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THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT-SECOND SESSION

DEPARTMENTAL COMMITTEE ON FINANCE AND
NATIONAL PLANNING



REPORT ON THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL,
2017

Directorate of Committee Services
The National Assembly,
Parliament Buildings, Continental House, Room 402
NAIROBI

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ABBREVIATIONS

PPP	-	Public Private Partnerships
CoG	-	Council of Governors
TISA	-	The Institute of Social Accountability
BPS	-	Budget Policy Statement
PFM	-	Public Finance Management
CS	-	Cabinet Secretary

CHAIRPERSON'S FOREWORD

This report contains the Committee's proceedings of the consideration of the Public Private Partnerships (Amendment) Bill, 2017, National Assembly Bill No. 52 was published on 29th December, 2017 and read a First Time on 14th February, 2018. In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard Newspapers on 19th February 2018 pursuant to Article 118 of the Constitution. Three institutions submitted memoranda for consideration by the Committee. The Committee has since adopted the stakeholders' amendments for introduction into the Bill during the Committee Stage of the Bill.

In considering the Bill, the Committee noted that the Bill seeks to amend the Public Private Partnerships Act, 2013, to recognize county governments as distinct contracting authorities for public-private partnerships projects. To achieve this, the Bill makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnerships arrangements.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Public Private Partnerships (Amendment) Bill, 2017.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank the stakeholders for their participation in scrutinizing the Bill.

Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

SIGNED  DATE 11/4/2018

THE HON. JOSEPH LIMO, MP

CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

EXECUTIVE SUMMARY

The Public Private Partnerships (Amendment) Bill, 2017, was published on 29th December, 2017 and read a First Time on 14th February, 2018 and thereafter committed to the Departmental Committee on Finance and National Planning for consideration pursuant to Standing Order 127. The Public Private Partnerships (Amendment) Bill, 2017 seeks to amend the Public Private Partnerships Act, 2013, to recognize county governments as distinct contracting authorities for public-private partnerships projects. To achieve this, the Bill makes provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with public-private partnerships arrangements.

The Bill delegates legislative powers to the Cabinet Secretary. It does not limit any fundamental rights and freedoms. The Bill affects the functions of the county governments as set out in the Fourth Schedule of the Constitution and is therefore a Bill concerning counties for purposes of the Standing Orders. The Bill is a money Bill within the meaning of Article 114 of the Constitution.

In processing the Bill, the Committee invited comments from the public by placing advertisements in the Daily Nation and Standard newspapers on Monday 19th February 2018 pursuant to Article 118 of the Constitution. On expiry of the period to submit memoranda the Committee had received memoranda from three stakeholders for consideration. All their proposals were discussed in a stakeholder's meeting held on Friday 23rd March, 2018 at Flamingo Beach Hotel and Spa, Mombasa pursuant to Article 118 of the Constitution. The following stakeholders submitted their memoranda:

1. The Council of Governors (CoG)
2. The Institute for Social Accountability (TISA)
3. The National Treasury

1.0 ESTABLISHMENT OF THE COMMITTEE

The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
- c) **To study and review all the legislation referred to it;**
- d) To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e) To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments);
- (fa) To examine treaties, agreements and conventions;
- g) To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- h) To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- i) To examine any questions raised by Members on a matter within its mandate.

1.1 MANDATE OF THE COMMITTEE

In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, Public finance, Monetary policies, Public debt, Financial institutions (excluding those in securities exchange), Investment and divestiture policies, Pricing policies, Banking, Insurance, Population revenue policies including taxation and National planning and development.

In executing its mandate, the Committee oversees the following government Ministries;

- i. The National Treasury
- ii. Ministry of Devolution and Planning

1.2 COMMITTEE MEMBERSHIP

The Committee on Finance and National Planning was constituted by the House in December, 2017 and comprises of the following Members:-

1. The Hon. Joseph K. Limo, MP – **Chairperson**
2. The Hon. Isaac W. Ndirangu – **Vice-Chairperson**
3. The Hon. Jimmy O. Angwenyi, MP
4. The Hon. Alfred W. Sambu, MP
5. The Hon. Enoch Kibunguchy, MP
6. The Hon. Shakeel S. Ahmed, MP
7. The Hon. Abdul R. Dawood, MP
8. The Hon. Daniel E. Nanok, MP
9. The Hon. Andrew A. Okuome, MP
10. The Hon. David M. Mboni, MP
11. The Hon. Francis K. Kimani, MP
12. The Hon. Joseph M. Oyula, MP
13. The Hon. Joshua C. Kandie, MP
14. The Hon. Lydia H. Mizighi, MP
15. The Hon. Mohamed A. Mohamed, MP
16. The Hon. Purity W. Ngirici, MP
17. The Hon. Samuel Atandi, MP
18. The Hon. Stanley M. Muthama, MP

1.3 COMMITTEE SECRETARIAT

1. Ms. Leah W. Mwaura - **First Clerk Assistant/Lead Clerk**
2. Ms. Laureen Wesonga - **Third Clerk Assistant**
3. Mr. Josephat Motonu - **Fiscal Analyst III**
4. Ms. Lynette Otieno - **Legal Counsel II**
5. Mr. Chelang'a Maiyo - **Research & Policy Analyst III**

2.0 CONSIDERATION OF THE BILL

2.1 BACKGROUND INFORMATION

The Public Private Partnerships (Amendment) Bill, 2017, was published on 29th December, 2017 and read a First Time on 14th February, 2018 and thereafter committed to the Departmental Committee on Finance and National Planning for consideration pursuant to Standing Order 127.

In processing the Bill, the Committee invited comments from the stakeholders pursuant to Article 118 of the Constitution. Three institutions responded by sending their memoranda to the Committee for consideration. The Committee held a stakeholder's meeting on Friday 23rd March, 2018 at Flamingo Beach Hotel and Spa, Mombasa to engage stakeholders on their memoranda pursuant to Article 118 of the Constitution. The following stakeholders appeared before the Committee during the stakeholder's conference, The National Treasury and the Council of Governors.

2.2 CLAUSE BY CLAUSE ANALYSIS

Clause 1

This Act may be cited as the Public Private Partnerships (Amendment) Act, 2017

Clause 2

This Clause proposes:

- a) Deleting the definition of the term "contracting authority" and substituting therefor the following new definition -

"contracting authority" means-

- i. at the national government level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or
- ii. at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;

- b) deleting the definition of the term "transaction advisor" and substituting therefor the following new definition --

"transaction advisor" means a person who has the appropriate skill and experience to assist and advise the contracting authority or the unit on matters related to a public private partnership.

Clause 3

The principal Act is amended by repealing section 3 and replacing it with the following new section –

3. The provisions of this Act shall apply to every contract for the design, financing, construction, operation, equipping, management or maintenance of a project or for the provision of public services undertaken as a public private partnership.

Clause 4

The Principal Act is amended by inserting the following new section immediately after section 3 –

3A. The Public Procurement and Asset Disposal Act, 2015, shall not apply to contracts under this Act.

Clause 5

Section 15 of the principal Act is amended by inserting the words “the county government or” immediately after the words “Unit with”

Clause 6

The principal Act is amended by repealing section 20.

Clause 7

Section 24 of the principal Act is amended –

(a) by adding the following proviso at the end of subsection (1)—

Provided that the county priority list shall be subject to approval by the county government and be submitted to the Unit for publication alongside the national government priority list.

(b) by deleting subsection (2) and substituting therefor the following subsection—

(2) Upon receipt of the project lists from the national government contracting authorities, the committee shall consider the lists and the recommendations of the Unit and prepare and submit to the Cabinet for approval a national priority list which shall include county approved priority lists of public private partnership projects that have been submitted to the Unit.

Clause 8

Deletes the word “committee” and substitutes the word “unit”

Clause 9

Section 36 of the principal Act is amended -

(a) by deleting subsection (1) and replacing it with the following subsection—

(1) The unit shall assess the technical expertise of the contracting authority to procure the development, preparation, procurement, contract negotiation and management of a project under this Act.

(b) by deleting subsection (2) and replacing it with the following subsection—

(2) Where the unit finds that the contracting authority does not have the technical expertise to procure the project under this Act, the contracting authority shall, in consultation with the unit, appoint a transaction advisor to assist the authority in the preparation, procurement, contract negotiations and financial close phase of a project.

Clause 10

Section 49 of the principal Act is amended in subsection (2) by deleting the words “Committee for approval” and substituting therefor the words “Unit for concurrence”.

Clause 11

Section 51 of the principal Act is amended by renumbering the existing provision as subsection (1) and adding the following subsections—

(2) A proposal evaluation team may reject all submissions by bidders where all bidders do not comply with the conditions and requirements specified in the tender documents or the rules made under section 44.

(3) Where a proposal evaluation team rejects a submission under this section, the proposal evaluation team shall prepare and submit to the accounting officer a report setting out the reasons for the rejection.

(4) The accounting officer shall inform the bidder of the decision of the contracting authority to reject the bid within fourteen days of receiving the report under subsection (3).

- (5) A bidder whose bid has been rejected under this section shall not be entitled to compensation.
- (6) Where all bids have been rejected under this section, the contracting authority may start the tender process anew.

Clause 12

Section 54 of the principal Act is amended -

(a) by deleting subsection (2) and substituting therefor the following subsection—

(2) The Committee shall consider the reports submitted to it under subsection (1) and, if satisfied, approve the execution of the public private partnership agreement with the successful bidder.

(b) by deleting subsection (3).

Clause 13

The principal Act is amended by inserting the following section immediately after section 54A -

Procedures for county government public private partnership projects

54A. (1) A county government may enter into a public private partnership arrangement and shall be responsible for the management and administration of the overall project development cycle in accordance with this section.

(2) Where a county government intends to enter into a public private partnership arrangement, it shall cause its user departments or county corporations, as the case may be, to prepare and submit a project proposal to the Unit for consideration and recommendation detailing the strategic and operational benefits of entering into such an arrangement.

(3) Where the Unit recommends that a project may be developed as a public private partnership under this Act, the county government may grant its approval for the project and subject the project to a detailed feasibility study in accordance with section 33.

(4) For every county public private partnership project, the Committee shall—

- (a) approve the feasibility study report prepared by the county government on each proposed public private partnership arrangement, in accordance with section 35;
- (b) approve the negotiated commercial, financial and technical terms of a proposed public private partnership project in accordance with section 54;
- (c) approve any proposed variations to a project agreement in accordance with section 64; and

(d) exercise the powers vested in it under section 8 (c).

(5) A county government shall implement a public private partnership project if the project—

(a) provides value for money;

(b) is determined to be affordable; and

(c) ensures appropriate risks are transferred to the private party

(6) The Cabinet Secretary may make regulations for the better implementation of public private partnership arrangements by county governments, including—

(a) projects that may be undertaken by county governments;

(b) the thresholds of contingent liabilities that may be approved for such projects;

(c) the management of the public private partnership procurement processes by county governments; and

(d) the negotiation of project terms by county governments.

Clause 14

Section 56 of the Principal Act is amended by -

(a) deleting subsection (1) and substituting therefor the following subsection—

(1) The Committee shall, within a period of thirty days from the date of its decision of approving the project and financial risk assessment report, inform the contracting authority of its decision.

(b) deleting subsection (2) and substituting therefor the following subsection—

(2) Where the Committee approves an undertaking of a project, the contracting authority shall finalize the project agreement for execution by the parties to the project.

(c) deleting the words “Cabinet or Parliament,” appearing in subsection (3) and substituting with the word “Committee”.

Clause 15

The principal Act is amended by repealing section 57 and substituting therefor the following new section —

Execution of contract.

57. The contracting authority shall, following its finalisation of the project agreement and after all parties to the agreement have complied with all conditions precedent to the execution of government contracts, execute the contract awarded to that bidder.

Clause 16

Section 67 of the principal Act is amended in subsection (2)—

(a) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) not less than six but not more than eight other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the Unit, consider appropriate;

(b) by deleting paragraph (c).

3.0 PUBLIC PARTICIPATION

Following the call for memoranda from the public on 19th February 2018, the Committee received memoranda from three organizations. All their proposals were deliberated on and considered by the Committee. Below are the views of the stakeholders:

3.1 COUNCIL OF GOVERNORS

The CoG made the following submission;

Clause 7, s.24

The CoG was proposing the deletion of the proposed new section 24(2) on the following grounds---

- i. The proposed section undermines the distinctness of the county Governments approval at the Cabinet level of the National Government.
- ii. The proposed section introduces another level of approval after the PPP Committee.
- iii. Section 24(3) to be amended to provide that the CS **"in consultation with County Governments through the Council of Governors"** shall prescribe the thresholds for approval and the carrying out of projects by the county governments under this Act.

NATIONAL TREASURY RESPONSE

On the proposed amendment National Treasury was of the view that the amendment was achieving the following --

- a) It was clarifying that only project lists from national contracting authorities are subject to review by the Unit, and approval by the PPP Committee and Cabinet.
- b) County project lists are approved at county level, and forwarded to Cabinet, not for approval, but for publication together with the national contracting authority projects.

National Treasury further notes that the real issue was in section 24(2) and 25 – which may be amended as follows to address the need to recognize the project selection autonomy of county governments --

24.(2) Amend by adding the words "relating to national contracting authorities" after the word 'lists' in the first line, the word "them" after the word 'submit' in the third line, and the words "and inclusion in" between the words 'approval,' and 'a' in the last line, so that it reads:

(2) Upon receipt of the project lists relating to national contracting authorities, the Committee shall consider lists and recommendations of the Unit and prepare and submit them to the Cabinet for approval and inclusion in a national priority list."

25. Add the words “and county” between the words ‘national’ and ‘priority’ in the second line, and deleting the words “that has been approved under...” so that the new section 25 reads:

“The unit shall publish in the electronic and print media, the national and county priority list of projects pursuant to section 24.”

With these new adjustments, the original amendment proposal to paragraph 24(a) remains valid, and the concerns of the CoG are adequately addressed.

Clause 13, s.54

The CoG was proposing was proposing several amendments on the following grounds—

- a. Section 6(3) of county Governments Act stipulates that county governments can enter into any PPP, the proposed new section undermines independence of County Governments by providing that they submit their project proposals to the Unit for Consideration and recommendation.
- b. Despite county governments being conferred the power to enter into PPPs, the composition of the Committee under section 4 of the Act has no county government representation. In essence allowing this entity to make approvals for county PPPs means violating the independence of county governments.
- c. If the committee makes approvals reports on PPPs then there should be a representation of both levels of governments
- d. The section must be re-arranged to clearly reflect the procedures of approval. Section 54A(3) states that after the units makes it recommendations , the County Government may grant its approval for the project. This is contradictory since the provision that follows provides for approvals from the Committee.
- e. Section 54A(6) provides that the CS may make regulations for better implementation of PPP arrangements by County Governments. Again since the two levels are distinct it would be prudent that the regulations be developed jointly.

The COG proposed the following amendments-

- (1) Amendment to the proposed section 54A (2) to delete the words “consideration and” and substituting therefor the words “for the unit to advise the Committee on the strategic and operational benefits of entering into such an arrangement”
- (2) Deletion of the proposed section 54A (3)
- (3) Amendment of section 4 of the Act to include representation from County Governments in the Committee. If this is approved the proposed section 54A (4) may be retained.
- (4) Amendment of the proposed 54A (6) The Cabinet Secretary, in consultation with the County Governments through the Council of Governors, may make regulations for the better implementation of public private partnership arrangements by County Governments.

NATIONAL TREASURY RESPONSE

On the amendment in Clause 13 the National Treasury stated that public participation at the stage of project selection is part and parcel of the PPP project selection process as shown below:

- a) Section 23(2) of the PPP Act requires mandatorily that projects can only be selected from within a planned development programme – meaning public agencies cannot pursue PPP projects outside of their disclosed development agenda. This is usually found in the MTEF framework of a public agency, as well as in strategic plans of public institutions. Both of these involve public participation to varying degrees.
- b) Secondly, public plans are recognized and disclosed in the Budget Policy Statement of Government, issued yearly, and a document that ALWAYS involves public participation.
- c) Thirdly, for county governments, the County Government Act 2012 allows counties to implement PPP projects, but the same Act prohibits the implementation of any project that is not included in the county’s Integrated Development Plan.
- d) Fourthly, the choice on whether to use the PPP methodology is a technical exercise, requiring levels of assessment that are ill-suited to the platform of public participation, as an activity. It is not feasible to use the public participation avenue to determine whether a project is suitable to PPP implementation – because that decisions guided by technical, financial, legal, social, environmental and economic assessments and value judgements.

e) Lastly, by law, EVERY PPP project gets subjected to intense forms of public participation as at feasibility study stage, complete social, environmental and economic impact assessments are required to be conducted, elements of a project that cannot be completed without intense public participation.

It is therefore the view of the National Treasury that TISA's recommendation on public participation does not add value to existing practice, and does not help address a true project implementation challenge, because none has been identified.

On CoG proposals, the National Treasury:-

a) Agreed on the first proposal.

b) On clause 54A(2) they prefer a process that starts and ends at the county government level, and clause 54A(2) should be amended to read as follows:

"Where a county government intends to enter into a public private partnership arrangement, it shall cause its user departments or county corporations, as the case may be, to prepare project proposals for approval at the county government level, detailing the strategic and operational benefits of entering into such an arrangement."

"Where the county approves that a project may be undertaken as a public private partnership, it shall cause the project to be subjected to detailed feasibility study assessment in accordance with section 33. The County Contracting Authority may liaise with the Unit as necessary in developing the PPP Feasibility Study"

c) The National Treasury prefers to retain and amend the new section 54A(3), but amended to read as follows;

d) In relation to COGs 3rd proposal on section 4 of the Act, the National Treasury is of the view that it is not necessary to amend as suggested, and instead, wishes to amend section 54A(4) to provide that PPP Feasibility Studies at the County level are approved at the County level except where such studies show that the project will require Government Support Measures such as Viability Gap Funding, Letters of Support, or any other project specific Guarantees that can not be granted by the County Government. Such approvals will need to be sought from the National treasury prior to the tender stage.

The amended section will therefore read as follows: *“A Feasibility Study completed pursuant to section 54A(3) shall be approved by the County Government, prior to initiation of procurement processes for the project, PROVIDED*

that:

- a. where such studies show that the project will require national government support measures or any other project specific guarantees that cannot be granted by the County Government or*
- b. exceeds the thresholds that have been prescribed by the Cabinet Secretary*

the county government contracting authority shall obtain the approval of the National Treasury prior to commencement of the tender processes”

The Treasury also recommends adding a new sub section 54A(4)(a) that reads as follows:

“Subject to sub-section 54A(4)(b), a County Government Contracting Authority shall seek and obtain the approval from the County Assembly where no National government support measures are required for the project prior to the execution of a Project Agreement at the County level, the Contracting Authority.

54A(4)(b) Where the project requires national government support measures or other project guarantees which cannot be granted at the County level, or exceeds the thresholds prescribed by the Cabinet Secretary by way of regulations, the county government shall not execute a project agreement without first seeking and obtaining the written approval of the National Treasury”.

This new provision will provide necessary checks and balances prior to contract execution, now that the projects are no longer being referred to the Committee for this purpose.

The National Treasury contends that CoG’s 4th amendment proposal to the proposed clause 54A(6) is problematic in law. This is because regulatory making power is conferred by statute on a distinct entity: it is not a shared duty. The power to make regulations under an act of Parliament is always a singular power. However, consultations in the making of regulatory instruments is already legislated, under the Statutory Instruments Act of 2013. It is not necessary to make a statutory amendment on consultation of stakeholders. It is already a given duty. The proposal is therefore problematic both in law and in practice.

Consequently, the National Treasury prefers to retain the proposed clause 54A(6) as initially drafted.

Lastly, it is proposed to add a new sub-section (e) under 54A(6) that reads as follows:

“(e) any other matter necessary for the better implementation of public private partnerships by county governments.”

This will ensure that the Cabinet Secretary’s hands are not tied in undertaking his Regulation making obligations.

3.2 THE INSTITUTE OF SOCIAL ACCOUNTABILITY (TISA)

TISA submitted the following memorandum to the Committee: -

Clause 13, s.54

- a. Public participation in implementation of PPP should be included in the parent Act. Specifically, public participation in the development and finalization of project priority list at the National and County Government level to be financed by way of PPP arrangements
- b. Public participation before a determination is made on feasibility studies by National and County governments of potential PPP projects.

General Comments

The Public Private Partnerships Act, 2013 requires further review to provide for-

- (a) Public participation and access to information and disclosure requirements for Public Private Partnerships arrangements. There is no provision for public input in PPP and provision for access to information insufficient in view of Article 35 of Constitution. Article 235 also provides for transparency and provision of accurate information to the public as among the values of public service.
- (b) Public participation in implementation of PPP should be included in the parent Act. Specifically public participation in the development and finalization of project priority list at the National and County Government level to be financed by way of PPP arrangements
- (c) Public participation is important as it will provide-
 - i. an opportunity to educate citizens on the PPP arrangements, provide a brief on value for money consideration that inform the arrangement;

- ii. information on any revenue share arising from a PPP between the nation or county government and the private entity
- (d) Public participation before a determination is made on feasibility studies by National and County governments of potential PPP projects. Section 34 of the Act should provide that the report format should ensure that sufficient information is provided to enable the public form informed opinions on the feasibility of proposed projects.
- (e) The unit should be mandated to undertake civic education on feasibility studies and include views of the public and submit the views to the committee together with the feasibility report.
- (f) The Act should be amended to mandate the committee make a determination on the sufficiency of degree of public participation conducted
- (g) The Act should be amended to provide a linkage between approved projects and the BPS and County Fiscal Strategy Paper. The PPP should be reflected in the BPS and the County Fiscal Strategy Paper.

RESPONSES OF THE NATIONAL TREASURY

The National Treasury gave its view on the TISA's proposal as follows: - **THAT,**

- (a) With respect to public participation in TISA's suggestion (a) and (b), there were adequate avenues for public participation in PPP projects in Kenya, and as such there was no statutory justification for this proposal.
- (b) With respect to access to information, the PPP Unit and the National Treasury were finalizing the design of PPP Disclosure Portal through which proactive data disclosure on PPP projects, throughout the PPP Project Cycle (Selection, Inception, Preparation, Procurement, Contract details, Implementation and Performance) shall be made available to the public. Furthermore, there were adequate legal tools on access to information, and it was not necessary to legislate on already legislated principles hence National Treasury was not in support of the proposal.
- (c) The National Treasury agreed on the utility of public participation hence the reason they were investing in a detailed and extremely proactive information disclosure platform for PPPs. However, at the level of project selection and finalization of the priority lists, value for money considerations are impossible to determine and this can only be done after feasibility studies are completed, and can only be confirmed after procurement and finalization of commercial and

financial terms of the transaction. Moreover, PPP is one of the options of procuring public goods and services and should thus not be subjected to different Public Participation requirements from projects procured under general public procurement rules. The National treasury did not therefore did not support legislation on these issues.

- (d) Similarly, information on revenue sharing, if any, can only be known after contract negotiations – it is impossible to determine these matters even after feasibility studies have been done, let alone before such studies are done. The PPP disclosure portal makes these matters of public knowledge once firmed up. Again, the National Treasury did not see merit in legislating these operational details.
- (e) With respect to Tisa’s recommendation (e), some elements of a PPP feasibility study are capable of varied forms of public participation. The Committee’s attention was drawn to section 33 of the PPP Act, 2013 for clarity. Civic education is perhaps an imprecise concept with respect to conduct of feasibility studies: it is usually elements of public consultations that are undertaken. As well as market sounding exercises
- (f) With respect to (f), the National Treasury submitted that the recommendation misses the point of why feasibility studies are conducted. They are done to establish if a proposed project is affordable to the government, and to the end user. They do so to assess whether doing the project through the PPP method gives the government better value for money compared to if they did it under the Exchequer. It also helps the National Treasury to determine how many risks they are transferring away from the public sector. Public participation, and its sufficiency otherwise, does not add transaction value to the assessments and value judgements required to be made on a project’s feasibility. The Treasury therefore opines that the suggested amendment does not add to regulatory clarity, and does not contribute to legal or governance practice in Kenya.
- (g) The last amendment proposal by TISA was substantially addressed in the National Treasury’s responses under clause 13. In short, the National Treasury believes this linkage is already there, and in any event, does not require legislative intervention.

3.3 THE NATIONAL TREASURY

During the interaction with the National Treasury, the Cabinet Secretary proposed further amendments that should form part of Committee’s amendments as follows: -

Clause 13 s. 54A(2)

Should be amended as follows, “where a county government intends to enter into a public private partnership arrangement, it shall cause its user departments or county corporations, as the case may be, to prepare project proposals for approval at the county government level, detailing the strategic and operational benefits of entering into such an arrangement.”

Section 54A(3)

Should be amended as follows, “where the county approves that a project may be undertaken as a public private partnership, it shall cause the project to be subjected to detailed feasibility study assessment in accordance with section 33. The County Contracting Authority may liaise with the Unit as necessary in developing the PPP Feasibility Study.”

Section 54A(4)

Should be amended as follows, “A Feasibility Study completed pursuant to section 54A(3) shall be approved by the County Government, prior to initiation of procurement processes for the project, PROVIDED that:

- a. where such studies show that the project will require national government support measures or any other project specific guarantees that can not be granted by the County Government or
- b. exceeds the thresholds that have been prescribed by the Cabinet Secretary,

the county government contracting authority shall obtain the approval of the National Treasury prior to commencement of the tender processes.”

Section 54A(4)(b) & (c)

“(b) Subject to sub-section 54A(4)(b), a County Government Contracting Authority shall seek and obtain the approval from the County Assembly where no National Government support measures are required for the project prior to the execution of a Project Agreement at the County level, the Contracting Authority.”

“(c) Where the project requires national government support measures or other project guarantees which cannot be granted at the County level or exceeds the thresholds prescribed by the Cabinet Secretary by

way of regulations, the county government shall not execute a project agreement without first seeking and obtaining the written approval of the National Treasury.”

Section 54A(6)

Add an additional sub-clause (e) that reads,

(e) “any other matter necessary for the better implementation of public private partnerships by county governments.”

Clause 15, s.57

“Following the approval at section 56, the Contracting Authority shall execute the contract awarded to that bidder.”

Clause 24, s.2

Should be amended as follows “upon receipt of the project lists relating to national contracting authorities, the Committee shall consider the project lists and recommendations of the Unit and prepare and submit them to the Cabinet for approval and inclusion in a national priority list.”

Clause 25

Should be amended as follows, “The unit shall publish in electronic and print media, the national and county priority list of projects, pursuant to Section 24.”

4.0 COMMITTEE'S STAGE AMENDMENTS

CLAUSE 1

Agreed to

CLAUSE 2

THAT, clause 2 of the Bill be amended by deleting paragraph (b) and substituting therefor the following new paragraph-

(b) deleting definition of "Committee"

Justification

There was no need to define the term committee since the Committee had agreed with the National Treasury to have the entire section on PPP committee be deleted.

CLAUSE 4

THAT, clause 4 of the Bill be amended by deleting the proposed new section 3A and substituting therefor the following new section-

3A. the provisions of the Public Procurement and Asset Disposal Act, 2015 shall, be exercised subject to the relevant provision of this Act and apply to contracts under this Act only in the event where there is no express provision for the applicable procurement procedures under this Act.

NEW CLAUSES

THAT, the Bill be amended by inserting the following new clauses immediately after clause 4—

4A. The principal Act is amended by repealing section 4.

4B. The principal Act is amended by repealing section 5.

4C. The principal Act is amended by repealing section 6.

4D. The principal Act is amended by deleting section 7 and substituting therefor the following new section—

7. (1) The functions of the Cabinet Secretary shall be—

- (a) formulate policy guidelines on public private partnerships;
- (b) ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships;
- (c) approve project lists submitted to it in under section 24;
- (d) formulate or approve standards, guidelines and procedures for awarding contracts and standardized, bid documents;
- (e) review the legal, institutional and regulatory framework of public private partnerships; and
- (f) ensure approval of, and fiscal accountability in the management of financial and any other form of support granted by the Government in the implementation of projects under this Act.

(2) The Cabinet Secretary shall, every six months, submit to Parliament a report on the estimated value of government obligations, risks, undertakings, subsidies, revenue guarantees, and other types of government guarantees and support linked to every public private partnership project together with the value of each public private partnership project agreement signed under this Act.

4E. The principal Act is amended by repealing section 8.

4F. The principal Act is amended by repealing section 9.

4G. The principal Act is amended by repealing section 10.

4H. The principal Act is amended by deleting section 14 and substituting therefor the following new section—

14. (1) The functions of the unit are to—

- (a) serve as a resource centre on matters relating to public private partnerships;
- (b) conduct civic education to promote the awareness and understanding of the public private partnerships process amongst stakeholders;
- (c) provide capacity building to, and advise contracting authorities or other parties involved in the planning, co-ordinating, undertaking or monitoring of projects under this Act;
- (d) rate, compile and maintain an inventory of public private partnership projects that are highly rated and which are likely to attract private sector investment;
- (e) develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects;
- (f) conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships;
- (g) collate, analyse and disseminate information including data on the contingent liabilities of the Government in relation to a project;
- (h) make recommendations on the approval or rejection of projects prior to submission to the Cabinet Secretary for approval;

- (i) assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritise, appraise, evaluate and negotiate projects; □
- (j) maintain a record of all project documentation;
- (k) review and assess requests for Government support in relation to a project and advise the Cabinet Secretary on the support that should be accorded in relation to the project; □
- (l) assist the Cabinet Secretary in formulating guidelines and standard documentation required under this Act; □
- (m) liaise with and assist the contracting authorities in their roles in the various stages of a project cycle; □
- (n) ensure that the tendering process relating to a project conforms to this Act and to procurement best practices; □
- (o) put in place measures to eliminate constraints limiting the realisation of benefits expected from a public private partnership; □
- (p) monitor contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance;
- (q) approve project proposals submitted by Contracting Authorities;
- (r) ensure that each project agreement is consistent with the provisions of this Act;
- (s) examine and approve a feasibility study conducted by a contracting authority under this Act;
- (t) ensure efficient implementation of any project agreement entered into by contracting authorities;
- (u) require any information from any party to a project on any matter relating to a public private partnership; and
- (v) carry out such other functions as may be conferred on it by the Cabinet Secretary and this Act. □

(2) The unit shall prepare financial accounts and an inventory of any monies allocated to it, any financial support received by it and any success fees received by it from a private party or project company as the case may be, under this Act.

Justification

4A, 4B, 4C, 4D, 4E, 4F, 4G, and 4H are provisions relating to the PPP committee which is being proposed for deletion as the functions of the PPP committee are to be carried out by the Cabinet Secretary. The provision in 4H is to provide functions for the PPP Unit which shall carry out the technical role as far as PPP projects are concerned. While the CS will guide in the policy direction, the Unit will offer the technical support.

NEW CLAUSE 5A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 5—

5A. Section 17 of the principal Act is amended in subsection (1) by deleting the word “Committee” appearing in paragraph (j) and substituting therefor the words “Cabinet Secretary”.

Justification

The word Committee will be replaced by the words Cabinet Secretary wherever it appears in the Act since the PPP committee will not be existing after the passage of the Amendment Bill.

CLAUSE 7

THAT, clause 7 of the Bill be amended-

- (a) in paragraph (a) by deleting the proposed new subsection (2) and substituting therefor the following new subsection—
 - (2) Upon receipt of the project lists from the national government contracting authorities, the Cabinet Secretary shall consider the lists and the recommendations of the Unit and prepare and submit to the Cabinet for approval a national priority list which shall include county approved priority lists of public private partnership projects that have been submitted to the Unit.
- (b) by inserting the following new paragraph immediately after paragraph (b)—
 - (c) in subsection (3) by inserting the words “in consultation with county governments” immediately after the words “Cabinet Secretary shall.”

Justification

This provision is to ensure that the National priority list is submitted by the Cabinet Secretary for approval by the Cabinet together with county approved priority lists.

NEW CLAUSE 7A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 7—

7A. The principal Act is amended by deleting section 25 and replacing it with the following new section—

27. The Cabinet Secretary may, in consultation with the Debt Management Office, where he or she considers it necessary to support a project and in order to reduce premiums factored for political risks, issue a guarantee, undertaking or binding letters of comfort in relation to a project.

Justification

The role of PPP committee will not be in existence as proposed by the amendment and there will no reference to the PPP committee.

7B. The principal Act is amended by inserting the following new section immediately after section 27—

27A. (1) The Cabinet Secretary shall ensure that the accumulation of contingent liabilities linked to public private partnerships by the government is consistent with debt sustainability objective set out in the medium term debt management strategy submitted to Parliament under section 33 of the Public Finance Management Act, 2012.

(2) The National Assembly shall, taking into consideration the medium term debt management Strategy, approve a limit on the cumulative value of all contingent liabilities that may be incurred through public private partnership agreements.

Justification

To ensure that the contingent liabilities accruing out of PPP projects are factored in the total public debt and to ensure that Parliament considers these reports while approving debt ceilings.

7C. Section 28 of the principal Act is amended by deleting subsection (3) and substituting therefor the following new subsection—

(3) The Cabinet Secretary may impose a success fee on a transaction to be paid by a successful bidder in accordance with the tender documents

Justification

The role of the Committee would be taken back to the CS since the PPP committee is proposed for deletion.

7D. Section 30 of the principal Act is amended by deleting the word “Committee” and substituting therefor the word “Cabinet Secretary.”

Justification

The role of the Committee would be taken back to the CS since the PPP committee is proposed for deletion.

NEW CLAUSE 8A

THAT, the Bill be amended by inserting the following new clause immediately after clause 8—

8A. Section 33 of the principal Act is amended in subsection (1) by deleting the word “Committee” and substituting therefor the word “Unit.”

Justification

The role of the PPP committee will not be in existence as proposed by the amendment and this function would be executed by the unit as it is technical in nature and there would be no reference to PPP committee.

NEW CLAUSE 9A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 9—

9A. Section 37 of the principal Act is amended in subsection (1) by deleting the words “upon approval by the Committee”.

Justification

The role of the PPP committee will not be in existence as proposed by the amendment.

9B. Section 45 of the Public Private Partnerships Act is amended by deleting subsection (1) and substituting therefor the following new subsection—

(1) A contracting authority may, hold a competitive dialogue with each bidder to define the technical or financial aspects of the project in the manner prescribed under this Act.

Justification

To give the contracting authority the discretion to hold competitive dialogue with each bidder without the need for involvement of the unit or any other body.

9C. Section 48 of the Public Private Partnerships Act is amended by deleting subsection (4).

Justification

The provision relates to the PPP committee and there is a proposal to delete all provisions relating to PPP committee and any reference to it.

NEW CLAUSE 11 A

THAT, the Bill be amended by inserting the following new clause immediately after clause 11—

11A. Section 52 of the principal Act is amended in subsection (1) by deleting the words “with the approval of the Committee”.

Justification

The role of the PPP committee will not be in existence as proposed by the amendment.

CLAUSE 12

THAT, the Bill be amended by deleting clause 12 and substituting therefor the following new clause—

12. The principal Act is amended by deleting section 54 and substituting therefor the following new section—

54. (1) The Unit shall submit the project report, the financial risk assessment report submitted to it under section 53 and its recommendations to the Cabinet Secretary for consideration and approval.

(2) For County projects, the project report, the financial risk assessment report shall be submitted to the Contracting Authority together with its recommendations for consideration and approval.

(3) The Contracting Authority shall, upon receiving approval under subsection (1) and (2), execute the project agreement.

Justification

The proposed amendment will ensure that the role of the Unit is amplified as far as submission of the project report, the financial risk assessment report and its recommendations to the Cabinet Secretary for consideration and approval. In the Principal Act, this is the role of the PPP committee. The provision would ensure that the counties are also recognized as contracting authorities.

CLAUSE 13

THAT, clause 13 of the Bill be amended in the proposed new section **54A** by—

(a) inserting the following new subsection immediately after subsection (3)—

(3A) A county government shall within thirty days of approval of a project a under submit a report to the county assembly; and

(b) inserting the words “in consultation with county governments” immediately after the words “Cabinet Secretary.”

Justification

To anchor the role of county governments and their assemblies as far as regulations relating to counties are concerned and to also ensure that the report on projects under PPP are submitted to the respective assemblies.

CLAUSE 14

THAT, the Bill be amended by deleting clause 14 and substituting therefor the following new clause—

14. The principal Act is amended by repealing section 56.

Justification

This provision relates to the role of the PPP committee which is being proposed for abolition hence the provision is not necessary.

NEW CLAUSE 14A

THAT, the Bill be amended by inserting the following new clause immediately after clause 14—

14A. The principal Act is amended by repealing section 57.

CLAUSE 15

THAT, the Bill be amended by deleting clause 15 and substituting therefor the following new clause-

15. Section 57 of the principal Act is amended by deleting the word “Cabinet” and substituting therefor the word “Cabinet Secretary”.

Justification

To provide for the role of Cabinet Secretary responsible for Finance and to also reduce the bureaucracy and timelines involved. If the function is left to the entire Cabinet to convene, then only a few projects would be implemented.

NEW CLAUSES

THAT, the Bill be amended by inserting the following new clause immediately after clause 15—

15A. The principal Act is amended by deleting section 58 and substituting therefor the following new section—

58. (1) A contracting authority may, at any time, terminate procurement proceedings without entering into a contract.

(2) The bidders of a tender that is cancelled under this section shall not be entitled to compensation for the cancellation of the tender.

Justification

To make sure that there is no contractual obligation in case there is cancellation of a tender.

15B. Section 61 of the principal Act is amended in subsection (2) by—

(a) deleting paragraph (b) and substituting therefor a new paragraph—

(b) submit the proposal to the Unit for consideration and **approval**; and

Justification

To ensure that the PPP unit has the final role of approval as far as projects are concerned and to also reduce the bureaucracy of approval of the PPP projects. The principal Act provides that the role of the PPP unit is merely recommendation. Further the PPP committee’s role would be non-existent.

(b) deleting paragraph (c)

Justification

The new role of the PPP unit would be that of approval of PPP projects and further the PPP committee would have no role as far as approval is concerned.

15C. Section 63 of the principal Act is amended by deleting subsection (3) and substituting therefor the following new subsection—

(3) The parties to the project agreement may agree to resolve disputes arising under the project agreement through arbitration, or any other non-judicial means of dispute resolution agreed upon in the agreement as specified in paragraph 18 of the Third Schedule.

Justification

The provision in the principal Act requires for approval of the PPP committee for any dispute arising from project agreement to be lodged. Since the PPP committee will cease to exist the proviso may not be necessary.

15D. The principal Act is amended by deleting section 64 and substituting therefor the following new section—

64. (1) A party who intends to make material any amendment or variation to a project agreement in relation to the term and conditions specified therein, the outputs of a project or any waivers specified in the agreement shall—

(a) for national level projects apply for, and obtain the approval of the Cabinet Secretary;

(b) for county projects, require the concurrence of the Cabinet Secretary, where the relevant project is supported by a letter of comfort or such risk mitigation instruments from the national government

(2) The Cabinet Secretary shall issue thresholds on what can be deemed material amendments.

(3) The approval of the Cabinet Secretary under subsection (1) shall be in writing.

Justification

To provide for the role of the CS in the case of amendment and variation of project agreements for both national and county projects.

15E. Section 65 of the principal Act is amended in subsection (5) by deleting the word “Committee” and substituting therefor the word “Unit”.

Justification

The unit will be expected to carry out the technical aspect of PPP projects and further the functions that were technical in nature that were to be done by the PPP committee would now be carried undertaken by the PPP unit.

CLAUSE 16

THAT, the Bill be amended by deleting clause 16 and substituting therefor the following new clause—

16. Section 67 of the principal Act is amended—

(a) in subsection (2)—

(i) by inserting the words “appointed by the Cabinet Secretary” immediately after the words “Kenya” appearing in paragraph (a);

Justification

To ensure that the chairperson of the petitions committee is appointed by the Cabinet Secretary.

(ii) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) six other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the Unit, consider appropriate;

Justification

To provide for additional members to the petitions committee for the better carrying out of the functions of the petitions committee and to also make decision making easy.

(iii) by inserting the following new paragraph immediately after paragraph (b)—

(ba) two persons of the opposite gender appointed by the Council of Governors.

Justification

To take care of the interests of the county governments.

(iv) by deleting paragraph (c);

Justification

The PPP unit director would be an interested party to sit in the Petitions committee and whose decisions would be a subject of discussion/challenge.

(b) in subsection (3) by deleting the words “and shall be eligible” and substituting therefor the words “and may be eligible”;

Justification

Not to make it mandatory for one to be eligible for reappointment. It goes with best practice.

(c) by deleting subsection (5) and substituting therefor the following new subsection—

(5) A person aggrieved by the decision of the Committee may appeal to the High Court within seven days from the date of the Committee’s decision.

Justification

To provide for an appeals mechanism on the decisions of the Petitions committee.

CLAUSE 17

THAT, the Bill be amended by inserting the following new clauses immediately after clause 16—

17. The principal Act is amended by inserting the following new section immediately after section 70—

70A. (1) A contracting authority that intends to enter into a public private partnership shall observe the principle of public participation.

(2) The cabinet secretary may make regulations for conduct of public participation in public private partnership arrangements.

Justification

To provide for the need to carry out public participation and the need for the CS to make regulations to guide the process of public participation.

18. Section 71 of the Public Private Partnerships Act is amended—

(a) in subsection (1) by deleting paragraph (d); and

(b) by deleting subsection (2).

Justification

Provision relating to PPP Committee hence the deletion

19. The principal Act is amended by repealing the First Schedule.

Justification:

Provision relating to conduct of business and affairs of the PPP Committee.

**MINUTES OF THE 20TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
FINANCE AND NATIONAL PLANNING HELD ON TUESDAY, 10TH APRIL, 2018 IN
THE NEW MEMBERS' LOUNGE, MAIN PARLIAMENT BUILDINGS AT 10.00AM**

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Dr. Enoch Kibunguchy, MP
4. Hon. Shakeel Shabbir Ahmed, MP
5. Hon. Abdul Rahim Dawood, MP
6. Hon. Daniel E. Nanok, MP
7. Hon. Andrew A. Okuome, MP
8. Hon. David M. Mboni, MP
9. Hon. Joseph M. Oyula, MP
10. Hon. Mohamed A. Mohamed, MP
11. Hon. Purity W. Ngirici, MP

APOLOGY

1. Hon. Jimmy O. Angwenyi, MP
2. Hon. Alfred Sambu, MP
3. Hon. Joshua C. Kandie, MP
4. Hon. Francis K. Kimani, MP
5. Hon. Lydia H. Mizighi, MP
6. Hon. Samuel Atandi, MP
7. Hon. Stanley M. Muthama, MP

INATTENDANCE

SECRETARIAT

- | | | |
|------------------------|---|-----------------------------------|
| 1. Ms. Leah Mwaura | – | First Clerk Assistant/ Lead Clerk |
| 2. Ms. Laureen Wesonga | – | Third Clerk Assistant |
| 3. Mr. Josephat Motonu | – | Fiscal Analyst |
| 4. Ms. Lynette Otieno | – | Legal Counsel II |
| 5. Mr. Vitus Oketch | – | Research and Policy Analyst |
| 6. Mr. Collins Mahamba | – | Audio Officer |
| 7. Mr. John Njoro | – | Serjeant-At-Arms |

Agenda

1. Prayers

2. Preliminaries/Introductions
3. Communication from the Chair
4. Bills
5. Petitions
6. Papers
7. Personal statement (**Members Only**)
8. Confirmation of Minutes
9. Matters Arising
10. Meeting to:-
 - i. **Adopt the reports on the consideration of the Public Private Partnerships (Amendment) Bill, 2017 and the County Pension Scheme Bill, 2017**
 - ii. **Consideration of Committee stage amendments to the County Pension Scheme Bill, 2017**
11. Adjournment

MIN.NO.101/DC-F/2018: PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 10:25 a.m with prayer from the Chairperson. The Chairperson then welcomed those present to introduce themselves before welcoming the Sponsor of the County Pension Scheme Bill, 2017. Hon. Muriuki Njagagua, MP to make his submission to the Committee.

MIN.NO.102/DC-F/2018: CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.103/DC-F/2018: CONSIDERATION AND ADOPTION OF THE REPORT ON THE COUNTY PENSION SCHEME BILL, 2017

The Chairperson invited Hon. Muriuki Njagagua, MP, the sponsor of the County Pension Scheme Bill, 2017 to make his submission to the Committee.

The Hon. Member took the Committee through the objects and reasons in coming up with the the Bill. He stated that the Bill was important as it would operationalize Section 132 of the County Governments Act thus enabling employees of county governments to be subscribed to a pension scheme.

He also stated that the Bill was seeking to implement the recommendations of the Attorney General as detailed in his Legal Opinion sought by County Stakeholders dated 24th January, 2017. The Attorney General Legal Opinion recommended that: *“Laptrust (Umbrella) Retirement Fund scheme should be anchored under an Act of Parliament to protect the interest of the members of the scheme as resolved by the County Governments.”*

The Committee also engaged the Member on several clauses of the Bill which the Members had concerns on. The Committee further informed Hon. Muriuki Njagagua, M.P on the areas it had made proposals for amendment.

COMMITTEE'S DELIBERATIONS

1. There was a proposal from some Members that given the fact that there was a similar Bill before the Senate, it was proper for the sponsor of the Bill to consider withdrawing the Bill to merge the ideas in the two Bills. The sponsor stated that he was well within his right as a private Member to initiate any legislation and as such he would not consider withdrawing the Bill as proposed. He further informed the meeting that the Bill had been extensively subjected to all stakeholders by the Senate in the 11th Parliament.
2. Some Members of the Committee expressed their desire to register their dissenting view on the Bill since some contentious clauses had not been factored as part of the Committee's amendments. The meeting deliberated extensively on the issue and agreed that another meeting will be held so that all clauses that were in contention can be discussed further. Members were requested to submit the clauses that they would like further amendments on to the secretariat before the meeting which would be held the following day at 10.00 am.
3. The report on the consideration of the County Pension Scheme Bill, 2017 will be adopted at a later date after further deliberations by the Committee.

MIN.NO.104/DC-F/2018: ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL, 2017

The Committee adopted the Report on the Consideration of the Public Private Partnerships (Amendment) Bill, 2017. The report will be tabled in the House on Wednesday, 11th April, 2018.

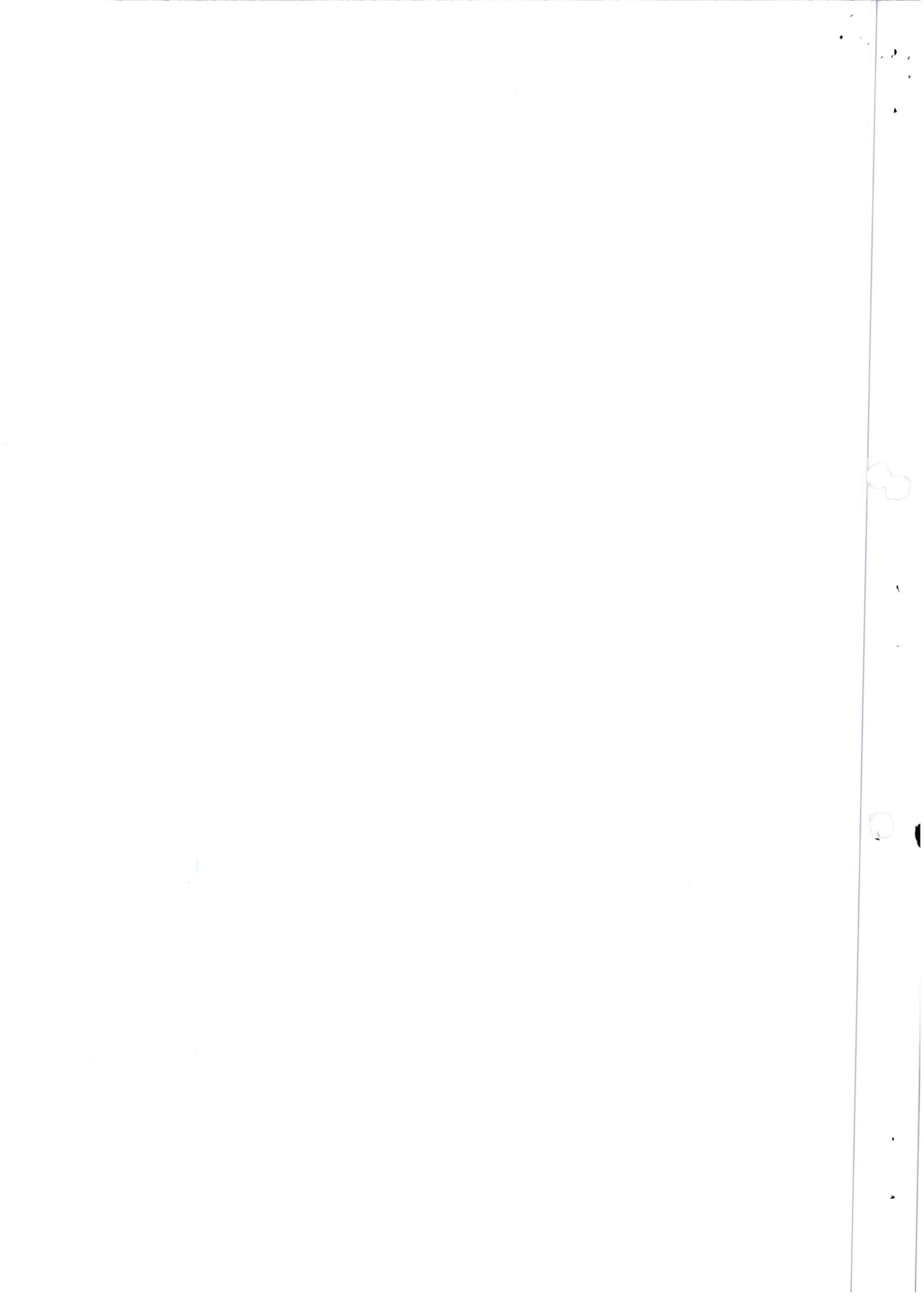
MIN.NO.105/DC-F/2018: ADJOURNMENT

There being no other business to deliberate on, the meeting was adjourned at 13.55pm. The next meeting will be held on Wednesday 11th April, 2018 at 10.00 am.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED  DATE 11/4/2018



MINUTES OF THE 16TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD ON THURSDAY, 29TH MARCH, 2018 IN COMMITTEE ROOM 5, MAIN PARLIAMENT BUILDINGS AT 11.00AM

PRESENT

1. Hon. Joseph K. Limo, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP- **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MP
4. Hon. ShakeelShabbir Ahmed, MP
5. Hon. Daniel E. Nanok, MP
6. Hon. Andrew A. Okuome, MP
7. Hon. Joseph M. Oyula, MP
8. Hon. Joshua C. Kandie, MP
9. Hon. David M. Mboni, MP
10. Hon. Lydia H. Mizighi, MP
11. Hon. Purity W. Ngirici, MP
12. Hon. Stanley M. Muthama, MP

APOLOGY

1. Hon. Alfred Sambu, MP
2. Hon. Dr. Enoch Kibunguchy, MP
3. Hon. Abdul Rahim Dawood, MP
4. Hon. Francis K. Kimani, MP
5. Hon. Mohamed A. Mohamed, MP
6. Hon. Samuel Atandi, MP

INATTENDANCE

SECRETARIAT

- | | | |
|------------------------|---|-----------------------------------|
| 1. Mr. Robert Nyaga | - | Deputy Director, PBO |
| 2. Ms. Leah Mwaura | - | First Clerk Assistant/ Lead Clerk |
| 3. Ms. Laureen Wesonga | - | Third Clerk Assistant |
| 4. Mr. Josephat Motonu | - | Fiscal Analyst II |
| 5. Ms. Lynette Otieno | - | Legal Counsel II |
| 6. Mr. Chelang'a Maiyo | - | Research and Policy Analyst |
| 7. Mr. John Njoro | - | Serjeant-At-Arms |
| 8. Mr. Collins Mahamba | - | Audio Officer |

Agenda

1. Prayers
2. Preliminaries/Introductions
3. Communication from the Chair
4. Bills

5. Petitions
6. Papers
7. Personal statement (**Members Only**)
8. Confirmation of Minutes
9. Matters Arising
10. **Consideration of Committee stage amendments to the Public Private Partnerships (Amendment) Bill, 2017**
11. Adjournment

MIN.NO.082/DC-F/2018:PRELIMINARIES/COMMUNICATION FROM THE CHAIRPERSON

The meeting was called to order at 11:20 a.m with prayer from the Hon. David Mboni, MP. The Chairperson then welcomed the Legal Counsel to take the meeting through the deliberations.

MIN.NO.083/DC-F/2018: CONFIRMATION OF MINUTES

Agenda deferred.

MIN.NO.084/DC-F/2018: CONSIDERATION OF COMMITTEE STAGE AMENDMENTS TO THE PUBLIC PRIVATE PARTNERSHIPS (AMENDMENT) BILL, 2017

The Committee agreed to amend the Bill as follows:

CLAUSE 1

Agreed to

CLAUSE 2

THAT, clause 2 of the Bill be amended by deleting paragraph (b) and substituting therefor the following new paragraph-

- (a) deleting the definition of "committee".

CLAUSE 4

THAT, clause 4 of the Bill be amended by deleting the proposed new section 3A and substituting therefor the following new section—

Exemption

3A. The provisions of the Public Procurement and Asset Disposal Act, 2015 shall, be exercised subject to the relevant provision of this Act and apply to contracts under this Act only in the event where there is no express provision for the applicable procurement procedures under this Act.

NEW CLAUSES

THAT, the Bill be amended by inserting the following new clauses immediately after clause 4—

Repeal of section 4 of No. 15 of 2013. **4A.** The principal Act is amended by repealing section 4.

Repeal of section 5 of No. 15 of 2013. **4B.** The principal Act is amended by repealing section 5.

Repeal of section 6 of No. 15 of 2013. **4C.** The principal Act is amended by repealing section 6.

Amendment of section 7 of No. 15 of 2013. **4D.** The principal Act is amended by deleting section 7 and substituting therefor the following new section—

The functions of the Cabinet Secretary.

7. (1) The functions of the Cabinet Secretary shall be—
- (a) formulate policy guidelines on public private partnerships;
 - (b) ensure that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships;
 - (c) approve project lists submitted to it in under section 24;
 - (d) formulate or approve standards, guidelines and procedures for awarding contracts and standardized, bid documents;
 - (e) review the legal, institutional and regulatory framework of public private partnerships; and
 - (f) ensure approval of, and fiscal accountability in the management of financial and any other form of support granted by the Government in the implementation of projects under this Act.

(2) The Cabinet Secretary shall, every six months, submit to Parliament a report on the estimated value of government obligations, risks, undertakings, subsidies, revenue guarantees, and other types of government guarantees and support linked to every public private partnership project together with the value of each public private partnership project agreement signed under this Act.

Repeal of section 8 of No. 15 of 2013. **4E.** The principal Act is amended by repealing section 8.

Repeal of section 9 of No. 15 of 2013. **4F.** The principal Act is amended by repealing section 9.

Repeal of section 10 of No. 15 of 2013. **4G.** The principal Act is amended by repealing section 10.

Amendment of section 14 of No. 15 of 2013. **4H.** The principal Act is amended by deleting section 14 and substituting therefor the following new section—

Functions of the unit. **14.** (1) The functions of the unit are to—

- (a) serve as a resource centre on matters relating to public private partnerships;
- (b) conduct civic education to promote the awareness and understanding of the public private partnerships process amongst stakeholders;
- (c) provide capacity building to, and advise contracting authorities or other parties involved in the planning, co-ordinating, undertaking or monitoring of projects under this Act;
- (d) rate, compile and maintain an inventory of public private partnership projects that are highly rated and which are likely to attract private sector investment;
- (e) develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects;
- (f) conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships;
- (g) collate, analyse and disseminate information including data on the contingent liabilities of the Government in relation to a project;
- (h) make recommendations on the approval or rejection of projects prior to submission to the Cabinet Secretary for approval;
- (i) assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritise, appraise, evaluate and negotiate projects;
- (j) maintain a record of all project documentation;
- (k) review and assess requests for Government support in

relation to a project and advise the Cabinet Secretary on the support that should be accorded in relation to the project;

- (l) assist the Cabinet Secretary in formulating guidelines and standard documentation required under this Act;
- (m) liaise with and assist the contracting authorities in their roles in the various stages of a project cycle;
- (n) ensure that the tendering process relating to a project conforms to this Act and to procurement best practices;
- (o) put in place measures to eliminate constraints limiting the realisation of benefits expected from a public private partnership; □
- (p) monitor contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance;
- (q) approve project proposals submitted by Contracting Authorities;
- (r) ensure that each project agreement is consistent with the provisions of this Act;
- (s) examine and approve a feasibility study conducted by a contracting authority under this Act;
- (t) ensure efficient implementation of any project agreement entered into by contracting authorities;
- (u) require any information from any party to a project on any matter relating to a public private partnership; and
- (v) carry out such other functions as may be conferred on it by the Cabinet Secretary and this Act.

(2) The unit shall prepare financial accounts and an inventory of any monies allocated to it, any financial support received by it and any success fees received by it from a private party or project company as the case may be, under this Act.

NEW CLAUSE 5A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 5—

Amendment of

5A. Section 17 of the principal Act is amended in subsection (1)

section 17 of by deleting the word “Committee” appearing in paragraph (j) and
No. 15 of 2013. substituting therefor the words “Cabinet Secretary”.

CLAUSE 7

THAT, clause 7 of the Bill be amended-

(a) in paragraph (a) by deleting the proposed new subsection (2) and substituting therefor the following new subsection—

(2) Upon receipt of the project lists from the national government contracting authorities, the Cabinet Secretary shall consider the lists and the recommendations of the Unit and prepare and submit to the Cabinet for approval a national priority list which shall include county approved priority lists of public private partnership projects that have been submitted to the Unit.

(b) by inserting the following new paragraph immediately after paragraph (b)—

(c) in subsection (3) by inserting the words “in consultation with county governments” immediately after the words “Cabinet Secretary shall.”

NEW CLAUSE 7A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 7—

Amendment of section 25 of No. 15 of 2013. **7A.** The principal Act is amended by deleting section 25 and replacing it with the following new section—

Guarantee or letter of comfort by the Government. **27.** The Cabinet Secretary may, in consultation with the Debt Management Office, where he or she considers it necessary to support a project and in order to reduce premiums factored for political risks, issue a guarantee, undertaking or binding letters of comfort in relation to a project.

Insertion of new section into No. 15 of 2013. **7B.** The principal Act is amended by inserting the following new section immediately after section 27—

Contingent liabilities linked to private partnership agreements. **27A.** (1) The Cabinet Secretary shall ensure that the accumulation of contingent liabilities linked to public private partnerships by the government is consistent with debt sustainability objective set out in the medium term debt management strategy submitted to Parliament under section 33 of the Public Finance Management Act, 2012.

No. 18 of 2012.

(1) The National Assembly shall, taking into consideration the medium term debt management Strategy, approve a limit on the

cumulative value of all contingent liabilities that may be incurred through public private partnership agreements.

Amendment of section 28 of No. 15 of 2013.

7C. Section 28 of the principal Act is amended by deleting subsection (3) and substituting therefor the following new subsection—

(3) The Cabinet Secretary may impose a success fee on a transaction to be paid by a successful bidder in accordance with the tender documents

Amendment of section 30 of No. 15 of 2013.

7D. Section 30 of the principal Act is amended by deleting the word “Committee” and substituting therefor the word “Cabinet Secretary.”

NEW CLAUSE 8A

THAT, the Bill be amended by inserting the following new clause immediately after clause 8—

Amendment of section 33 of No. 15 of 2013.

8A. Section 33 of the principal Act is amended in subsection (1) by deleting the word “Committee” and substituting therefor the word “Unit.”

NEW CLAUSE 9A

THAT, the Bill be amended by inserting the following new clauses immediately after clause 9—

Amendment of section 33 of No. 15 of 2013.

9A. Section 37 of the principal Act is amended in subsection (1) by deleting the words “upon approval by the Committee”.

Amendment of section 45 of No. 15 of 2013.

9B. Section 45 of the Public Private Partnerships Act is amended by deleting subsection (1) and substituting therefor the following new subsection—

(1) A contracting authority may, hold a competitive dialogue with each bidder to define the technical or financial aspects of the project in the manner prescribed under this Act.

Amendment of section 48 of No. 15 of 2013.

9C. Section 48 of the Public Private Partnerships Act is amended by deleting subsection (4).

NEW CLAUSE 11 A

THAT, the Bill be amended by inserting the following new clause immediately after clause 11—

Amendment of section 52 of No. 15 of 2013.

11A. Section 52 of the principal Act is amended in subsection (1) by deleting the words “with the approval of the Committee”.

CLAUSE 12

THAT, the Bill be amended by deleting clause 12 and substituting therefor the following new clause—

Amendment of section 54 of No. 15 of 2013. **12.** The principal Act is amended by deleting section 54 and substituting therefor the following new section—

Submission of memorandum to Cabinet for approval. **54.** (1) The Unit shall submit the project report, the financial risk assessment report submitted to it under section 53 and its recommendations to the Cabinet Secretary for consideration and approval.

(2) For County projects, the project report, the financial risk assessment report shall be submitted to the Contracting Authority together with its recommendations for consideration and approval.

(3) The Contracting Authority shall, upon receiving approval under subsection (1) and (2), execute the project agreement.

CLAUSE 13

THAT, clause 13 of the Bill be amended in the proposed new section **54A** by—

- (a) inserting the following new subsection immediately after subsection (3)—
(3A) A county government shall within thirty days of approval of a project a under submit a report to the county assembly; and
- (b) inserting the words “in consultation with county governments” immediately after the words “Cabinet Secretary.”

CLAUSE 14

THAT, the Bill be amended by deleting clause 14 and substituting therefor the following new clause-

Repeal of section 56 of No. 15 of 2013. **14.** The principal Act is amended by repealing section 56.

NEW CLAUSE 14A

THAT, the Bill be amended by inserting the following new clause immediately after clause 14—

Repeal of section 57 of No. 15 of **14A.** The principal Act is amended by repealing section 57.

CLAUSE 15

THAT, the Bill be amended by deleting clause 15 and substituting therefor the following new clause

Amendment of section 57 of No.15 of 2013. of **15.** Section 57 of the principal Act is amended by deleting the word “Cabinet” and substituting therefor the word “Cabinet Secretary”.

NEW CLAUSES

THAT, the Bill be amended by inserting the following new clause immediately after clause 15—

Amendment of section 58 of No. 15 of 2013. of **15A.** The principal Act is amended by deleting section 58 and substituting therefor the following new section—

Cancellation of tender. of **58.** (1) A contracting authority may, at any time, terminate procurement proceedings without entering into a contract.

(2) The bidders of a tender that is cancelled under this section shall not be entitled to compensation for the cancellation of the tender.

Amendment of section 61 of No. 15 of 2013. of **15B.** Section 61 of the principal Act is amended in subsection (2) by—

- (a) deleting paragraph (b) and substituting therefor a new paragraph—
(b)submit the proposal to the Unit for consideration and approval; and

- (b) deleting paragraph (c).

Amendment of section 63 of No. 15 of 2013. of **15C.** Section 63 of the principal Act is amended by deleting subsection (3) and substituting therefor the following new subsection—

- (3) The parties to the project agreement may agree to resolve disputes arising under the project agreement through arbitration, or any other non-judicial means

of dispute resolution agreed upon in the agreement as specified in paragraph 18 of the Third Schedule.

Amendment of section 64 of No. 15 of 2013.

15D. The principal Act is amended by deleting section 64 and substituting therefor the following new section—

Amendment and variation of project agreements.

64. (1) A party who intends to make material any amendment or variation to a project agreement in relation to the term and conditions specified therein, the outputs of a project or any waivers specified in the agreement shall—

- (a) for national level projects apply for, and obtain the approval of the Cabinet Secretary;
 - (b) for county projects, require the concurrence of the Cabinet Secretary, where the relevant project is supported by a letter of comfort or such risk mitigation instruments from the national government
- (2) The Cabinet Secretary shall issue thresholds on what can be deemed material amendments.
- (3) The approval of the Cabinet Secretary under subsection (1) shall be in writing.

Amendment of section 65 of No. 15 of 2013.

15E. Section 65 of the principal Act is amended in subsection (5) by deleting the word “Committee” and substituting therefor the word “Unit”.

CLAUSE 16

THAT, the Bill be amended by deleting clause 16 and substituting therefor the following new clause—

Amendment of section 67 of No. 15 of 2013.

16. Section 67 of the principal Act is amended—

- (a) in subsection (2)—
 - (i) by inserting the words “appointed by the Cabinet Secretary” immediately after the words “Kenya” appearing in paragraph (a);
 - (ii) by deleting paragraph (b) and substituting therefor the following new paragraph—
 - (b) six other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the Unit, consider appropriate;
 - (iii) by inserting the following new paragraph immediately after paragraph (b)—

(ba) two persons of the opposite gender appointed by the Council of Governors.

- (iv) by deleting paragraph (c);
- (b) in subsection (3) by deleting the words “and shall be eligible” and substituting therefor the words “and may be eligible”;
- (c) by deleting subsection (5) and substituting therefor the following new subsection—
 - (5) A person aggrieved by the decision Committee may appeal to the High Court within seven days from the date of the Committee’s decision.

CLAUSE 17

THAT, the Bill be amended by inserting the following new clauses immediately after clause 16—

Insertion of new section in to No. 15 of 2013.

17. The principal Act is amended by inserting the following new section immediately after section 70—

Public participation.

70A. (1) A contracting authority that intends to enter into a public private partnership shall observe the principle of public participation.

(2) The cabinet secretary may make regulations for conduct of public participation in public private partnership arrangements.

Amendment of section 71 of No. 15 of 2013.

18. Section 71 of the Public Private Partnerships Act is amended—

(a) in subsection (1) by deleting paragraph (d); and

(b) by deleting subsection (2).

Repeal of First Schedule to No.15 of 2013.

19. The principal Act is amended by repealing the First Schedule.

MEMBERS' DELIBERATIONS

The meeting agreed that the report on the Public Private Partnerships (Amendment) Bill, 2017 will be adopted in the next meeting since it will be considered for third reading soon after the short recess.

MIN.NO.085/DC-F/2018: ANY OTHER BUSINESS


The Chairperson informed the meeting that The Statute Law (Miscellaneous Amendments)(No. 3) Bill, 2017 would go for third reading the following day. Members were requested to be present in the House to defend the Committee's amendments.

MIN.NO.086/DC-F/2018: ADJOURNMENT

There being no other business to deliberate on, the meeting was adjourned at 02.15pm. The next meeting will be held at 3.30pm.

HON. JOSEPH K. LIMO, MP

(CHAIRPERSON)

SIGNED.....DATE 11/14/2018

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

**DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE OF THE REPORT ON PUBLIC PRIVATE PARTNERSHIPS
(AMENDMENT) BILL, 2017**

DATE: 10TH APRIL, 2018

NAME	SIGNATURE
1. HON. JOSEPH K. LIMO, MP – CHAIRMAN	
2. HON. ISAAC W. NDIRANGU – VICE-CHAIRMAN	
3. HON. JIMMY O. ANGWENYI, MP	
4. HON. ALFRED W. SAMBU, MP	
5. HON. ENOCH KIBUNGUCHY, MP	
6. HON. SHAKEEL SHABBIR AHMED, MP	
7. HON. ABDUL RAHIM DAWOOD, MP	
8. HON. DANIEL E. NANOK, MP	
9. HON. ANDREW A. OKUOME, MP	
10. HON. DAVID M. MBONI, MP	
11. HON. KURIA KIMANI, MP	
12. HON. JOSEPH M. OYULA, MP	
13. HON. JOSHUA KANDIE, MP	
14. HON. LYDIA H. MIZIGHI, MP	
15. HON. MOHAMED ALI, MP	
16. HON. PURITY NGIRICI, MP	
17. HON. SAMUEL ATANDI, MP	
18. HON. STANLEY M. MUTHAMA, MP	

