   (iv) Limited, complex and rigid procurement options processes; Absence of enforcement mechanisms for the Directorate to enforce compliance under the Act;

(v) Inadequate entrenchment of the devolution system of governance as a national value within the Act;

(vi) Unsustainability of the Public Private Partnerships Directorate without the World Bank funding;

(vii) Overall, gaps and weaknesses in the governance framework under the Act;

(viii) Absence of local content principles in the Act

4. In 2016, the National Treasury drafted the Public Private Partnerships (Amendment) Bill to move forward a set of piecemeal amendments that sought to address two main constraints with the PPP Act, 2013 – entrenching devolution in the Act through giving county governments greater prominence under the Act and prescribing a procedure for county PPP projects, and reducing the number of regulatory approvals required by a project under the Act. The PPP (Amendment) Bill, 2016 lapsed with the prorogation of Parliament in 2017, and was republished as Bill No.52 of 2017. It was passed by the National Assembly on 31st July 2018, and sent to the Senate on 29th August 2018. Senate passed the PPP (Amendment) Bill on 5th March 2019, but with a few amendments, and returned it to the National Assembly. The National Assembly rejected Senate's amendments on 31 July 2019, and the Bill was sent to Mediation.
5. On 11th February 2021, the Mediated Version of the PPP (Amendment) Bill 2017 came up for consideration by the National Assembly but it was not voted on. The National Treasury therefore intended to withdraw the PPP (Amendment) Bill No.52 of 2017 from the floor of the House to pave way for the introduction of the comprehensive PPP Bill, 2021. That was because the PPP (Amendment) Bill, 2017 did not go far enough in fixing the operational constraints of the PPP Act, 2013.
6. A conscious decision was therefore made by the National Treasury to incorporate all the key amendment proposals in the 2017 Bill into the new comprehensive PPP Bill, 2021, and to subsequently withdraw the PPP (Amendment) Bill, 2021 from the floor of the House.

7. The revision of the Public Private Partnerships Policy, 2011 and amendments to the Public Private Partnerships Regulations, 2014, the Public Private Partnerships (Project Facilitation Fund) Regulations, 2017, and the Public Private Partnerships (Petition Committee) Guidelines, 2014 will be required after the enactment of the Bill on account of the changed circumstances occasioned by the Act.

Objects of the Public Private Partnerships Bill, 2021

8. The Bill would achieve the following key objects:
    a) The Bill repeals the Node structure, confers on the PPP Directorate the lead responsibility in project development and gives contracting authorities supporting roles;
    b) The Bill creates a strong, albeit facilitative Directorate, and gives it process leadership in PPP project implementation while simultaneously conferring on the Directorate a guidance and advisory role to contracting authorities in project structuring, procurement and tender evaluation. The Bill also reforms the PPP Committee by making it leaner and locking in county government representation to address a historical sticky point with the devolved units in that regard;
    c) The Bill enables the PPP Directorate to engage in the Budget Process with the view to identifying projects best suited for development under the PPP framework, in order to discipline projects that get loaded onto the Exchequer. This will free up critically needed fiscal space that would allow Government deliver more effectively on its social agenda;
    d) The Bill timelines key project processes and stages for a more efficient and predictable project development environment. In addition, the Bill places an overall 30-year timeline as the upper limit for the lifespan of any PPP project;
    e) The Bill refocuses oversight and supervisory roles of the PPP Committee by reducing the number of oversight approvals required from the Committee in

the course of project development, and delegates to the Unit extensive operational latitudes to guide and champion project development;

f) The Bill aligns responsibility with accountability under the Act, by placing on the Directorate PPP process leadership, and obligating contracting authorities to follow the lead of the Unit;

g) The Bill reduces procedural and substantive bureaucracy in various PPP processes throughout the PPP project cycle, which greatly improves the efficiency of the system underpinning PPPs in Kenya;

h) The Bill expands the scope of arrangements that qualify as public private partnerships – to include brown field concessions for such things as rail, pipeline and urban infrastructure investments, joint venture arrangements, Build-Transfer deal structures and strategic partnerships;

i) The Bill expands the scope of available procurement methods for PPPs by introducing Direct procurement and Restricted Bidding as approved methods, in addition to competitive bidding and unsolicited proposals. This will allow for partnerships to be procured either competitively, or single-sourced through direct procurement or as unsolicited privately initiated investment proposals;

j) The Bill introduces requirements for local content in PPP projects, to promote the national policy on Buy Kenya Build Kenya, and this will also lock in greater social acceptability of PPPs amongst Kenya's business and accountability institutions.

k) The Bill introduces a revenue sharing mechanism and thresholds within every project agreement to cater for instances where a project's revenue performance meets and exceeds the target return on investment negotiated under a project agreement.

l) The Bill expands the scope of Government Support Measures available to PPP projects by including Letters of Support, Binding Undertakings, Letters of Credit – whether partial or full, Partial Risk Guarantees and political risk insurances.

m) The Bill streamlines existing procurement options under the Act by clarifying and simplifying procedural elements on the conduct of feasibility studies, tender evaluations, contract negotiations and approval applications;

n) The Bill entrenches good governance ethics by separating policy from operational roles at three levels: Cabinet, PPP Committee and PPP Directorate, and by embedding offences associated with procurement violations, similar to the legal framework under general procurement law, and creates specific corruption-related offences to strengthen the overall compliance systems within the PPP ecosystem;

o) The Bill clarifies the framework for county government level PPP projects, and writes in careful principles for the management of contingent liabilities arising from such projects, for overall fiscal sustainability of PPP investments in Kenya;

p) The Bill promotes PPP Directorate's sustainability by requiring the imposition of success fees on every successful project under the Act, as well as by requiring payment of an appraisal fee by proponents submitting privately initiated investment proposals, and requiring recoverability of project development costs, all payable into the PPP Project Facilitation Fund to drive sustainability into the process.

q) Part of the sustainability strategy for the PPP Directorate under the Bill is the latitude created in the Directorate to secure secondments and strategic technical partnerships to augment embedded capacity within the Directorate, which is seen as a critical variable in unlocking faster deal turnaround time.

Development Impact of the PPP BILL, 2021

9. The Bill would speed up project development by facilitating faster processing of Privately Initiated Proposals, enabling direct negotiations through direct

procurement where feasible as well as value engineering of open procurement options in line with the new directive to align public investment programmes into project prioritization.

10. There would be greater sustainability of the Public Private Partnerships Programme through enabling the Public Private Partnerships Directorate to generate adequate appropriation-in-aid (via success fees) and strategic partnerships.
11. The improved legal framework would create greater credibility for the Public Private Partnerships programme by establishing stronger institutional frameworks that centralize capacity within the Directorate and promote government-wide improved compliance in project development (greater effectiveness in utilization of public finances);
12. It was anticipated that the relationship between the national and county governments would benefit through the improved and clarified governance frameworks for public private partnerships projects in counties.

Process Followed in Development of the PPP Bill, 2021

13. The National Treasury and Planning conducted a structured process in developing the PPP Bill, 2021 including –
    a. Developed a Consultation Paper on Law Reform Proposals to the PPP Act, 2013;
    b. Issued the Consultation Paper to a wide cross-section of contracting authorities involved in PPP projects, international and local law firms and transaction advisory firms involved in PPP projects locally and globally, local commercial banks, multilateral financing institutions, and independent PPP practitioners both local and globally, requesting comments and recommendations on how Kenya's PPP legal framework could be improved;
    c. Conducted a face-to-face stakeholder workshop on 21st January 2021 attended by over 60 persons drawn from the wide cross-section outlined in (b) above;

d. Receipt of written comments and memoranda from members of the public on both the Consultation Paper and independent recommendations on the PPP Act, 2013;
e. Legal drafting led by the Kenya Law Reform Commission with the direct support of the Attorney General.

14. The PPP Bill 2021 was considered by the NDITC Legal Sub-Committee on 8th February 2021, and revised to take into account recommendations made by the NDITC-Legal.
15. The PPP Bill 2021 was also considered by the PPP Committee at its 33rd Special Meeting held on 16th February 2021, and the Committee endorsed and adopted the Bill, acting under section 7(1) of the PPP Act, 2013, that mandates the Committee to review the legal, institutional and regulatory framework of PPPs.
16. The Bill was tabled and passed by the National Assembly on Wednesday 30th June 2021, following successful deliberations at the 1st, 2nd and 3rd Readings, paving the way for presentment of the Bill before the Senate, and its commitment to Standing Committee on Finance and Budget.

Financial Implications

17. The Public Private Partnerships Bill, 2021 was a money Bill within the meaning of Article 114 of the Constitution, and concerns counties. The enactment of the Bill would therefore, occasion additional expenditure of public funds.

2. Submission by the Judiciary

The Chief Registrar of the Judiciary, Ms. Anne Amadi submitted a memorandum to the Committee stating that-

18. The views of the Judiciary were informed by the Constitution and the March 2021 decision of the High Court on *Petition 197/2018-Okiya Omtata V JSC, the Attorney*

General and Parliament & Katiba Institute (Interested Party) as well as similar court decision touching on the place of local Tribunals in Kenya's governance framework. Further, the views were shared by the Attorney General who appointed a committee chaired by the Lenya Law Reform Commission to advise on the transition of Tribunals to the Judiciary in 2015. The committee developed the Tribunals bill that was awaiting tabling before parliament.

19. While that was pending, the High Court rendered judgement in March 2021 in Petition 197 of 2018 in which it laid down the criterion that statutory bodies should meet before they would be classified as local tribunals. The Court held that the bodies that met that criterion belonged under the Judiciary and that their members should be appointed by the Judicial Service Commission. Given its functions, the Pubic Private Partnerships Petitions Committee (PPPPC) to be established under Clause 74 of the Bill fitted the criteria laid down by the High Court and was therefore a tribunal that belonged under the Judiciary.
20. That was further evidenced by the fact that the National Treasury remitted the budgetary allocation for the PPPPC and other tribunals to the Judiciary with effect from FY 2015/2016, citing Constitutional provisions that place local tribunals under the Judiciary. Following the transfer of budgets, the Petitions Committee had been administered from the Judiciary, alongside other tribunals for the last six (6) years.
21. The Judiciary therefore urged the Senate to place a clear statutory framework that placed the PPPC firmly within the Judiciary under the governance of the Judicial Service Commission as dictated by the Constitution.
22. They proposed that the provisions regarding the PPPPC be placed under a separate Part of the Act (Part VIII) in order to allow room for sufficient detail and clarity, and to accord the Petitions committee status as a distinct entity in the PPP Act. Further, the Part should have the following sections-
    a. A separate section on **Establishment and Membership** of the Petitions Committee, including their tenure and terms of service (full-time vs part-time) to provide that the chairperson and members are to be appointed by the

Judicial Service Commission in the manner provided in the Judicial Service Act for the appointment of judicial officers;

b. A separate section on the **Jurisdiction** of the Petitions Committee;
c. A separate section on the grounds and procedure for **Removal of Members of PPPC** to provide that the removal is to be done by the Judicial Service Commission in the manner provided in the Judicial Service Act for the removal of judicial officers;
d. A separate section on the **Determination of Disputes** to provide for the timelines for filing of cases, the timelines for the determination of cases- including any extensions that the committee may grant and the quorum fir sittings;
e. A separate section to provide for the manner of **Enforcement of the Decisions** of the Petitions committee
f. A separate section to on **Review and Appeals**, to provide for the filing of appeals and whether one may seek review as well as the grounds for such review.
g. A separate section on the **Secretary and Staff** of the Petitions Committee, to provide that they are to be appointed/ seconded by the Judicial Service Commission;
h. A separate section on the **Expenses** of the Petitions Committee, to provide that the remuneration and the expenses of the Petitions Committee shall be paid out of monies allocated by the National Assembly to the Judiciary Fund, and that the Chairperson and members of the Petitions Committee shall be paid such allowances as shall be determined by the Judicial Service Commission on the recommendation of the Salaries and Remuneration Commission.
i. A separate section on the **Rules** governing the procedure before the Petitions Committee, to give the Chief Justice the power to make such rules.

3. **Submission by the Council of Governors**

23. The Chairman, CoG Technical Committee on Finance, Planning and Economic Affairs and Laikipia Governor Hon. Nderitu Mureithi made submissions on behalf of CoG as follows-

24. **Approvals of County Projects by a Directorate-** This Bill seeks to establish a Committee and Directorate. The two assume a lot of powers that if not managed can make PPP difficult to implement. Further the envisaged 'in consultation' need to be comprehensively interpreted in the bill to avoid any constriction in the implementation of PPP projects since decisions of County Governments on matters Public Private Partnership would be subject to approvals of a Directorate.

25. **Public Private Partnerships as an Intergovernmental Agent-** Public Private Partnership's projects are implemented as per the functions assigned by either level of Government in the Constitution. The bulk of the PPPs would be devolved functions. Therefore, the National Government should not create a PPP Directorate but an intergovernmental Authority to ensure that the PPPs implemented do not infringe on the competences of the County Governments.

26. **Long timelines for approvals** -For a contracting agent to get into a public-private partnership, especially for a county government, the minimum time required would be nine months for the approval of the project and engaging with the private party. After approval, the projects would then follow a whole year of Government budgeting cycle for inclusion in the Fiscal Year Annual Estimate, therefore if County Government was to get into a PPP at the onset of implementing a new generation of County Integrated Development Plan, the timelines provided would result in the Contracting agent starting the project toward mid-term implementation of CIDP.

27. **Citizen Engagement-**The Bill should be elaborate to avoid two institutions providing contradictory procedures and regulations. For instance, given that section 62 of the Bill requires the approval of PPPs by Parliament, at what stage should the public participation be undertaken by Parliament—at the Budget making,

contracting, or implementation stages? Likewise, given that section 64 of the Bill requires approval of PPPs by County Assemblies, at what point are the county assemblies expected to undertake public participation.

Comments on Specific provisions

Section No.	**Provision of Section in the Bill**	**Proposed Amendment**	**Justification for amendment and recommendation**
6. (1) Public private partnership committee	**6.** (1) There is established the Public-Private Partnership Committee which shall consist of— (f) one person nominated by the Council of County Governors;	***Amend Section 6.(1)(f) to read as follows;*** (f) two persons nominated by the Council of County Governors;	To ensure better representation of forty-seven County Governments in the Committee.
33. Approval of the feasibility study	**Not provided;** **Timelines for approval**	***Amend Section 33 to include;*** The Committee shall within fourteen days consider the feasibility report in determining whether or not the contracting authority may procure a project under this Act.	To ensure set out timelines for execution of Public-Private Partnerships projects

40. Privately initiated proposals	40. (1) A private party may submit a privately initiated proposal to a contracting authority.	40. (1) A local or foreign private party may submit a privately initiated proposal to a contracting authority.	That section on privately initiated proposal does not seem to recognize that there may be many Kenyans capable and interested in investing in local infrastructure if well guided and gives stress to foreign investors as opposed to Article 227, that emphasizes giving priority to local people in the procurement process
54. Proposal evaluation Committee	(1) A contracting authority shall, in consultation with the Directorate, constitute a proposal evaluation team for the purpose of evaluating bids submitted under this Act.	(1) A contracting authority shall constitute a proposal evaluation team for the purpose of evaluating bids submitted under this Act.	Subject to County Governments, the provisions appear to take away the discretion which the counties have under Article 227 in the procurement process and subject them to merely being directed by the Directorate. That was in addition to prescribing standards and specifying the

			practice notes on procurement and tender administration as provided for in Section 46 of the Bill. Further, that would lead to bureaucracy.
Composition of the Negotiation Committee	Not provided for	***Amend the section by including guidance on;*** ***3. The composition and size of the Committee;***	For uniformity and maintaining standards across contracting authorities, the provision should guide regarding the composition and size of the proposal evaluation team.
Negotiation	57(1) A contracting authority shall, in consultation with the Directorate, constitute a negotiating committee.	57(1) A contracting authority shall constitute a negotiating committee	Consultation with the Directorate in the negotiation is bringing about conflict of interest since the Directorate also issues the guidelines for the negotiation and also approves the final deal in terms of section 57(2) of the Bill.

Composition of the Negotiation Committee	Not provided for	***Amend the section by including guidance on;*** ***3. The composition and size of the Committee;***	For uniformity and maintaining standards across contracting authorities, the provision should guide regarding the composition and size of the negotiation committee
74.(2) Petition Committee	74. (2) The Petition Committee shall consist of the following persons appointed by the Cabinet Secretary — (c) one person, not being a member of county executive committees, and possessing such relevant knowledge and experience as the Cabinet secretary shall consider appropriate, nominated by the Council of County Governors	***Amend section 74(2)(c) to read as follows:*** 74. (2) The Petition Committee shall consist of the following persons appointed by the Cabinet Secretary — (c) two persons, not being a member of county executive committees, and possessing such relevant knowledge and experience as the Cabinet secretary shall consider appropriate,	To ensure better representation of forty seven County Governments in the Committee.

		nominated by the Council of County Governors	
Accountability of the Committee to the public	Not provided	The Bill should also make provision for accountability of the Committee to both levels of government but ensuring that it does not lose its independence as a tribunal to resolve disputes that may even involve the two levels of government.	The Committee runs as the Board for the Directorate, and therefore in its oversight role, the Bill should provide for its accountability and independence

4. Submission by the Public Private Partnerships Petitions Committee

28. The Chairperson, Public Private Partnerships Petitions Committee submitted a memorandum that stated the following-

Clause in the Bill	Proposed changes	Justification
Clause 74	There be set out entire part for the PPP petitions committee-to provide for establishment, composition and mandate of the Petition Committee PPPPC be part of the bill	To mirror the architecture of Part II of the Bill that set out the establishment composition and functions of the PPP Committee, as well as to accommodate the subsequent comprehensive changes. The PPPPC would be a distinct organ in the PPP framework and it

		was important to have a distinct part for it.
Clause 74	Inclusion of the Petition committee to review its decisions	The Bill should be clear as to the powers of the Petition Committee to review its decisions. That would allow minor clarifications and amendments to be made with ease and rendering of PPPPC's decisions without much hardship to parties and expeditiously.
Clause 74	Inclusion of immunity on the members of the Petition Committee from suits in the following terms- 1. The chairman and members of Petition Committee shall not be liable to be sued in a civil/criminal proceeding for an act done or omitted to be done in good faith. 2. The immunity is extended to officials acting with authority of their duties in good faith.	The PPP Bill as currently drafted exposed the Petition Committee to suits. Clothing the Petition Committee with immunity was typical with such tribunals and cushioned the petition committee members from all suits arising from discharge of their functions
Clause 74 (5) A petition under this section shall be made within seven days from the date of the	The Bill be reworded as follows A petition under this section shall be made within seven days from the date the decision of the Directorate, committee or a contracting authority is officially communicated	Linking time to file a petition to when the decision will be communicated officially, creates more clarity to parties

decision of the Directorate, OOO Committee or a contracting authority		
Clause 74	The Bill includes a provision on remuneration of Petition Committee members as follows- There shall be paid to the chairman and members of the Petition Committee such remuneration and allowances as the Salaries and remuneration commission may in consultation with the cabinet secretary determine from time to time Remuneration and entitlements of petitions committee be appropriated from the unit	As per standard practice
Clause 74	1. A member of the Petition Committee who has a direct interest in any matter which is the subject of the proceedings before the committee shall declare that there is a conflict of interest and not take part in those proceedings	Declaration of conflict of interest is important to ensure that the decisions are free from influence

Clause 74 (2)	The Committee as constituted has 5 Members. Parliament has amended this to make it a proposed 8 members committee. 8 being an even number, it is proposed either that the numbers be made odd in tandem with good governance practices or that the chairperson is made to have a casting vote.	Tribunal numbers and court decision are best when the numbers of decision makers are odd
Clause 74	Inclusion of enforcement powers of the Petition Committee as follows- (1) The Committee may- 1. (a) make such orders for the purposes of securing the attendance of any person at any place, the discovery or production of any document or the investigation of contravention of this Act as it deems necessary or expedient; (b) take evidence on oath and may for that purpose administer oaths; or (c) on its own motion summon and hear any person as a witness (2) any person who- (a) fails to attend to the Committee after having been required to do so under subsection (1)(a)(b)(c) and;	Enforcement powers shall enable the committee execute its mandate more effectively

	Refuses to take oath before the committee or to answer satisfactorily to the best of his knowledge and belief any question lawfully put to him in any proceedings before the Committee or to produce any article or document when required to do so by the committee; Knowingly gives false evidence or information which he knows to be misleading; At any sitting of the Committee- 1. (i) willfully insults any member or officer of the Committee; or 2. (ii) willfully interrupts the proceedings or commits any contempt of the committee Shall be guilty of an offence under this Act. (3) where the Committee enters judgement in terms of the decision	

	together with costs, it shall issue a decree which shall be enforceable as a decree of a court	
Clause 74 (1)	The Petition committee to be allowed to hear complaints on decisions made by contracting authority, the directorate and the committee, hence addition of the term 'complaints' before petitions	That would enhance access to the PPPPC by making anyone affected by decisions to easily file a complaint before the committee
Clause 74 (6)	That there be a proviso to the section 74 (6) to read as follows; Provided that the petition committee may for just cause and in the interest of justice extend the period for a period not exceeding 14 days	

5. **Submission by Dr. Daniel Mutegi Giti, PhD, PPP Expert by APMG International**

29. Dr. Daniel Mutegi Giti, PhD and expert with keen interest on PPP submitted his observations and recommendations to the Committee as follows-

(a) Constitution of the PPP Committee

30. The current PPP committee needed to be expanded to include representative from the Council of Governors in addition to the PS Devolution; PSs for Housing and Urban Development and Infrastructure should be included in the committee since the bulk of expected PPPs shall fall within the classification for urban, housing and infrastructure categories.

31. The PPP Committee was heavily government despite the spirit of PPPs for Public and Private partnerships. The 4 private sector officials should be increased to 6 and

their nomination be handed over to the umbrella bodies representing private sector players, such that 4 are from such bodies like: KEPSA, KNCCI, APSEA and 2 are appointed by the CS Treasury competitively.

(b) Framework for Privately Initiated Investment Proposals

32. Section 61 of the PPP Act on privately initiated investment proposals should be amended to state that there must be justifiable reason as to why the project is being done as PIIP. It should also show the legal basis on which the applicant seeking a PIIP stands on and what benefits it brings to the applicant.
33. The framework should be made more competitive by introducing a clause on exposing the deal to alternative proposals.
34. The PIIP should be taken as a financial proposal and as such, the contracting authority should undertake detailed feasibility study and checks as part of the approval process.

(c) Framework for solicited proposals

35. The regime should be optimized by making the process shorter so as to encourage more players. The two- step procedures for submission of RfQ followed by RfP should be retained in the PPP programme as it is in line with the global practice

(d) Expansion of the scope of PPPs

36. The PPP arrangements should be expanded beyond the current 13 to include: Blend in of the various models; introduction of the cooperative model into the PPP framework – cooperatives own lots of land, have membership to offer the necessary uptake of some assets and savings, all of which can accelerate PPPs; Joint venture model should be introduced into PPPs. It should also include more room for social and soft infrastructure as well, because experience shows that the sector can too benefit from PPPs.
37. The definition under the statute should be broader and not limited to the current models.

(e) Call for proposals

38. The methodology of supporting contracting authorities to generate priority lists for PPP projects should be codified, including inbuilt mechanisms for public consultation and stakeholder engagements. That consultation should be part of the market sounding and analysis on the likelihood of the project being undertaken through PPPs. In the codification, steps, procedures and matrixes should be provided for ease of utilization of the methodology.

(f) Shareholding structure of Project Companies under the PPP Model

39. The SPV of the PPP as established was fine since it was linked to the Kenyan company law which had undergone recent changes. The provisions were therefore sufficient for a PPP company.

(g) Timelines in the PPP process

40. Timelines should be provided for each step of the PPP, albeit with room for flexibility so as to encourage faster inception and completion of PPP projects;
41. Specific processes that should be time bound include feasibility study time, market sounding, stakeholder engagement and public participation, financial and technical proposal stages and formation of the SPV. That was because those steps have major implications for the success of the PPP project.

(h) Ownership of the PPP projects and Processes

42. The current model should be retained with introduction of flexibility on ownership of such projects to respect financiers, contractors and proponents.
43. The PPP Unit should be left to handle the technical, policy and application of PPPs processes while leaving specific output ownership to the contracting authorities. The PPP unit should also be delinked from the National Treasury to give it the authority required to enforce PPP processes.

(i) Threshold on PPP project Values

44. The current thresholds should be amended for both national and county government in respect of debt ceilings and other public interests and sustainability concerns for such projects.

(j) Public Participation within the PPP processes

45. The Public participation element in the PPP process should be codified and documented in line with other applicable laws and regulations guiding the public participation process. That would make it easy for implementation of the public participation and eliminate unnecessary delays or court cases on the conduct or lack of Public participation.

(k) Sanctions Regime

46. The PPP law should include applicable sanctions in breach of written down laws or agreements in the conduct of PPPs in Kenya. This will act as an incentive for fast tracking PPPs and a disincentive for default or slowed utilization of PPPs;

(l) Overall complexity of the current Legal Framework

47. The PPP legal framework should be made less complex by ensuring that it shortens and determines practical timelines for each activity under PPPs;

48. All institutions should remain the way they are but their mandates must be clearly stated in addition to timelines under which they must act.

(m) Formation of a PPP institute/centre in Kenya

49. The centre will -

a) Deepen its vintage position in technology and innovation, two of the most important aspects of PPPs;

b) Attract research and academic financial support from various development partners like the World Bank through Infrastructure Finance Public Private Partnerships (IFPPP) currently providing more financing for PPPs in Kenya. Research collaboration will also come from APMG international and other consortium of international banks championing for PPPs.

c) Link up with World Bank and PPP Unit of the National Treasury, CUE, among other stakeholders to promote the application of PPPs in Kenya

d) Enhance good working relationships between private and public bodies to promote local PPPs usage.

CHAPTER THREE

3.0 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.1 OBSERVATIONS

The Committee, having considered the Bill and the submissions from various stakeholders, made the following observations-

a) Clause 6 -the PPP Committee is comprised of Principal Secretaries from relevant government ministries but sub-clause (1)(c) states Cabinet Secretary for infrastructure. This appears to be misplaced since the Committee should consist of principal secretaries.

b) There was need to provide timelines for execution of PPP projects. Clause 33 on approval of feasibility reports should be amended to provide timeline within which the PPP Committee shall take to consider feasibility report.

c) The proposed membership under clause 75(2) of the Public Private Partnership Petitions Committee should be an odd number for better decision making.

d) Clause 75 on Public Private Partnership Petitions Committee should be revised to increase the number of persons nominated by Council of Governors (COG) to ensure better representation of the 47 counties.

e) Clause 75 establishes Petitions Committee. However, there is need to amend to provide for powers of the Petition Committee to review its decisions, immunity of the members, declaration of conflict of interest and a Secretary to the Petitions Committee.

3.2 RECOMMENDATIONS

The Committee recommends that the Public Private Partnership Bill (National Assembly Bills No. 6 of 2021) be approved with amendment as follows-

a) deleting paragraph (c) and replacing with the Principal Secretary in the State department responsible for matters relating to infrastructure. This is because the PPP Committee should include principal secretaries and not Cabinet Secretary.
b) Clause 33(3) be amended to provide that the PPP Committee shall consider the feasibility report within 21 days.
c) Clause 75(2)(bb) should be amended to provide that the Cabinet Secretary shall appoint four persons with such relevant knowledge and experience. This will ensure the PPP Petitions Committee has a membership which is odd for easier decision making.
d) Clause 75(2)(cc) should be amended to provide that the Cabinet Secretary shall appoint two persons nominated by the council of Governors.
e) Amend by introducing a new sub-clause under sub-clause 6 to provide that a person aggrieved by the decision of the PPP Petitions Committee may, within seven days of the decision, make an application for review to the Committee in the prescribed form.
f) Amend by introducing the following subclause after clause 75-
    (i) The Cabinet Secretary shall appoint a public officer to be the Secretary of the Petitions Committee. This officer shall be an Advocate of the High Court of Kenya of seven years standing.
    (ii) The members of the Petitions Committee shall, on consultation with the Salaries and Remuneration Committee, be paid such allowances as may be determined the Cabinet Secretary for National Treasury.
    (iii) A member of the Petitions Committee who has a direct or indirect interest in a matter before the Committee shall declare the interest and shall not participate in any proceedings of the Committee on the matter.
    (iv) The Petitions Committee shall issue a decree setting out its decision in a particular matter and the decree shall be enforceable in the same manner as a decree of the Court.

(v) A person shall not without reasonable cause or lawful excuse, obstruct or hinder, assault or threaten a member of the Committee acting under this Act. A person who contravenes this commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding one year, or to both.

APPENDIXES

(a) Committee Stage Amendments

(b) Minutes of the Committee sittings

(c) Submission from Public Institutions and Members of Public