

SPECIAL ISSUE

Kenya Gazette Supplement No. 68

467

12th May, 2017

(Legislative Supplement No. 33)

LEGAL NOTICE No. 74

THE KENYA CITIZENSHIP AND IMMIGRATION ACT

(No. 12 of 2011)

IN EXERCISE of the powers conferred by section 59 of the Kenya Citizenship and Immigration Act, 2011, the Cabinet Secretary for Interior and Co-ordination of National Government makes the following Regulations—

**THE KENYA CITIZENSHIP AND IMMIGRATION
(AMENDMENT) REGULATIONS, 2017**

1. These Regulations may be cited as the Kenya Citizenship and Immigration (Amendment) Regulations, 2017.

2. The Fifth Schedule to the Kenya Citizenship and Immigration Regulations, 2012, is amended in Category 1 (b) by inserting the following new paragraph immediately after paragraph (xxvii)—

L.N. 64/2012.

(xxviii) Civil servants, holders of diplomatic, official or ordinary passports from the Republic of South Africa, for a period exceeding ninety (90) days.

Dated the 19th April, 2017.

JOSEPH K. NKAISSERY,
*Cabinet Secretary for Interior
and Co-ordination of National Government.*



LEGAL NOTICE No. 75

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013

(No. 15 of 2013)

IN EXERCISE of the powers conferred by section 68 (4) of the Public Private Partnerships Act, 2013, the Cabinet Secretary makes the following Regulations—

**THE PUBLIC PRIVATE PARTNERSHIPS (PROJECT
FACILITATION FUND) REGULATIONS, 2017**

PART I—PRELIMINARY

1. These Regulations may be cited as the Public Private Partnerships (Project Facilitation Fund) Regulations, 2017.

Citation.

2. In these Regulations, unless the context otherwise requires —

Interpretation.

“Act” means the Public Private Partnerships Act, 2013;

“approved transaction advisor” means a transaction advisor appointed by a contracting authority;

No. 15 of 2013.

“capital subsidy” means a financial contribution to construction costs of a project whether in the form of a grant, loan, equity or other financial instrument;

“Committee” means the Public Private Partnerships Committee established under section 4 of the Act;

“Contingent Liability Reserve Account” is an account by that name opened by the Officer Administering the Fund, as a dedicated sub-account within the Fund, for the sole purpose of ensuring ready liquidity to meet contingent liability disbursement requirements of the Fund;

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

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

“Fund” means the Public Private Partnerships Project Facilitation Fund established under section 68 of the Act;

“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 available to projects under the Fund;

“implementation” means development, procurement, construction, operation and maintenance, as well as other related activities, of a public private partnership project;

“Officer Administering the Fund” means the Officer designated as such under regulation 20;

“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;

“project” has the same meaning as assigned to it under the Act;

“recoverable land acquisition costs” means monetary advances made by the Fund to a contracting authority to support that contracting authority’s shortfalls in land acquisition costs, and 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;

“secretariat” means the secretariat established under regulation 23(1);

“unit” means the public private partnerships unit under section 11 of the Act;

“viability gap funding” means payment that is made under these Regulations to a project whether by way of loan, grant, equity or other financial instrument to promote the financial capability of a project.

3. The object of the Fund is to provide financial support for the implementation of public private partnership projects under the Act, which may be provided in the form of grants, loans, equity, guarantees and other financial instruments as may from time to time be approved by the Cabinet Secretary.

Object of the Fund.

PART II—ELIGIBILITY AND APPLICATIONS

4. The Fund shall be applied to the following purposes with respect to eligible projects under these Regulations—

Eligible projects.

- (a) support to contracting authorities' third party costs in the preparation of public private partnership projects, including settlement of transaction advisory costs;
- (b) support to the activities of the Unit;
- (c) provision of viability gap funding to projects; and
- (d) provision of a source of liquidity to meet contingent liabilities arising from a project.

5. (1) In supporting contracting authorities in project preparation, the Fund may be applied to meet the cost of —

Support to the contracting authorities.

- (a) recoverable land acquisition costs;
- (b) consultancy services related to the public private partnerships programme including the conduct of sector diagnostic and studies, project proposal and feasibility studies;
- (c) conduct of tender processes including project advertisements, marketing and communications, tender documentation and due diligence;
- (d) transaction and associated advisory services; or
- (e) other project preparation activities as may be approved from time to time by the Committee.

(2) Subject to guidelines to be issued by the Committee, project preparation funding provided under paragraph (1) (c) and (d) may be recoverable.

6. (1) 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—

Support to the unit.

- (a) consultancy and advisory 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; or

(f) recurrent operation and maintenance costs for the secretariat.

(2) Funding for the unit shall be approved by the Committee in accordance with these Regulations.

7. (1) In supporting the provision of viability gap funding for eligible projects, the Fund may, among others, be applied to fund—

(a) capital grants made to a project during construction;

(b) recoverable advances made to a contracting authority;

(c) any other recoverable advances that may be made to a project under these regulations; or

(d) loans, equity or other financing arrangement as may be made available to a project in accordance with a project agreement and guidelines governing the operations of the Fund.

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

8. (1) As a source of liquidity to meet short term liquidity gaps, the Fund shall be used to meet contingent liabilities arising from the implementation of a project agreement where the liability—

(a) cannot be handled by the National Treasury under alternative frameworks;

(b) cannot be handled under the National Government Contingency Fund; and

(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 the provisions of paragraph (1) —

contingent liabilities materialising out of national government default and not recoverable from a contracting authority under a project agreement shall be eligible for settlement under the Fund and shall not be recoverable;

(a) 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 in exceptional circumstances, a contracting authority may apply to the Fund for a recoverable advance in settling such liabilities; or

(b) contingent liabilities which are neither the responsibility of a contracting authority or a private party, and which arise from the implementation of a project agreement shall be eligible for settlement under the Fund, subject to any guidelines that may for this purpose be issued from time to time by the Committee.

Viability gap funding.

Liquidity for contingent liabilities.

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

(4) For purposes of paragraph (3), contracting authorities shall, in conjunction with the debt management office, submit annually to the Officer Administering the Fund estimates of contingent liability arising from their eligible projects, provided that the Fund may finance short-term liquidity gaps in support of a project.

(5) For purposes of this regulation, every contracting authority shall in each financial year remit into the Fund a percentage of their estimated contingent liability funding requirements in accordance with guidelines issued by the Committee from time to time.

(6) Where payments out of 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.

(7) 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 the amount of funds to set aside for payments in any given financial year.

(8) The debt management office shall assess, manage and monitor all contingent liabilities arising from projects under the Act.

(9) The Committee shall adopt rules within the Fund Governance Manual for addressing default in repayment of recoverable advances with the view to promoting the sustainability of the Fund.

9. The following shall not be eligible for support under the Fund— Exclusions.

- (a) viability gap funding for privately initiated investment proposals; and
- (b) projects procured before the Act came into operation.

10. Any application to the Fund shall satisfy the following eligibility requirements when seeking support for project preparation under the Fund— Eligibility for support under project preparation.

- (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, land acquisition, compensation and resettlement plans; and

- (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.

11. (1) To be eligible for viability gap funding, a project requires to have had its contingent liability requirements estimated and approved at feasibility stage, and re-estimated and re-confirmed under section 53(4) of the Act.

Eligibility for viability gap funding and contingent liability support.

(2) Viability gap funding shall only be available to support project capital costs and recoverable land acquisition costs.

(3) When applying for viability gap funding and contingent liability liquidity support under the Fund, contracting authorities shall be required to provide to the Fund—

- (a) an approved feasibility study report, which approval shall include approval of contingent liability estimates in a proposed project; and
- (b) approved project report and financial risk assessment report.

(4) 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.

(5) 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 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 fifty one per centum 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; and
- (d) the project provides a service against payment of a tariff or user charge.

(6) Despite any provision in these Regulations but subject to paragraph (7), viability gap funding for any one project shall not exceed fifty per centum of the total project capital cost, whether the support is funded entirely by the Fund or co-funded by the sponsoring contracting authority.

(7) Despite paragraph (6), the Cabinet Secretary may, in exceptional circumstances, approve higher thresholds of support for any one project under the Fund.

12. In making a determination on which of the eligible applications to the Fund should be funded, the Fund shall apply the

Prioritization criteria.

principle of first come-first serve, and 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) potential value for money impact of the support;
- (d) equitable application of support under the Fund;
- (e) any specific requirements applying to the resources available within the Fund;
- (f) a contracting authority's compliance history under the Act and track record of effective use of the Fund support; and
- (g) quantum of the viability gap funding and its impact on the continued availability of the Fund to support other eligible projects.

13. Contracting authorities shall adopt prior 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.

14. (1) A request to the Fund with respect to project preparation funding support shall be made as follows — Forms for applications.

- (a) on a form provided by the secretariat which application shall be supported by the relevant documents; and
- (b) evidence of Committee approval of a project proposal and approval of an application for funding by a contracting authority for support by the Fund of the activity specified.

(2) A request to the Fund with respect to funding support to the Unit shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by evidence of the Unit's annual approved budget estimates.

(3) A request to the Fund with respect to viability gap funding support shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by a signed project agreement and evidence of the approved viability gap funding requirement.

(4) An application to the Fund with respect to contingent liability liquidity 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; and

(d) evidence that the Contingent Liability has materialised.

15. (1) Except as provided for in this Regulation, all disbursements under the Fund shall be made in accordance with the Funding Agreement.

Disbursements.

(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) Viability gap funding shall be disbursed in accordance with the disbursement schedule set out in the project agreement.

16. (1) The Officer Administering the Fund shall prepare a funding agreement for each funding support provided under the Fund.

Funding agreement.

(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.

(3) The Officer Administering the Fund shall, subject to any guidelines that may from time to time be issued by the Committee, establish standards, practices and documents to be utilised in documenting financing arrangements between the Fund and all applicants, other than applications for viability gap funding.

(4) A disbursements from the Fund shall not be effected in the absence of an appropriate agreement made under this Regulation.

PART II – MANAGEMENT OF THE FUND

17. (1) The Committee shall, pursuant to section 7 of the Act, oversee the operations and management of the Fund.

Responsibility of the Committee.

(2) In discharging its mandate, the Committee may delegate its functions under these Regulations to a sub-committee in accordance with section 9 of the Act.

(3) The 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.

18. The functions of the Committee in relation to the Fund shall be to —

Functions of the Committee.

(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 the estimates to the Cabinet Secretary for approval;

(c) ensure that the annual estimates of revenue and expenditure for all funding window include cumulative commitments for the financial year under review;

- (d) ensure that only eligible projects are authorised for funding under these Regulations;
- (e) approve all funding applications to the Fund;
- (f) inform the Cabinet Secretary on amounts and timing for Exchequer transfers into the Fund;
- (g) approve and review the investment of surplus funds in the Fund; and
- (h) advise the Cabinet Secretary on additional sources of funds for the Fund.

19. The 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; and
- (h) adopt the non-financial reports of the Fund and submit them to the Cabinet Secretary.

Powers of the Committee.

20. The Director of the Unit shall be the Officer Administering the Fund.

Officer Administering the Fund.

21. (1) The functions of the Officer Administering the Fund shall be to—

- (a) act as secretariat and technical arm of the Committee;
- (b) supervise and control the administration of the Fund;
- (c) prescribe all forms and prepare all funding documentation necessary for the proper administration of the Fund;
- (d) prepare estimates of annual revenue and expenditure of the Fund relating to the public private partnerships programme and the Funds' operational expenses and submit it to the Committee for adoption;
- (e) cause to be established proper systems of control and oversight over the operations of the Fund;
- (f) advise and consult the Committee on matters relating to the administration of the Fund;

Functions of Officers Administering the Fund

- (g) advise and consult with the Cabinet Secretary on matters relating to the administration of the Fund as may, from time to time, be necessary;
- (h) keep and maintain complete financial records of all projects supported under the Fund;
- (i) advise the Committee on trends and projections relating to the financing requirements under the Fund;
- (j) prepare non-financial performance report of the Fund and submit it to the Committee for adoption;
- (k) 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;
- (l) prepare, sign and submit to the Auditor-General in respect of each financial year and within three months after the end of the financial year, a statement of accounts 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, Commission on Revenue Allocation and the Controller of the Budget; and
- (m) 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.

No. 18 of 2012.

(4) For purposes of paragraph (3), and with respect to viability gap funding and project preparation activities, contracting authorities and the Unit 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 paragraph (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 liquidity funding requirements by the thirtieth day of September in each year.

22. 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;
- (b) call for any additional information with respect to requests for payments out of the Fund; and

Powers of Officer Administering the Fund.

- (c) in consultation with the National Treasury, issue financial management guidelines relating to the Fund.

23. (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, in consultation with the chairperson of the Committee, consider necessary for the proper performance of its functions under these Regulations.

24. 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 Committee, standardised documentation requirements for use in making applications to the Fund;
- (d) develop and publish, with the approval of the Committee, guidelines and procedures for making and processing applications made under the Fund by contracting authorities and the Unit;
- (e) prepare all funding agreements and documentation necessary to effectuate disbursements from the Fund;
- (f) ensure that every applicant that has received an allocation from the Fund reports to the Officer Administering the Fund every six months, or within such other frequency as set out in the documents executed for the funding, on the use of the allocation; and
- (g) monitor the progress of projects that have received an allocation from the Fund.

PART III – FINANCIAL PROVISIONS

25. (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 Kenya, in accordance with any financial management rules that for the time being govern public funds in Kenya.

Accounts of the Fund.

(2) All monies payable into the Fund shall be received into the relevant bank account of the Fund, in accordance 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.

26. (1) Upon opening of the accounts of the Fund pursuant to regulation 25, the Cabinet Secretary shall cause to be paid into the Fund such amounts of money as the Cabinet Secretary shall determine, with the view to operationalizing the Fund.

Payments into 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.

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

Withdrawals from the Fund.

(2) The Officer Administering the Fund shall ensure the accounts of the Fund are not overdrawn at any time.

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, 2012.

Records.
No. 18 of 2012.

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 operation.

Financial and procurement Regulations.

PART IV – MISCELLANEOUS AND TRANSITIONAL PROVISIONS

30. The Officer Administering the Fund shall publish annually on its website the following minimum categories of information —

Publication.

- (a) the amount and source of money received into the Fund, divided by each funding window;
- (b) total number of projects supported under each window of the Fund and divided by the sector and region; and
- (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 lapse 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, 2012.

Review on the performance of the Fund.

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

No. 18 of 2012.

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

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 established.

Winding up of the Fund.

(2) On the winding up of the Fund—

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;

- (a) the Cabinet Secretary shall pay any deficit into the Fund from funds of the National Government in the National Exchequer Account with the approval of the National Assembly;

- (b) assets other than cash of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to finance; and
- (c) if at the time of winding up of the Fund there are outstanding obligations, such obligations shall be transferred to the National Treasury.

(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.

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 liquidity support as prescribed under these Regulations, subject to contracting authorities submitting to the Officer Administering the Fund 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; and
- (c) a copy of the project's approved financial model.

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

34. The Public Private Partnership Regulations, 2014 are amended in the provisions specified in the first column of the Schedule, in the manner respectively specified in the second column of the Schedule.

Projects concluded outside of the Act.

Amendment of L.N No. 171 of 2014.

SCHEDULE

<i>Regulation</i>	<i>Amendment</i>
2 (2) (a)	Delete the word "more" appearing immediately before the words "than eighty-five million shillings" and substitute thereof with the word "less".
2 (2) (b)	Delete the word "more" appearing immediately before the words "than five million shillings" and substitute thereof with the word "less".
2 (2) (c)	Delete the word "more" appearing immediately before the words "than five million shillings being life cycle costs" and substitute thereof with the word "less".
61	revoked
62	revoked
63	revoked
64	revoked

Dated the 18th April, 2017.

HENRY K. ROTICH,
Cabinet Secretary for the National Treasury.

PUBLIC PRIVATE PARTNERSHIPS (PROJECT FACILITATION FUND) REGULATIONS 2017

IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO.23 OF 2013
AND IN THE MATTER OF THE PUBLIC PRIVATE PARTNERSHIPS ACT NO.15 OF 2013

LEGAL NOTICE No. 75 of 2017



EXPLANATORY MEMORANDUM ON THE PUBLIC PRIVATE PARTNERSHIPS (PROJECT FACILITATION FUND) REGULATIONS 2017

PART 1

Name of the Statutory Instrument	:	Public Private Partnerships (Project Facilitation Fund) Regulations 2017
Name of the Parent Act	:	Public Private Partnerships (PPP) Act, No.15 of 2013
Enacted Pursuant to	:	Section 68(4) and 71(1)a), Public Private Partnerships Act 2013
Name of Ministry	:	The National Treasury
Gazetted on	:	19 May 2017
Tabled on	:	06 June, 2017
Submitted under	:	Section 11, Statutory Instruments Act No.23 of 2013

PART II

1. Purpose of the Statutory Instrument

- 1.1 The Public Private Partnerships (Project Facilitation Fund) Regulations 2017 are aimed at providing financial support in the form of loans, grants, equity, guarantees and other financial instruments approved by the Cabinet Secretary, National Treasury, to contracting authorities implementing public private partnership (PPP) projects under the PPP Act, 2013. The Regulations thus provide a mechanism to fast track the development of public infrastructure projects, through the PPP procurement methodology.
- 1.2 The statutory instrument was published in the Kenya Gazette under Legal Notice No.75 of 2017, on 19 May 2017. A copy of the extract of the Legislative Supplement notifying the publication of the regulatory instrument is attached to this Explanatory Memorandum at Annex 1. The actual Legislative Supplement carrying the regulatory instrument is yet to be issued by Government Printer as of the 06 June 2017, which is the 7th Sitting Day of Parliament since the instrument was gazetted, hence this submission is made using the version of the instrument that was sent to the Government Printer,

duly signed by the regulation making authority. The actual published regulatory instrument shall be availed to Parliament as soon as it is obtained from the Government Printer.

2. Legislative Context of the Statutory Instrument

- 2.1 Under the PPP Act, Contracting Authorities – public entities at both the National and County Government level – are vested with the power and the mandate to identify projects that they would like to develop through the PPP methodology. The PPP project preparation process involves the undertaking of a feasibility study to assess the projects viability from a technical, financial, legal, economic and social and environmental perspective, which method of procurement is best suited to implement the project, and if PPPs is the most suitable, which form of PPP. Such assessments are usually expensive, as they would require the Contracting Authority to hire a Transaction Advisor, with specialist experience on the project, to assist in the projects development. The procurement process is also complex, and resource-intensive, requiring dedicated budget spaces for smooth project implementation. Contract negotiations also require financial resources. Furthermore, most projects require some land or wayleave to be acquired, which requires money. The PPP Act, in recognising that the development and preparation of a PPP project is a costly affair and may be a limiting factor to Contracting Authorities that are interested in infrastructure development through PPPs, provided for the establishment of the project facilitation fund, to mitigate these financial constraints.
- 2.2 The Project Facilitation Fund is thus established under section 68 of the Public Private Partnerships (PPP) Act 2013, to provide the following financial supports in the development of PPP projects: (i) support to contracting authorities in the preparation and tendering phases of a project; (ii) support for the activities of the Unit outlined in the PPP Act; (iii) support to meet projects viability gap finance for projects that cannot be implemented without such support from Government; (iv) provision of a source of liquidity to meet contingent liabilities arising from a PPP project; and (v) settle any transaction advisors retainer fees.
- 2.3 The Act, however, does not make provision for the Fund's operational and administrative procedures, and the Regulations are thus made to guide the manner in which the fund will be administered. It does not also make provision on the procedural requirements that contracting authorities need to satisfy to access support under the Fund, nor does it make provision for the manner in which the Fund is to be accounted for. All of these matters are the subject of the Regulations, elaborated as a set of specific instructions, obligations and mechanisms, by which each aspect of Project Facilitation Fund activity as established under the PPP Act may be undertaken.
- 2.4 The PPP Act 2013 anticipates and contemplates at least two additional sets of implementing regulations. These are (1) regulations to govern the conduct of PPPs in counties (under section 54(4) of the Act), and (2) regulations to govern PPP procurement disputes or petitions (under section 67(6) of the Act). Since these two additional sets of regulations are crucial to the completion of the PPP legal framework in Kenya, it is the intention of the National Treasury to table them before Parliament in due course. The PPP Regulations 2014 are already in force, promulgated under section 71 of the PPP Act, 2013. An amending bill, the PPP (Amendment) Bill, 2016, is currently pending approval at the Senate, having been approved by the National Assembly in December 2016 – and this Bill seeks to better clarify the substantive rules of engagement for county-level PPPs, as well as mainstreaming the idea of devolution in the PPP Act, 2013. That Bill, and the pending regulations under the cited sections 54(4) and 67(6) of the PPP Act, 2013 do not, however, impair the efficacy or requirement for the PPP (Project Facilitation Fund) Regulations 2017.

3. Policy Background

- 3.1 Official Government policy on public private partnerships in Kenya was stated in 2011 (attached at Annex 2), wherein Government affirms the important role played by the private sector in Kenya's development, and how that participation can be harnessed to accelerate the pace of delivering some of the most critical pieces of public infrastructure across most economic sectors. PPPs are seen as an important contributor for the attainment of Vision 2030. In this regard, an enabling regulatory framework to facilitate such development – from a financial and structural innovation perspective - was deemed necessary to create a structured process by which the desired partnerships could occur.
- 3.2 An important reason for these Regulations additionally lies in the overall policy objective of leveraging private finance and private sector efficiencies and innovation in the delivery of public services. Since the private sector is generally risk-averse, the quality of projects promoted through the PPP framework should be high. This can only be achieved through careful project selection and preparation. In many ways, the quality of projects assume the colour of the implementing institution and the nature of project preparedness, hence project financial support matters become crucial determinants of private sector comfort and confidence that projects are well selected and well prepared, and that typical Government-side project risks such as project land acquisition requirements and financial viability requirements will be dealt with in a timely fashion due to the availability of funds. Through creating a new business paradigm for public infrastructure development, supported by well-defined and properly mandated institutions, the Government through these Regulations will be communicating a firm message to the investing private sector that Kenya is committed to making the PPP transaction structure work.
- 3.3 The application of the PPP Act 2013 since it became operational early 2013 has generated an immense amount of interest from both investors and public bodies desiring to speed up the scale and quality of infrastructure development. The PPP Unit has been receiving numerous inquiries from various contracting Authorities, seeking support in their project development as well as support in meeting viability gap financing requirements to improve their projects viability. Due to the limited resources the Unit has, it has not been able to support all the requests received and many contracting authorities are counting on the support they will receive from the Fund once it is operational. This indicates that the contracting authorities are optimistic these Regulations will provide much needed support to the PPP process. The National Treasury believes this will be the case.

4. Consultation Outcome

- 4.1 The National Treasury consulted a wide range of stakeholders while preparing these Regulations. Consultations were guided by the principles of the Statutory Instruments Act No.23 of 2013, particularly sections 4, 5, 6 and 9 thereunder. The Cabinet Secretary determined under section 5 that the PFF Regulations did not have the effect contemplated under sections 5(1)(a&b), and that their application would not impose significant or any costs on the community or part of the community, per section 6 of that Act. In line with the principles of section 5(2), the consultations were designed to draw on the views of especially knowledgeable persons having expertise in matters covered by the Regulations, and also from such persons as would most likely benefit from the operationalisation of the Regulations.
- 4.2 The initial draft of the PFF Regulations were developed with the participation of a core cohort of stakeholders, drawn from the core departments of the National Treasury (being Directorate of

Accounting Services, Economic Affairs Department, Directorate of Public Debt Management and Budgetary Supply Department), and advisors to the PPP programme being a PPP Advisor to the Unit, PPP County Advisor, PPP Capital Markets Advisor, the PPP Legal Expert, and PPP Financial Modeller. The report of the Task Force on the PFF Regulations is attached at Annex 3 to this Memorandum.

- 4.3 Subsequently, a broad-based stakeholder engagement process was conducted, and climaxed through a stakeholder conference held on 19 March 2015, attended by over 100 delegates representing diverse public and private sector institutions. These included the Tana River Development Authority, the Geothermal Development Corporation, Tharaka Nithi County, Bomet County, the PPP Committee, Ministry of Health, Nakuru County, Kenya Civil Aviation Authority, Deloitte Tax Advisory Firm, Athi Water Services Board, Kiambu County, Kenya Urban Roads Authority, Jomo Kenyatta University of Agriculture and Technology, United States of America International Development Agency (USAID), the University of Nairobi, Kenya Rural Roads Authority, the PPP Petition Committee, the French Development Agency (AFD), the Kenya School of Government, DAI – US Energy Advisory Group, Kenya National Chamber of Commerce and Industry, Kenya Medical Trainers College, Japanese International Cooperation Agency (JICA), Kerio Valley Development Authority, International Finance Corporation of the World Bank Group, Institution of Engineers of Kenya, Ministry of Transport and Infrastructure, Kenya Technical Trainers College, Ministry of Energy and Petroleum, Moi University, Council of Governors, Kenya Ports Authority, Lake Basin Development Authority, GIBB Africa Ltd, African Development Bank (AfDB), Machakos University, MALF/SDC, Kenyatta University, Maseno University, Kenya Railways Corporation, Kenyatta National Hospital, National Oil Corporation of Kenya, Ministry of Devolution, Ministry of Livestock, Kenya Private Sector Alliance, Institute of Certified Public Accountants of Kenya, TNT, the Law Society of Kenya, Egerton University, Kenya Association of Manufacturers, and the National Treasury.
- 4.4 The professions, and official functions represented by those in attendance at the stakeholders conference on the Regulations were diverse: engineers, economists, lawyers, directors and heads of departments, deputy governors and chief executive committee members for county governments, vice chancellors for universities, CEOs and programme directors for private sector and civil society organisations, chief accountants, investment officers and financial directors of various organizations, researchers and departmental chairs. These people were engaged at a day-long stakeholders' workshop, details in 4.5 below. Virtually all the consulted stakeholders supported the proposed regulations. About 80% of the stakeholder responses at the Conference related to questions of clarity in the draft regulations, for instance where there were overlaps with the parent Act, or where the procedural requirements were not as clear as they could be. All of these interventions were incorporated in an improved draft of the regulations.
- 4.5 The attendance sheets indicating the names and institutions of all participants at the stakeholders' conference held on Thursday, 19 March 2015 at Laico Regency, is attached at Annex 4.
- 4.6 The consolidated set of Stakeholder Comments from the Stakeholder Conference is attached at table in Annex 5 to this Memorandum.
- 4.7 Furthermore, specialised comments were sought and obtained on the draft regulations from the World Bank Group, and individual comments were obtained from some of the stakeholders that

attended the stakeholders' conference in (4.5) above. The detailed comments of the World Bank Group based at Washington DC through Ms Shyamala Shukla, the World Bank Lead PPP Specialist and Key Contact Person for Kenya's PPP Programme at the World Bank in Washington DC, as well as the comments of Dr Were and Mr Daniel Giti. The PPP Unit also received extensive comments from Mr Nick Allen, the Unit's PPP Advisor and specialist PPP expert in his own right. The consolidated comments of Nick Allen, Shyamala Shukla, "DKK" and the responses of the PPP Unit Legal Expert who was the document controller and lead drafter of the regulations. All are provided at Annex 6 to this Memorandum

- 4.8 The PPP Unit also held a specialized session of the PPP Committee at a Retreat in Naivasha, on 25-26 November 2015, where the draft PFF Regulations were considered. The PPP Committee noted that the Regulations were a fair representation of the procedural requirements of the Fund, and approved their finalization. The Committee furthermore directed the Unit to develop the resource requirements for the Fund, such as would inform budgetary allocations to the Fund in subsequent financial years. The notes relating to this retreat, and the PowerPoint presentation used to discuss the draft Regulations are provided at Annex 7 to this Memorandum.
- 4.9 The clean version of the regulations, implementing comments from all stakeholder groups, is attached at annex 8 of this Memorandum.
- 4.10 Overall, the consultations yielded the important outcome that the Regulations were within the spirit of the parent law, and that they would promote faster project implementation.

5. Guidance

- 5.1 Contracting authorities, government departments involved in project planning, and development partners will require guidance and capacity building to enable them effectively leverage and participate in the Fund.
- 5.2 An important obligation reposed in the PPP Unit under the PPP Act 2013 is the duty to conduct civic education to promote awareness and understanding of the PPP law and process amongst stakeholders. In addition, the Unit is obligated to provide capacity building to and advise contracting authorities on PPPs with respect to the planning, coordinating, undertaking or monitoring PPP projects, including on all forms of supports available to them under the Act. Furthermore, the Unit is designated a resource centre on matters relating to PPPs and for that purpose, is required to conduct research and gap analysis to ensure continuous performance improvement in the implementation of PPPs. Part of this mandate extends to collating, analysing and disseminating information including the types of support mechanisms necessary to fast-track the development of PPP projects, on a sustainable basis.
- 5.3 The PPP Unit will therefore develop and issue a formal guidance, through the Cabinet Secretary, in the form of a circular to all contracting authorities at both national and county government levels, setting out the structure of the Fund, the types of supports available under the Fund, how contracting authorities can apply and what the eligibility requirements are for each form of support.
- 5.4 The Unit will also engage various development partners for leveraging resources into various windows of the Fund, to operationalize the Fund, and create ongoing mechanisms through which additional resources may be leveraged for the Fund. Furthermore, the Unit will work with all

contracting authorities through the budgeting frameworks in the country to ensure that contracting authority responsibilities with respect to the mandate of the Fund are taken into account, planned for and executed in timely manner (e.g., on recoverable advances for project land acquisition, or through budgeting for contingent liabilities, or viability gap funding requirements).

5.5 To spearhead this process, the Regulations create a Fund Secretariat that is mandated to ensure awareness is created around the Fund among all key stakeholder groups. The Secretariat together with the Fund Administrator are mandated to prepare all forms and associated documents that applicants to the Fund are expected to use. These forms will be made available through the Unit's website, and also on the website of the Fund itself, and all users will be pointed to the same for ease of access. Capacity building workshops will be made part of the stakeholder engagement strategy, and will be conducted for all stakeholder groups at both national and county government levels. Adequate staffing and associated resourcing will be secured to ensure this objective is met.

5.6 This engagement strategy is thus intense, real-time and practical.

6. Impact

6.1 In line with Section 9(a) and (b) of the Statutory Instruments Act, 2013, the PPP (Project Facilitation Fund) Regulations 2017 do not impose any new or significant costs on the community or part of the community, nor indeed on the investment community, and does not impose any charges or levies of equivalent effect. It does, however, make some provision involving some expenditure from the Consolidated Fund or any other public revenue, specifically, by way of appropriations-in-aid (per section 9(b) of the Statutory Instruments Act, 2013. The sources of revenue for the Fund are not new impositions, however, having already been established in the parent statute, which is in full effect, and include: (i) grants and donations; (ii) levies or tariffs imposed on projects; (iii) Success fees paid by a project company to the Unit; (iv) appropriations-in-aid; and (v) monies from a source approved by the State department responsible for matters related to finance.

6.2 In terms of their regulatory effect, the Regulations are not in any way addressed to individual rights and entitlements, and do not create offences, hence do not operate to limit individual freedoms and rights.

6.3 In addition, the Regulations do not oust the jurisdiction of the courts, and do not make any right, liberty or obligation unduly dependent upon any non-reviewable decisions. In general, they are designed to accord with the principles of good governance, rule of law and administrative efficiency and justice.

6.4 On the basis of the foregoing reasons, and in line with the provisions of Section 9(a)&(b) of the Statutory Instruments Act, No. 23 of 2013, the Cabinet Secretary of the National Treasury has deemed it not necessary to prepare a regulatory impact statement for the PPP (Project Facilitation Fund) Regulations 2017 on account of their neutral impact on the private and voluntary sectors of Kenyan society. It is requested that Parliament acquiesces in this determination and excuses the requirement for the publication in the Kenya Gazette of a Regulatory Impact Statement with respect to these Regulations.

6.5 Be that as it may, the Cabinet Secretary assures the National Assembly that adequate consultations were held with all persons to whom the Regulations will apply, as documented in this Explanatory Memorandum.

7. Monitoring and Review

7.1 A proper application of the PPP (Project Facilitation Fund) Regulations 2017 will yield the following positive outcomes –

- 7.1.1 The Fund will receive revenues and other capital injections once it becomes operational, aimed at supporting the Fund's obligations under each of the four funding windows (project preparation, contingent liability management, viability gap funding, and operations of the Unit);
- 7.1.2 More project ideas will receive funding support to progress projects to full feasibility study, procurement preparation and implementation – which together contribute to faster project development in support of faster public infrastructure development;
- 7.1.3 More projects means more job opportunities for Kenyans, hence job creation will be a positive spin-off from the successful implementation of these regulations;
- 7.1.4 Social projects which typically require financial support for PPP viability will receive a new source of support through the PFF Viability Gap Funding Facility window, meaning that Kenya will see more water, solid waste and associated environmental PPP projects developing;
- 7.1.5 Improvement of the fiscal space in Kenya, as the Fund will have a dedicated window to support Contingent Liabilities arising from PPP projects;
- 7.1.6 More projects attaining financial closure due to the speedy resolution on land matters – through the Project Preparatory Window, which includes provision for recoverable advances for project land acquisition and associated short-term liquidity constraints of contracting authorities. This will result in improved confidence in the Government's ability to procure and manage complex transactions, directly improving the country's overall perception and standing as an investment destination for the international private sector;
- 7.1.7 Successful project development under the Regulations will additionally validate the utility of this transaction model, expanding Government's repertoire of options in discharging its overall mandate in the production and sustenance of public goods in Kenya.

7.2 These success criteria will be subject to continuous review, monitoring and evaluation in line with the statutory responsibilities of the PPP Unit. That mandate requires the Unit to continuously rate, compile and maintain an inventory of PPP projects, support contracting authorities by ensuring that tendering processes conform to the Act, monitor contingent liabilities and accounting and budgetary issues related to PPPs, among other like responsibilities imposed under law.

7.3 The records of the Fund shall be maintained by the Officer Administering the Fund, and shall be audited annually to ensure that the funds are being used for their intended purpose. In addition, the Fund shall also conform to all applicable public financial management laws and regulations that are in full force and effect.

7.4 In addition, the PPP Committee is obligated to routinely monitor the implementation of the Act, and the Unit submits periodic reports (every 6 months) to the PPP Committee on the performance of the PPP programme in Kenya, as well as the level of compliance with the established legal framework and policy.

7.5 The PPP Unit has developed a project Monitoring and Evaluation Framework for the PPP programme, which tracks the progression of PPP projects throughout their various stages of the PPP Project Cycle: Inception, Preparation (feasibility study), Procurement, Contract Negotiation and Award, Financial Close, Construction, Operation Maintenance and Rehabilitation, and Close Out or Termination. Furthermore, the Fund will have its own Monitoring and Evaluation Framework to track, log, evaluate and rate the extent to which the Fund is meeting its obligations under each of the Funding windows.

7.6 Annually, the Fund's Oversight Board – the PPP Committee, will report to the Cabinet Secretary on the Funding requirements of the Fund, and will include submission of performance reports of the Fund. For the external stakeholders, the Officer Administering the Fund (the Fund Administrator), is required to publish, annually, a report setting out the status of the Fund from a liquidity profile perspective, with the view to letting all stakeholders know the status of the Fund, and provide guidance on the types and possible extents of supports available under the Fund.

7.7 At the elapse of every 10 years, the Fund shall be subject to review by Parliament to determine the extent to which the objectives for which the Fund was created have been met, and to determine whether the Fund should be continued or collapsed.

7.8 Overall, there are sufficient mechanisms built into the Regulations for monitoring and review of the Fund.

8. Contact

8.1 For further information on this statutory instrument, please contact **Eng. Stanley Kamau, Director of Public Private Partnerships Unit** at the National Treasury on telephone number 020-2252299 Ext 316.
