



LEGAL NOTICE NO.

THE PUBLIC PRIVATE PARTNERSHIPS ACT
(No. 14 of 2021)
PROPOSED PUBLIC PRIVATE PARTNERSHIPS REGULATIONS
ARRANGEMENT OF REGULATIONS

PART I – PRELIMINARY

1. Citation
2. Interpretation
3. Application
4. Objects and purpose of the Regulations
5. Guiding Principles

PART II — PUBLIC PRIVATE PARTNERSHIPS COMMITTEE

6. Members of the Committee
7. Co-opting persons to the Committee for feasibility studies
8. Sub-committees of the Committee
9. Code of Conduct

PART III — PROJECT PREPARATION AND APPRAISAL

10. Submission and approval of project lists
11. Project identification, selection, and prioritisation
12. Project preparation and appraisal
13. Feasibility study
14. Value assessment report
15. Approval of feasibility reports by the Committee

PART IV — TRANSACTION ADVISORS

16. Appointment of transaction advisors
17. Procurement of transaction advisor
18. Alternative method of procurement of transaction advisors
19. Short-list of pre-qualified transaction advisors

PART V — DIRECT PROCUREMENT METHOD

20. Preliminary assessment of projects under direct procurement
21. Approval of the use of direct procurement
22. Tender documents
23. Evaluation Committee

24. Negotiation

PART VI — PRIVATELY INITIATED PROPOSALS

25. Preliminary assessment of private proposals

26. Content of private proposals

27. Due diligence on consortiums

28. Evaluation of privately initiated proposals

29. Project development

30. Project Design

PART VII- RESTRICTED BIDDING

31. Preliminary assessment of restricted bids

32. Invitation to tender

33. Notice

34. Submission of tenders

PART VIII- COMPETITIVE BIDDING

35. Invitation of requests for qualification

36. Pre-qualification committee

37. Procedures of a pre-qualification committee

38. Evaluation of applications for pre-qualification

39. Preparation of a short-list of prequalified persons

40. Preliminary bidders meeting

41. Clarification during bidding

42. Tender documents

43. Invitation to tender

44. Pre-bid conference and site visit

45. Modification of tender documents

46. Submission of bids

47. Proposal evaluation team

48. Bid security

49. Opening of bids

50. Rejection of bids

51. Financial offer to be returned unopened

52. Bid security to be returned

53. Objection to the decision of proposal evaluation team

54. Opening of financial bids

55. Evaluation scoring system

PART IX - PUBLIC PRIVATE PARTNERSHIPS BY COUNTY GOVERNMENTS

56. Submission of project lists
57. County project implementation team
58. Functions of the county project implementation team
59. Feasibility studies
60. Public private partnerships requiring National Treasury approval
61. Project and risk assessment report
62. Procurement methods

PART X — GOVERNMENT SUPPORT MEASURES

63. Compliance with public finance management laws
64. Pre-Approval from the Cabinet Secretary of the intention to use Government support measure
65. Application process
66. Approval of application for Government support measure

PART XI - NEGOTIATIONS GENERALLY

67. Negotiations by a contracting authority

PART XII — PROJECT COMPANIES

68. Project company
69. Performance security

PART XIII — PROJECT AGREEMENTS

70. Bid documents and project agreements
71. Publication of executed project agreement
72. Independent experts

PART XIV – PETITION COMMITTEE

73. Petition Committee and Petition Committee's secretariat
74. Petitions
75. Determination of petitions
76. Effects of petitions

PART XV – MISCELLANEOUS PROVISIONS

77. Preservation of project agreements

PART XVI- GENERAL PRINCIPLES

78. Corrupt, coercive, obstructive, collusive, or fraudulent practice and conflicts of interest.

PART XVII-EFFECTS OF EXISTING LAWS

79. Application of laws relating to the management of environment and climate change

PART XVIII– OFFENCES, SANCTIONS AND REVOCATIONS

80. Offences and sanctions
81. Revocation of Legal Notice 171 of 2014

IN EXERCISE of the powers conferred by section 89 of the Public Private Partnership Act, 2021, the Cabinet Secretary for National Treasury & Economic Planning, makes the following Regulations: -

PART I – PRELIMINARY		
1.	These Regulations may be cited as the Public Private Partnerships Regulations, 2023.	Citation
2.	<p>In these Regulations, unless the context otherwise requires –</p> <p>“Accounting Officer” means,</p> <p style="padding-left: 40px;">(a) in the case of a contracting authority at the county government level, an officer designated by law, or designated by the County Executive Committee member for finance as an accounting officer in accordance with section 148 of the Public Finance Management Act, 2012 (No. 18 of 2012). In the case of a county corporation, an accounting officer shall mean the chief executive officer; or</p> <p style="padding-left: 40px;">(b) in the case of a contracting authority at the national government level, an accounting officer shall have the meaning assigned to it in section 2 (1) (a), (c) and (d) of the Public Finance Management Act, 2012 (No. 18 of 2012);</p> <p>“Act” means the Public Private Partnerships Act, 2021;</p> <p>"county corporation" has the meaning assigned to it in section 2 of the Public Finance Management Act (No. 18 of 2012);</p> <p>“County Executive Committee” has the meaning assigned to it in section 2 of the County Government Act (No. 17 of 2012);</p> <p>“County Executive Committee member for finance” has the meaning assigned to it in section 2 of the Public Finance Management Act (No. 18 of 2012);</p> <p>“Government Support Measures” means the measures set out in section 28 of the Act;</p> <p>“independent expert” means an entity or a firm jointly appointed by a private party and a contracting authority in relation to a project in accordance with the terms of the Act and these Regulations;</p> <p>“national list” means the national list of projects approved and required to be maintained by the Directorate under section 26 of the Act, which also includes the county project lists; and</p> <p>"public sector comparator" means an estimate of the total costs to the government of achieving the targeted outputs if the project is completed using other forms of public procurement other than through a public private partnership arrangement.</p>	Interpretation

3.	These Regulations shall apply to every contract for the design, financing, construction, operation, equipping or maintenance of a project for the provision of public services undertaken under the Act.	Application
4.	<p>(1) The object and purpose of these Regulations is to operationalize the Public Private Partnerships Act, 2021 on procurement of a project as a public private partnership.</p> <p>(2) Without prejudice to the generality of the foregoing, these Regulations shall:</p> <ul style="list-style-type: none"> (a) ensure transparency, accountability, efficiency and effective procurement of projects; (b) provide means of administering the powers vested in the Committee and Directorate under the Act; (c) harmonize and standardize the procedure of procuring, implementing and executing projects; and (d) set out a standardized and clear procedure for hearing and determining petitions. 	Objects and purpose of the Regulations
5.	<p>A contracting authority that intends to procure a project under the Act and these Regulations shall be guided by the following values and principles of the Constitution and relevant legislation:</p> <ul style="list-style-type: none"> (a) the national values and principles provided for under Article 10; (b) equality and freedom from discrimination provided for under Article 27; (c) promotion of sustainable development and protection of the environment in accordance with Article 69; (d) principles of public finance under Article 201; (e) principles of integrity under the Leadership and Integrity Act, No. 19 of 2012; (f) values and principles of public services provided for under Article 232 including effective, efficient and economic use of public resources; and (g) maximisation of value for money. 	Guiding principles
PART II — PUBLIC PRIVATE PARTNERSHIP COMMITTEE		
6.	(1) A person qualifies to be appointed as a member of the Committee under section (6)(1) (e) and (f) of the Act if that person —	Members of the Committee

	<p>(a) is a Kenyan;</p> <p>(b) has not been convicted of an offence involving corruption under the Anti-Corruption and Economic Crimes Act No. 3 of 2003 and</p> <p>(c) satisfies the requirements of Chapter Six of the Constitution.</p> <p>(2) A person is qualified to be appointed under section 6(1) (e):</p> <p>(a) if the person is an official of a county government; or</p> <p>(b) if the person is not an official of a county government, that person must have at least 10 years of experience in matters relevant to public private partnerships.</p> <p>(3) The members appointed under section (6)(1) (e) shall hold office for a period of three years and may be eligible for reappointment for one further term.</p> <p>(4) In relation to a declaration of interests, if there is a material change to the interests declared by a member appointed under section 6(1) (e) and (f) of the Act, that member shall inform the Committee in writing in accordance with the provisions of paragraph (2) of the First Schedule to the Act.</p> <p>(5) Where a vacancy occurs in relation to section 9 of the Act, a replacement of the outgoing member shall be made in accordance with the terms of the Act, but that person shall hold office for the remainder of the outgoing member's term. The replacement member may be eligible for reappointment for one further term in accordance with the terms of the Act.</p> <p>(6) Vacancy of office under section 9 of the Act refers to vacancy in the office of Committee members appointed under section 6 (1) (e) and (f) of the Act.</p> <p>(7) The Directorate shall inform the Cabinet Secretary of a material change in the interests of a member appointed under section 6(1) (e) and (f) of the Act within fourteen days of that member informing the Committee of that material change, and the Cabinet Secretary shall determine whether or not that member shall continue to be a member of the Committee.</p> <p>(8) The vice-chairperson of the Committee shall be the Principal Secretary responsible for matters relating to Planning.</p> <p>(9) Each member of the Committee, shall attend meetings of the Committee in person.</p>	
7.	(1) When approving feasibility studies, the Committee shall, in accordance with section 6 (3) of the Act give priority to co-opting a person who has relevant environmental expertise to ensure	Co-opting persons to the Committee

	<p>compliance with environmental and climate change laws, provided that co-opting of such persons will only be done where the Committee lacks such expertise.</p> <p>(2) A person is qualified to be co-opted under sub-regulation (1) above if that person holds at least post-graduate degree from a recognized university in the fields of environmental law, environmental science, natural resource management or a relevant social science.</p>	for feasibility studies
8.	<p>(1) Where the Committee receives a project agreement for the purpose of monitoring a party's compliance with the terms and conditions of the agreement, the Committee may delegate to a sub-committee the responsibility of monitoring that compliance.</p> <p>(2) The Committee shall ensure that where sub-committees are established under section 10 of the Act and sub-regulation (1) above, such sub-committees shall include persons with experience in environmental science or governance including knowledge on matters of climate change.</p> <p>(3) Persons appointed to the sub-committee under sub-regulation (2) above shall have such qualifications as provided under regulation 7 (2) above.</p>	Sub-committees of the Committee
9.	<p>In discharging the mandate provided for under the Act, members of the Committee shall —</p> <p>(a) discharge all their duties in a professional, timely and efficient manner;</p> <p>(b) at all times maintain unquestionable standards of ethics and integrity;</p> <p>(c) accord respect and courtesy to the public and fellow members;</p> <p>(d) not engage in any act that may promote or encourage patronage, tribalism, cronyism and nepotism or any other form of preferential treatment; and</p> <p>(e) not accept or request gifts or favours from any person who may have a commercial interest with the Committee or any other interest that may be affected by the normal business of the Committee.</p>	Code of Conduct
	PART III— PROJECT PREPARATION AND APPRAISAL	
10.	<p>(1) The Accounting Officer of the contracting authority, other than a county government or county corporation, shall approve the project list prepared by the contracting authority before submitting the project list, together with the appropriate project concept notes, to the Directorate for approval in accordance with section 25 of the Act.</p>	Submission and Approval of project lists

	<p>(2) The contracting authority may update the project list every year, but the final project list must be submitted to the Directorate at least three months before the end of the financial year.</p> <p>(3) A county government or county corporation that intends to implement projects through public private partnership, shall submit its project list to the Directorate in accordance with regulation 56.</p>	
11.	<p>(1) The contracting authority shall in accordance with section 30 of the Act, identify projects it intends to prioritise and considers appropriate to implement from the project list approved by the Directorate.</p> <p>(2) The contracting authority shall thereafter, submit a project proposal in relation to the identified project to the Directorate for review and approval in accordance with section 19 (2) (g) of the Act.</p> <p>(3) The project proposal shall include the following information —</p> <ul style="list-style-type: none"> (a) demand assessment; (b) the estimated cost of the project based on — <ul style="list-style-type: none"> (i) the prevailing market rates; (ii) an updated cost of similar precedent projects; or (iii) international best practices; (c) details of the project; (d) the expected private sector role in the project; (e) the operational and strategic benefits of the project; (f) a description of the key project risks and the risk allocation under the proposed project, including environmental and social risks; (g) details of any Government support measures the project will require; (h) the duration of the proposed project; (i) the market interest for the proposed project; and (j) the project's innovation potential. 	Project identification, selection, and prioritisation
12.	<p>(1) Upon the approval of the project proposal under regulation 11 (2), the accounting officer of the contracting authority shall appoint a project implementation team that shall oversee the project during the preparation phase up to the signing of the project agreement.</p> <p>(2) The project implementation team shall:</p>	Project preparation and appraisal

	<p>(a) be chaired by a representative of the contracting authority,</p> <p>(b) include a representative of the Directorate; and</p> <p>(c) include such technical, financial, procurement, legal, environmental, social and governance experts appointed by the contracting authority, in consultation with the Directorate in accordance with section 31 of the Act.</p> <p>(3) The Accounting Officer of the contracting authority shall also appoint a secretary to support the project implementation team in executing its functions.</p>	
13.	<p>(1) The contracting authority shall undertake or cause to be undertaken, a feasibility study for a project in accordance with the terms of section 32 of the Act, under the direction of the Directorate.</p> <p>(2) The feasibility study shall contain the following in addition to the matters set out in section 32(2) of the Act: -</p> <p>(a) explanation of the strategic and operational benefits of the proposed project for the contracting authority in terms of its strategic objectives and government policy;</p> <p>(b) proposed allocation of financial, technical, operational and legal risks between the parties;</p> <p>(c) if the contracting authority will incur any financial commitments, a demonstration on the affordability of the project for the contracting authority;</p> <p>(d) the anticipated value for money to be achieved by the project;</p> <p>(e) the capacity of the contracting authority to procure, implement, manage, enforce, monitor and report on the project;</p> <p>(f) environmental and social impact assessments, including potential climate change impacts of the project, and mitigation measures to be taken during and after implementation of a project; and</p> <p>(g) integration of climate change vulnerability assessment, relevant adaptation and mitigation actions.</p> <p>(3) The Accounting Officer of the contracting authority shall submit the feasibility study report to the Directorate in accordance with section 33 (1) of the Act.</p>	Feasibility studies

	<p>(4) The Directorate shall, within twenty-one days from the date of receipt of the feasibility study report, consider and evaluate the feasibility study report and either:</p> <ul style="list-style-type: none"> i. return the feasibility study report to the contracting authority for reconsideration and re-submission; or ii. submit an evaluation report and its recommendations to the Committee for approval in accordance with section 33 (3) of the Act. <p>(5) The Directorate shall publish an operations manual approved by the Committee for the development and the content of feasibility studies. This shall include an outline of the requirements for submission of feasibility study reports.</p>	
14.	<p>(1) The Directorate shall publish an operations manual for the preparation of —</p> <ul style="list-style-type: none"> (a) affordability assessment; (b) value for money assessment; (c) public sector comparator assessment; (d) risk assessment, including environment and climate change assessment; and (e) method of risk allocation. 	Value assessment report
15.	<p>(1) The Committee shall consider the feasibility study report and the evaluation report submitted by the Directorate and shall within twenty-one days from the date of receipt of the evaluation report either:</p> <ul style="list-style-type: none"> (a) approve the feasibility study report; (b) return the feasibility study report to the contracting authority, through the Directorate, for reconsideration and re-submission for approval; or (c) reject the feasibility study report. <p>(2) The Committee shall inform the contracting authority in writing, through the Directorate, whether or not the contracting authority can tender for the project under the Act, as a public private partnership project.</p> <p>(3) Where the Committee declines to permit a contracting authority to tender for a project pursuant to regulation 15(1)(c), it shall set down in writing its reasons for its decision and advise the contracting authority on the steps to be taken in order for the project to be approved.</p> <p>(4) Where a feasibility study report is rejected under sub-regulation 1(c) above, a contracting authority that wishes to resubmit its</p>	Approval of feasibility reports by the Committee

	<p>feasibility study report shall do so within ninety (90) days from the date it is informed of the Committee’s decision.</p> <p>(5) A contracting authority may re-submit its feasibility study report to the Directorate for submission to the Committee for approval taking into consideration the proposed steps provided by the Committee under sub-regulation (3) above.</p> <p>(6) The Committee shall within twenty-one days of receipt of the re-submitted feasibility study report, consider the report, and make its determination on whether or not the contracting authority may procure a project under the Act.</p> <p>(7) If the contracting authority is unable to re-submit its feasibility study report within the period set out in sub-regulation (4) above, the contracting authority may request an extension of time for re-submission from the Directorate.</p> <p>(8) When making a decision under this regulation, the Committee shall take into account the written recommendations of the Directorate in relation to the proposed project.</p> <p>(9) If at any time, after the Committee has approved a feasibility study report for a project, any assumption in the feasibility study report is materially revised, including any assumption concerning affordability, value for money and substantial technical, operational, legal, and financial risk transfer, the contracting authority shall immediately, through the Directorate:</p> <p>(a) provide the Committee with details of the intended revision including a statement regarding the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and</p> <p>(b) ensure that a revised feasibility study report is submitted to the Directorate for submission to the Committee for consideration and approval.</p>	
	<p>PART IV — TRANSACTION ADVISORS</p>	
<p>16.</p>	<p>(1) The Accounting Officer of a contracting authority shall, where required pursuant to section 34 of the Act, appoint a transaction advisor. Such appointment will be procured in consultation with the Directorate.</p> <p>(2) A transaction advisor shall, in accordance with the terms of reference of the appointment, assist the contracting authority in either all or some of the following functions—</p> <p>(a) develop feasibility studies;</p> <p>(b) prepare bid documents;</p> <p>(c) carry out due diligence activities for projects;</p> <p>(d) structure the procurement process;</p>	<p>Appointment of transaction advisors</p>

	<p>(e) manage such other technical, financial, or legal matters as the contracting authority may require assistance in relation to a public private partnerships project; or</p> <p>(f) develop a contract management framework and project monitoring tools for the project.</p>	
17.	<p>(1) A contracting authority shall, in consultation with the Directorate, be responsible for procuring the services of a transaction advisor. Such appointment shall be made following the approval of the project proposal under regulation 11 (2) and upon the appointment of the project implementation team under regulation 12.</p> <p>(2) Where the services of a transaction advisor are to be paid for by the Directorate, the contracting authority shall request the Directorate to undertake the procurement of the services of the transaction advisor on behalf of the contracting authority.</p> <p>(3) The procurement of the services of a transaction advisor shall be done:</p> <p>(a) through the procurement methods and processes provided under the Public Procurement and Assets Disposal Act No. 33 of 2015;</p> <p>(b) in accordance with regulation 18; or</p> <p>(c) through guidelines provided by the donor or financier of a project.</p>	Procurement of transaction advisor
18.	<p>(1) Where the services of a transaction advisor are to be paid for by the Directorate under regulation 17 (2) above, the Directorate shall appoint a transaction advisor from the shortlist of prequalified transaction advisors under regulation 19.</p>	Alternative method of procurement of transaction advisors
19.	<p>(1) The Directorate may pre-qualify transaction advisors based on the sectors in section 34(4) of the Act.</p> <p>(2) The Directorate may publish a short-list of pre-qualified persons who may offer transaction advisory services to contracting authorities —</p> <p>(a) after publishing a general request for qualifications at the beginning of each financial year; and</p> <p>(b) when selecting persons who qualify to offer transaction advisory services to contracting authorities.</p> <p>(3) A general request for qualifications for transaction advisors shall be in relation to the national project list and the request shall specify the expertise of the transaction advisors in relation to the project list.</p>	Short-list of prequalified transaction advisors

	PART V — DIRECT PROCUREMENT METHOD	
20.	<p>(1) A contracting authority may use direct procurement if it:</p> <ul style="list-style-type: none"> (a) meets any of the conditions specified in section 38 of the Act and these Regulations; and (b) has conducted a feasibility study pursuant to section 33 (1) of the Act. <p>(2) In addition to the conditions set out in section 38 of the Act, a contracting authority may use direct procurement where the use of any other method of procurement is not appropriate for the protection of essential security interests.</p> <p>(3) A contracting authority shall comply with the following requirements when using direct procurement:</p> <ul style="list-style-type: none"> (a) the contracting authority shall record the reasons upon which it makes a determination that the relevant condition set out in section 38 of the Act and these Regulations have been satisfied, (b) the contracting authority shall provide details of the proposed private party including the full name, address and beneficial ownership information of the private party; (c) a contracting authority shall not procure a project under the Act using direct procurement method unless it is satisfied that: <ul style="list-style-type: none"> (i) the requirements specified in sub-regulations (1) are met; and (ii) the bid by the private party is at the prevailing real market price, (d) ensure that in negotiating with a private party for direct procurement of a project, it does so: <ul style="list-style-type: none"> (i) in accordance with the provisions of the Act and these Regulations; and (ii) in a manner that provides value for money, and (e) ensure that a feasibility study has been conducted for the project and that the feasibility study report has been approved in accordance with the provisions of the Act and these Regulations. 	Preliminary assessment of projects under direct procurement
21.	<p>(1) Before commencing direct procurement of a project, a contracting authority shall submit to the Directorate, in writing, a justification as to why it intends to use direct procurement method for a project, together with details of the private party.</p> <p>(2) The Directorate shall, within twenty-one days of receiving justification from the contracting authority under sub-regulation (1), determine whether or not the proposed project may be procured</p>	Approval of the use of direct procurement

	<p>through direct procurement.</p> <p>(3) If the Directorate is satisfied with the justification given by the contracting authority, the Directorate shall submit the justification provided by the contracting authority, together with its recommendations, to the Committee for approval.</p> <p>(4) The Committee shall consider the justification given by the contracting authority and the recommendations of the Directorate and shall within fourteen days of receiving the Directorate's recommendations,</p> <p>(a) if satisfied, approve the justification provided for using of direct procurement method and the selected private party; or</p> <p>(b) reject the justification provided and the use of direct procurement method for the project.</p> <p>(5) The Committee shall inform the contracting authority in writing, through the Directorate, of its decision under sub-regulation (4) above. Where the Committee does not approve the use of direct procurement, it shall specify the reasons in writing.</p>	
22.	<p>(1) If the Committee approves the use of direct procurement method, the contracting authority shall prepare the tender documents in relation to the project.</p> <p>(2) When preparing the tender documents, the contracting authority shall take into account these Regulations and any guidelines that may be published by the Directorate.</p> <p>(3) The tender documents prepared under this regulation 22 shall set out the following:</p> <p>(a) general information relating to the project;</p> <p>(b) specifications of the project including the technical and financial conditions that should be met by the private party;</p> <p>(c) specifications of the final product, level of services, performance indicators and such other requirements as may be necessary including the safety, security, and environment preservation requirements to be met by the private party;</p> <p>(d) basic terms of the project agreement, including non-negotiable conditions;</p> <p>(e) the criteria and method to be used in evaluating the tender documents submitted by the private party;</p> <p>(f) any requirement that a bid security be submitted by the private party, including the form and amount of the bid</p>	Tender Documents

	<p>security;</p> <p>(g) the date, time and place for submission of the tender by the private party; and</p> <p>(h) any other matter that may be necessary for the proper conduct of the tender stage of the project.</p> <p>(4) The private party shall, within sixty days from the date of receipt of the tender documents, submit its tender to the contracting authority.</p>	
23.	<p>(1) The accounting officer of the contracting authority shall appoint an evaluation committee in accordance with section 39 (b) of the Act to undertake evaluation of the tender submitted by the private party:</p> <p>Provided that representatives of the Directorate, the Attorney-General and regulatory bodies may be appointed as advisors or observers in the evaluation committee but shall not be allowed to participate in evaluation of the tender submitted by the private party.</p> <p>(2) The Accounting Officer shall appoint the head of the relevant department as the chairperson of the evaluation committee and a secretary to support the evaluation committee.</p> <p>(3) If a contracting authority has appointed a transaction advisor in relation to the project, that transaction advisor may be part of the evaluation committee as an advisor or observer and shall not be allowed to participate in evaluation of the tender submitted by the private party.</p> <p>(4) The contracting authority may reconstitute the project implementation team, to act as the evaluation committee. The contracting authority shall ensure that the project implementation team is reconstituted to comply with this regulation 23.</p> <p>(5) The evaluation committee shall evaluate the tender submitted by the private party against the evaluation criteria set out in the tender documents.</p> <p>(6) The evaluation committee shall evaluate the tender within thirty days of receipt of the tender from the private party.</p> <p>(7) The contracting authority shall at all times during the procurement process, consult the Directorate.</p>	Evaluation Committee
24.	<p>(1) The accounting officer of the contracting authority shall, in consultation with the Directorate, constitute a negotiating committee in accordance with the terms of section 57 of the Act.</p>	Negotiation

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| | <p>(2) The contracting authority may authorise the evaluation committee to undertake negotiation of the project with the private party, provided that the contracting authority shall reconstitute the evaluation committee to include the following:</p> <ul style="list-style-type: none">(a) representatives of the contracting authority;(b) at least one representative of the Directorate;(c) a representative of the office of the Attorney General;(d) such persons representing such State departments as the contracting authority may, in consultation with the Directorate, consider necessary; and(e) where applicable, the transaction advisor appointed under the Act and these Regulations or such other professional persons or consultants as shall be determined by the contracting authority <p>(3) A contracting authority shall, prior to negotiating a direct procurement of a project, develop criteria for negotiations with the private party and submit the same to the Directorate and the Committee for approval.</p> <p>(4) The criteria developed under sub-regulation (3) must include the following:</p> <ul style="list-style-type: none">(a) the financing parameters;(b) the terms of the contract including non-negotiable terms; and(c) the terms of delivery of the project. <p>(5) The Directorate shall, within twenty-one days of receiving the criteria from the contracting authority under sub-regulation (3), determine whether or not the proposed project may be negotiated using the said criteria.</p> <p>(6) If the Directorate is satisfied, it shall submit the criteria together with its recommendations to the Committee for approval.</p> <p>(7) The Committee shall consider the criteria and the recommendations of the Directorate within fourteen days of receiving the Directorate's recommendations, and if satisfied, approve the criteria.</p> <p>(8) The Committee shall, through the Directorate, notify the contracting authority in writing of the approval of its approval of the criteria for negotiations. If the Committee does not approve the criteria, it shall inform the contracting authority in writing and specify the reasons thereof.</p> | |
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	<p>(9) Once the criteria for negotiations are approved by the Committee, the negotiating committee shall negotiate the tender received with the private party.</p> <p>(10) The negotiating committee shall take the following into consideration when negotiating with the private party:</p> <ul style="list-style-type: none"> (a) take all reasonable steps to ensure that the contracting authority obtains value for money in relation to the negotiations; (b) ensure that the laws relating to public financial management are complied with at all times during the negotiations; (c) the affordability and value for money proposition for the project; and (d) take all reasonable steps to prevent any impropriety in relation to the negotiation. <p>(11) The procedure for negotiations provided under Sections 57 to 60 of the Act and guidelines issued under the Act on negotiations shall apply <i>mutatis mutandis</i> to negotiation of direct procurement of projects.</p>	
PART VI — PRIVATELY INITIATED PROPOSALS		
25.	<p>(1) A contracting authority may consider a privately initiated proposal if the proposal complies with section 40(2) of the Act.</p> <p>(2) If the contracting authority is satisfied that a privately initiated proposal complies with section 40(2) of the Act, the contracting authority shall submit the proposal to the Directorate for evaluation, with the contracting authority's detailed assessment report that the proposal satisfies the criteria under section 40(2) of the Act and adequate information has been furnished pursuant to section 40(3) of the Act.</p>	Preliminary assessment of private proposals
26.	<p>(1) The privately-initiated proposal shall contain the following information and documents in addition to the information set out in section 40(3) of the Act –</p> <ul style="list-style-type: none"> (a) a company profile, and notarised audited financial accounts for the last three years and evidence of the financial capacity of the private party or each of the consortium's members if the private party is constituted through a consortium; (b) a statement describing property rights or any confidential information or proprietary data not to be made public; (c) a statement to indicate compliance with other relevant laws and government policies; 	Content of private proposals

	<p>(d) proof of payment of the review fee payable under section 40(6) of the Act;</p> <p>(e) where the private party is constituted through a consortium a notarised binding agreement executed by the consortium's members, indicating the lead member and the powers vested in the lead member; and</p> <p>(f) evidence of similar projects, successfully undertaken by the private party.</p> <p>(2) Prior to payment of the review fee under section 40(6) of the Act, the private party shall execute a declaration in a form acceptable to the Directorate, setting out that it has obtained independent advice and understood:</p> <p>(a) that the payment of the review fee is not a guarantee that their proposal will be accepted; and</p> <p>(b) the content of the law and regulations regarding privately initiated proposals.</p>	
27.	In the event a privately-initiated proposal is submitted by a private party constituted through a consortium, the Directorate shall, in co-ordination with the contracting authority, conduct due diligence on all members of the consortium in accordance with section 41 of the Act.	Due diligence on consortium members
28.	<p>(1) A critical component of establishing the project's feasibility under Section 42(3)(b) of the Act, shall include the assessment of the project's climate and disaster resilience profile.</p> <p>(2) If a private party is requested to provide clarifications or additional information on a privately initiated proposal in accordance with section 42 (4) of the Act, the private party shall provide such clarifications or additional information to the contracting authority within seven days from the date such request is made by Directorate. This timeline shall not be included for purposes of computing the ninety-day period set out under section 42 (5) of the Act.</p> <p>(3) Notwithstanding the provisions of sub-regulation (1), the Directorate may, at the request of a private party through the contracting authority, extend the timeline for submission of the clarifications or additional information on a privately initiated proposal.</p> <p>(4) The Committee may request clarifications or additional information on a privately initiated proposal from the Directorate within seven days of receiving the report on the proposal from the Directorate. This timeline shall not be included for purposes of computing the period of fourteen days provided under section 42(7) of the Act.</p>	Evaluation of privately initiated proposals
29.	(1) In the event the contracting authority requests for extension of time under section 43(3) of the Act, the contracting authority must	Project development

	<p>submit its written application to the Directorate at least thirty days before the expiry of the six-month period under section 43(2) of the Act.</p> <p>(2) If an extension is granted under section 43(4) of the Act, it shall be for a maximum of ninety days from the expiry of the six-month period, which extension shall only be granted once.</p> <p>(3) The contracting authority may, in accordance with section 43(6) of the Act, enter into a project development agreement within twenty-one days from the date of the approval of the Committee provided that the terms of section 43(7) of the Act shall apply.</p> <p>(4) In the event the contracting authority does not enter into a project development agreement with the private party, the provisions of section 43(7)(c) of the Act shall still apply.</p> <p>(5) Where a contracting authority restructures a project in accordance with section 43(12) of the Act, it shall do so by requesting the private party to resubmit the documents under section 40 of the Act and these Regulations for fresh determination.</p>	
30.	Where a competitive tender process is used pursuant to section 44(4), (5) or (6) of the Act, and the private party does not emerge as the winning bidder, the private party shall be given a right to match the winning bid.	Project Design
	PART VII - RESTRICTED BIDDING	
31.	<p>(1) A contracting authority may use restricted bidding if the conditions set out in section 45 of the Act are met and a feasibility study has been conducted and approved in accordance with the Act and these Regulations.</p> <p>(2) A contracting authority wishing to use restricted bidding shall submit to the Directorate the restricted bidding proposal together with reasons why it wishes to use restricted bidding.</p> <p>(3) The contracting authority shall also include the proposed list of restricted bidders in its restricted bidding proposal, which shall be a minimum of two and a maximum of five bidders.</p> <p>(4) The Directorate shall, within twenty-one days of receiving the restricted bidding proposal together with the list of restricted bidders from the contracting authority, determine whether or not the proposed project may be procured through restricted bidding.</p> <p>(5) If the Directorate is satisfied with the reasons given by the contracting authority for the proposed use of restricted bidding, the Directorate shall submit the proposal together with the written reasons to the Committee for approval.</p> <p>(6) The Committee shall consider the restricted bidding proposal and the reasons given by the contracting authority and if satisfied, approve the restricted bidding for the project and the list of the</p>	Preliminary assessment of restricted bids

	<p>proposed restricted bidders within fourteen days from the date of receipt of the proposal from the Directorate.</p> <p>(7) The Committee shall, through the Directorate, notify the contracting authority in writing of its approval.</p> <p>(8) If the Committee does not approve the use of restricted bidding, it shall, through the Directorate, inform the contracting authority in writing and specify the reasons thereof. The contracting authority shall then consider whether to procure the project through competitive bidding.</p>	
32.	<p>(1) A contracting authority shall, in consultation with the Directorate, prepare an invitation to tender to be issued to proposed list of bidders for purposes of inviting bids, which shall include the following information:</p> <ul style="list-style-type: none"> (a) general information related to the project necessary for the preparation and submission of bids; (b) specifications of the project including the technical and financial conditions that should be met by bidders; (c) specifications of the final product, level of services, performance indicators and such other requirements as may be necessary including the safety, security, and environment preservation requirements to be met by bidders; (d) basic terms of the project agreement including non-negotiable conditions; (e) the criteria and method to be used in evaluating bids; (f) forms and documents that are required to be filled and submitted by bidders; (g) the value of the bid security required to be submitted by bidders; (h) the conditions, procedures, and administration of bid clarifications; (i) the date, time, and place for the submission of tender documents by bidder; (j) instructions regarding pre-bid conferences, where necessary; (k) the conditions to be met by any consortiums on permissible changes to a consortium arrangement; (l) the procedure to be followed in a competitive dialogue process; and (m) any other matter that may be necessary for the proper conduct of the tender stage of the project. 	Invitation to tender

	(2) The conditions and procedure provided in regulations 42 to 55 of these Regulations shall apply <i>mutatis mutandis</i> to restricted bidding.	
33.	<p>(1) A contracting authority shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.</p> <p>(2) Notwithstanding the provisions of sub-regulation (1) above, if the estimated value of the goods, works or services being procured is equal to, or more than the threshold as may be prescribed by the Cabinet Secretary from time to time for county, national and international advertising, the contracting authority shall publish the invitation to tender in the dedicated Government tender portals or in its own website.</p> <p>(3) A county government that intends to give notice for an invitation to tender shall do so in the dedicated Government tender's portal or on its own website.</p>	Notice
34.	A bidder intending to bid for a project under Part VII of these Regulations shall do so in accordance with sections 51 to 57 of the Act and guidelines issued under the Act.	Submission of tenders
PART VIII - COMPETITIVE BIDDING		
35.	<p>(1) A contracting authority shall invite persons to apply for qualification to develop and implement a public private partnerships project by notice in at least one newspaper of national circulation the Directorate's website, the contracting authority's website or other wide-reaching media.</p> <p>(2) The contracting authority shall specify in the notice the qualifications required by a person who may bid for the tender to develop and implement a public private partnership project including —</p> <ul style="list-style-type: none"> (a) technical qualifications; (b) legal capacity to bid; (c) financial requirements; (d) relevant experience; (e) compliance with health and safety regulations; and (f) compliance with environmental regulations. <p>(3) A contracting authority may, before issuing an applicant with the tender documents, charge the applicant a prescribed fee, which amount shall be set out in the notice to be issued under sub-regulation 1 above.</p> <p>(4) The fee charged under sub-regulation (3) above shall not exceed five thousand shillings for hard copies of a tender document or as may be set by the Cabinet Secretary from time to time.</p>	Invitation of requests for qualification

36.	<p>(1) The Accounting Officer of the contracting authority shall appoint a pre-qualification committee constituted under section 48(1) of the Act.</p> <p>(2) The pre-qualification committee shall be headed by the relevant head of department of the contracting authority and shall include representatives of the Directorate as well as any other suitably qualified person from outside the contracting authority as may be appointed by the contracting authority.</p> <p>(3) The Accounting Officer of the contracting authority shall appoint a secretary of the pre-qualification committee who shall carry out all administrative functions related to the pre-qualification committee.</p> <p>(4) The functions of a pre-qualification committee shall be —</p> <ul style="list-style-type: none"> (a) to advise the contracting authority regarding any aspect of the prequalification process; (b) to receive, register and preview applications for pre-qualification; and (c) to prepare a pre-qualification evaluation report. <p>(5) The Directorate shall publish an operations manual that may be used by applicants for pre-qualification.</p>	Pre-qualification committee
37.	<p>(1) Subject to the approval of the contracting authority, each pre-qualification committee shall determine its own procedure.</p> <p>(2) A pre-qualification committee shall comprise of not less than five members.</p> <p>(3) Each pre-qualification committee shall make its decisions through a scoring mechanism and the decisions shall be submitted to the contracting authority for approval.</p>	Procedures of a pre-qualification committee
38.	<p>(1) The pre-qualification committee, while evaluating applications for pre-qualification, may request an applicant to provide clarifications regarding that applicant's application. Where a pre-qualification committee requires any person to do anything or provide any document, the pre-qualification committee shall grant that person a reasonable period of time to comply with its requirement.</p> <p>(2) The pre-qualification committee shall evaluate applications for pre-qualification within twenty-eight days from the date of submission of the applications.</p>	Evaluation of applications for pre-qualification
39.	<p>(1) The pre-qualification committee shall prepare a short list of pre-qualified persons and shall notify the contracting authority in writing.</p> <p>(2) The contracting authority shall, in writing, provide the short list of pre-qualified persons to each applicant who participated in the</p>	Preparation of a short list of pre-qualified persons.

	<p>pre-qualification process. The contracting authority shall inform each applicant of how their bid scored.</p> <p>(3) The contracting authority shall publish the short list of the pre-qualified persons in at least two newspapers of national circulation, the Directorate's website, the contracting authority's website or other wide-reaching media.</p>	
40.	<p>(1) A contracting authority may, in consultation with the Directorate, hold a preliminary meeting with the bidders who are shortlisted under regulation 39.</p> <p>(2) The contracting authority shall, during the preliminary meeting, deliberate on issues related to the project specifications and initial preliminary conditions and respond to any enquiry made by the bidders in relation to the project.</p> <p>(3) Any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders.</p>	Preliminary bidders meeting
41.	<p>(1) A contracting authority may alter the specifications of a project based on the outcome of the preliminary meeting held with the shortlisted bidders, but only if the alteration shall not disqualify any shortlisted bidder.</p> <p>(2) The Accounting Officer of the contracting authority shall inform all the shortlisted bidders of the altered specifications of the project within seven days of the alterations being made.</p> <p>(3) Where a contracting authority alters the specifications of a project, that contracting authority shall invite bids for the project based on the altered specifications.</p>	Clarification during bidding
42.	<p>(1) A contracting authority may delegate to the project implementation team constituted under regulation 12 the preparation of tender documents.</p> <p>(2) When preparing tender documents, the project implementation team shall take into account these Regulations and any guidelines that may be published by the Committee.</p> <p>(3) In addition to the information required under section 50(2) of the Act, the tender documents shall provide —</p> <ul style="list-style-type: none"> (a) the methodology to be used during the technical or financial evaluation of bids; (b) the validity period of the bids; (c) the value of bid security; (d) the method of calculating a performance bond; (e) the validity period of a performance bond; (f) whether the competitive dialogue procedure will be used; 	Tender documents

	<ul style="list-style-type: none"> (g) the deadline for receiving bids; (h) where the tender documents may be collected from; (i) the price of tender documents; (j) the scoring system to be applied in the evaluation of bids, where applicable; (k) the criteria for assessing technical bids and the threshold each technical bid should meet; (l) the criteria for ranking the successfully evaluated bids; (m) the criteria for evaluating and comparing financial bids; and (n) the circumstances under which a bid may be rejected. 	
43.	<ul style="list-style-type: none"> (1) The Accounting Officer of a contracting authority shall issue the tender documents to the pre-qualified bidders. (2) Where a contracting authority has a website or some other electronic means for communications, the Accounting Officer shall also publish a notice on the Directorate's website or the contracting authority's website or such other electronic means of communication informing the public that it has started accepting bids from pre-qualified bidders. 	Invitation to tender
44.	<ul style="list-style-type: none"> (1) After the tender documents are issued under regulation 42, a contracting authority shall convene a pre-bid conference to clarify key issues in relation to a tender. (2) Any person participating in the tender may attend a pre-bid conference. (3) Where the contracting authority deems it necessary to have a site visit, it shall notify all the applicants. 	Pre-bid conference and site visit
45.	<ul style="list-style-type: none"> (1) A contracting authority may modify a tender document based on the outcome of a pre-bid conference. (2) Where a contracting authority has modified a tender document based on the outcome of a pre-bid conference, it may extend the deadline for the submission of bids if the modification introduces significant variations to the original project conceptualisation. 	Modification of tender documents
46.	<ul style="list-style-type: none"> (1) The tender documents issued under regulation 42 shall indicate the mode of submission of tenders by specifying whether the submission shall be done electronically or manually or through both means. (2) If a bid is submitted manually, it shall be submitted in two separate and sealed envelopes being — <ul style="list-style-type: none"> (a) the technical bid which shall include details of the inputs required in relation to the tender specifications; and (b) the financial bid which shall be in the form prescribed in the tender documents. 	Submission of bids

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| <ul style="list-style-type: none">(3) Each bidder shall, in the case of manual submission, cause the bid to be delivered to the place on or before the deadline specified by the contracting authority in the tender document.(4) The contracting authority shall receive and register each bid. On request, the contracting authority shall issue an acknowledgment receipt to the bidder.(5) A bid shall not be received or registered by the proposal evaluation team if that bid —<ul style="list-style-type: none">(a) has not been delivered to the place specified in the tender documents; or(b) has not been delivered within the period designated in the tender document.(6) If a bid is submitted electronically, such submissions shall be received into an electronic tender procurement system notified by the contracting authority. Each bidder shall be required to sign all statements, documents and certificates uploaded to take responsibility for their correctness and authenticity.(7) A bid submitted electronically shall be scanned for malware by the system administrator before being uploaded and accepted into the online bid box.(8) Where a scan causes a bid to be rejected, the bidder shall be notified immediately.(9) Proof of bid security as required by the contracting authority, where applicable, shall be scanned and uploaded along with the bid, and the original physical copy shall be submitted to the contracting authority so as to reach before the date of closing of the bids. Failure to submit the original physical copy of a tender security before the closing of the bid shall lead to the disqualification of the bid.(10) Bids submitted online shall be signed electronically with a digital signature to establish the identity of the bidder submitting the bid.(11) Receipt of electronic submissions, including the date and time, shall be acknowledged electronically. A contracting authority shall accept only those bids in electronic format received within the bid submission deadline.(12) The figures quoted in a financial bid shall be expressed in both words and numbers but where there is a discrepancy between the figure expressed in words and the figure expressed in numbers the figure expressed in words shall prevail.(13) The financial bid shall be evaluated where the technical bid of the bidder has passed the scoring threshold indicated in the tender documents.(14) The proposal evaluation team shall ensure that the submitted bid documents are not tampered with by any person. | |
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	<p>(15) Where submission of bids is done electronically, such bids shall be received and maintained to high standards of security and the e-tender box shall remain closed until the time of tender opening.</p> <p>(16) The electronic tender box referred to under sub-regulation (15) shall have sufficient passwords that are simultaneously time-activated, and each password shall be issued to different officers who are members of the proposal evaluation team.</p> <p>(17) A bidder may encrypt their bid as long as their respective passwords are availed at the tender opening.</p> <p>(18) A bidder who submits an encrypted tender and fails to provide their respective password or other means of access to the document at the tender opening shall be deemed not to have submitted their bid.</p> <p>(19) The contracting authority shall ensure that the date and time of an automated closure of an electronic bid deadline are indicated in the tender document in accordance with the local time zones.</p> <p>(20) A bidder may not withdraw a bid once the bid has been submitted.</p> <p>(21) A bid shall be deemed to be valid during the bid validity period specified in the tender document.</p> <p>(22) The contracting authority may extend the bid validity period.</p>	
47.	<p>(1) The Accounting Officer of a contracting authority shall appoint a proposal evaluation team in accordance with section 54(1) of the Act:</p> <p>(2) The Accounting Officer shall appoint the head of the relevant department as the chairperson of a proposal evaluation team and a secretary to support the proposal evaluation team.</p> <p>(3) If a contracting authority has appointed a transaction advisor in relation to the project, that transaction advisor shall be part of the proposal evaluation team but shall not be allowed to participate in scoring in relation to a decision made by the proposal evaluation team.</p> <p>(4) The proposal evaluation team shall keep in safe and secure custody all bids submitted to it.</p> <p>(5) The proposal evaluation team shall preserve the confidentiality of the tender evaluation process and shall not be influenced or directed by any person regarding the evaluation of a proposal except in accordance with the Act and these Regulations.</p> <p>(6) Every member of the proposal evaluation team shall sign and submit to the contracting authority a declaration of impartiality, confidentiality, and ethics deed, in a form to be prescribed by the Directorate, which shall then submit the declaration to the Directorate.</p>	Proposal Evaluation Team
48.	(1) A bid security shall be —	Bid security

	<p>(a) in the form of an irrevocable and unconditional bank guarantee issued by the bidder in favour of the contracting authority from a bank licensed to operate in Kenya or a correspondent bank recognised by the Central Bank of Kenya; and</p> <p>(b) an undertaking by the issuing bank to pay the contracting authority on the first formal claim to pay, in writing, by the contracting authority regardless of any objection by the bidder.</p> <p>(2) The bid security shall remain valid and enforceable until the issuance of performance security by the Project Company as set out in the Act and these Regulations.</p> <p>(3) The Directorate shall publish guidance notes on bid securities and contracting authorities shall apply the guidance notes in relation to the tender documents prepared for each project.</p>	
49.	<p>(1) Immediately after the deadline for submitting bids, the proposal evaluation team shall open all the bids received before that deadline.</p> <p>(2) All bidders shall be invited for the opening of bids and all bidders present at the bid opening shall be required to sign a record of attendance.</p> <p>(3) Notwithstanding the provisions of sub-regulation (2) above, the contracting authority may allow for online viewing of bid opening proceedings by bidders.</p> <p>(4) As each bid is opened, the proposal evaluation team shall read out loud and record the details of each bidder and their bids, in a document to be called the bid opening register.</p> <p>(5) The proposal evaluation team shall assign an identification number to each bid and record the number of pages received.</p> <p>(6) The proposal evaluation team shall prepare bid opening minutes which shall set out:</p> <p style="padding-left: 40px;">(a) a record of the procedure followed in opening the bids; and</p> <p style="padding-left: 40px;">(b) the particulars of those persons submitting bids, or their representatives, who attended the opening of the bids.</p> <p>(7) To acknowledge that the minutes are a true reflection of the proceedings at the bid opening ceremony, each member of the proposal evaluation team shall initial each page of the minutes and append his or her signature to the final page of the minutes indicating their final name and designation. Failure by the proposal evaluation team to initial each page of the minutes shall not nullify the proceedings at the bid opening ceremony.</p>	Opening of Bids

	<p>(8) Where bids were submitted electronically, all e-bids shall be readable through open standard interfaces and formats as specified in the tender documents.</p> <p>(9) The proposal evaluation team shall open the bids in electronic format using the passwords provided by the bidders under regulation 46.</p> <p>(10)The contracting authority shall ensure that financial bids in electronic format shall only be accessed and opened after the technical evaluation of the bids is completed.</p>	
50.	<p>(1) Where a proposal evaluation team rejects a bid, the contracting authority shall, in writing, notify the bidder of the reasons for rejecting the bid.</p> <p>(2) Where the proposal evaluation team rejects all bids, the tender process shall be terminated and all processes or proceedings in relation to that tender shall cease.</p> <p>(3) Where a bid is rejected, the contracting authority shall promptly return the bid security to the person whose bid has been rejected.</p> <p>(4) Where a tender process is terminated in accordance with this regulation 50 and the contracting authority re-initiates the process, regulations 35 to 49 shall apply to the reinitiated tender process.</p>	Rejection of bids
51.	Where the proposal evaluation team rejects a bid based on the evaluation of the technical offer, the proposal evaluation team shall enclose the unopened financial offer in the notification of rejection of the bid made under regulation 50(1).	Financial offer to be returned unopened
52.	If the rejection of the bid is based on the evaluation of both the technical and financial offers, the proposal evaluation team shall promptly return the bid security to the person whose bid has been rejected.	Bid security to be returned
53.	<p>(1) A bidder whose bid is rejected may file with the Petition Committee a petition to the decision of the proposal evaluation team.</p> <p>(2) Where a petition is made after the technical bids have been opened and evaluated and the bidders have been informed of the outcome in writing, the proposal evaluation team shall neither open, nor evaluate the financial bids until the Petition Committee makes a decision.</p> <p>(3) Where a petition is made after the Directorate issues no objection to a proposal evaluation report in accordance with section 55 (4) of the Act, the tender shall not be awarded until the Petition Committee makes a determination.</p>	Objection to decision of proposal evaluation team

54.	<ol style="list-style-type: none"> (1) The financial offers shall be opened at a time and at a place designated by the proposal evaluation team after the technical bids have been opened and evaluated. (2) The proposal evaluation team shall invite every bidder whose technical offer has been evaluated successfully to the session at which the financial offers shall be opened. (3) Where a bidder or that bidder's representative attends the session for the opening of the financial offers, that bidder or that bidder's representative shall sign an attendance sheet kept and maintained by the proposal evaluation team. (4) The proposal evaluation team shall confirm to the bidders present that each of the envelopes containing the financial offers is sealed before the offers are opened. (5) The financial bid for each bidder read at the financial bid opening shall be final. (6) The chairperson of the proposal evaluation team shall announce the value of each financial offer at the session where the financial offers are opened. 	Opening of financial bids
55.	<ol style="list-style-type: none"> (1) The proposal evaluation team shall apply the criteria specified in the tender documents when evaluating technical offers. (2) The proposal evaluation team shall apply the criteria specified in the tender documents against each technical bid but shall not compare one bid against another bid. (3) Where the proposal evaluation team assesses a technical bid as falling below the threshold of the criteria specified in the tender documents, the bidder's financial offer shall be returned to the bidder unopened. (4) The proposal evaluation team shall evaluate the financial bids within seven days of opening the financial bids. (5) Where the proposal evaluation team applies a scoring system, it shall rank each offer in accordance with the scores each offer has attained after the evaluation. 	Evaluation scoring system
PART IX – PUBLIC PRIVATE PARTNERSHIPS BY COUNTY GOVERNMENTS		
56.	<ol style="list-style-type: none"> (1) The County Executive Committee member for finance shall prepare a list of projects intended to be implemented by the county government or county corporation in line with section 66 (2) of the Act. (2) The County Executive Committee member for finance shall submit the list to the County Executive Committee for approval and thereafter submit the list to the Directorate in accordance with section 66 (1) of the Act. (3) The County Executive Committee member for finance may update the list provided that any update to the list shall be 	Submission of project lists

	<p>consistent with amendments to the County Integrated Development Plan. Any update to the list must be submitted to the Directorate at least three months before the end of the financial year.</p>	
57.	<p>A county government intending to undertake a public private partnership project shall constitute a county project implementation team in consultation with the Directorate, which shall consist of such technical, financial, environmental, social and governance and legal experts as the county government shall determine.</p>	<p>County project implementation team</p>
58.	<p>The county project implementation team shall be responsible for:</p> <ul style="list-style-type: none"> (a) overseeing the conduct of feasibility studies; (b) overseeing the structuring and implementation phases of the project; (c) preparing the project for procurement; (d) conducting the tender stage of the project; (e) negotiating project agreements for the project; and (f) oversee the implementation of the contract management framework. 	<p>Functions of the county project implementation team</p>
59.	<ul style="list-style-type: none"> (1) A county government intending to undertake a project shall be required to undertake a feasibility study and submit its feasibility study report to the Directorate in accordance with sections 32 and 33 of the Act. (2) The county government shall first submit its feasibility study report to the County Executive Committee for approval. The submission of the feasibility study report to the County Executive Committee shall be done after the appointment of the county project implementation team under regulation 57 above. (3) The County Executive Committee shall render its decision in writing within twenty-one days from the date the feasibility study report is submitted. (4) Where the County Executive Committee approves the feasibility report, it shall submit the same to the Directorate for evaluation and subsequent approval by the Committee in accordance with section 33 of the Act. (5) Where the County Executive Committee determines that the project does not meet the relevant criteria and should be restructured, the County Executive Committee can elect to direct the County Executive Committee member for finance to restructure the project and resubmit the revised feasibility study report to the CEC for approval. (6) Where the County Executive Committee determines that the project does not meet the relevant criteria and should be 	<p>Feasibility studies</p>

	<p>abandoned, the County Executive Committee shall direct the County Executive Committee member for finance to abandon the project.</p> <p>(7) Notwithstanding sub-regulation (1) above, the Cabinet Secretary may prescribe a threshold for projects by county governments that may not require submission of feasibility study reports to the Directorate for evaluation and subsequent approval by the Committee.</p> <p>(8) For purposes of section 64 (5) of the Act, the County Executive Committee member for finance shall submit the feasibility study report for the project to the County Executive Committee for approval.</p> <p>(9) Once a feasibility study report is approved under sub-regulation (8) above, the county government through the County Executive Committee member for finance shall submit the feasibility study report to the Directorate for evaluation in accordance with section 33 of the Act.</p> <p>(10) When considering a feasibility study report and evaluation report submitted to it under this regulation 60, the Committee shall do so in accordance with regulation 15.</p>	
60.	<p>(1) The Committee shall consider the evaluation report submitted by the Directorate under regulation 57 (9) and make its determination within twenty-one days in accordance with section 33 (3) of the Act. The Committee shall thereafter submit the feasibility study report together with its recommendations to the Cabinet Secretary for approval.</p> <p>(2) The Cabinet Secretary shall, within fourteen days of receiving recommendations from the Committee, determine whether or not the county government can undertake the project.</p> <p>(3) The determination in sub-regulation (2) and (3) above shall be in writing.</p> <p>(4) Where the Cabinet Secretary determines that the project should be abandoned, the county government may elect to restructure the project and resubmit the same to the Committee. The county government shall follow regulations 59 (1) to (4) when resubmitting a project afresh.</p> <p>(5) For the avoidance of doubt, this regulation shall only be applicable for purpose of section 64 (5) of the Act.</p>	Public private partnerships requiring National Treasury approval
61.	<p>(1) After the negotiation of a county public private partnership project under section 57 of the Act, the negotiating committee shall submit the project and risk assessment report to the county executive committee for approval.</p> <p>(2) The county executive committee shall approve the project and</p>	Project and risk assessment report

	<p>risk assessment report and submit it to the Directorate for approval under section 58(2) of the Act.</p> <p>(3) Notwithstanding section 59(1) of the Act, the Cabinet Secretary may prescribe a threshold for projects by county governments that may not require submission of project and risk assessment report to the Committee for approval.</p> <p>(4) Where such threshold is met, the Directorate shall submit the project and risk assessment report and its recommendations to the Committee for record keeping.</p>	
62.	A county government intending to undertake a public private partnership project that has been approved under regulation 61, shall comply with procurement provisions in Part V, VI, VII and VIII of these Regulations.	Procurement methods
	PART X – GOVERNMENT SUPPORT MEASURES	
63.	<p>Government support measures issued for a public private partnership shall comply with the provisions of the following laws in relation to public finance management:</p> <p>(a) Constitution of Kenya, 2010;</p> <p>(b) Public Finance Management Act, No. 18 of 2012; and</p> <p>(c) such guidelines and policy documents that have been or may be passed by the Cabinet Secretary in relation to government support measures.</p>	Compliance with public finance management laws
64.	<p>(1) Following the approval of the feasibility study under the Act and these regulations, and where the feasibility study report shows that the project requires a government support measure, a contracting authority shall before it undertakes procurement and negotiation processes of the project, comply with the provisions of this regulation 65.</p> <p>(2) A contracting authority shall be required to notify the Cabinet Secretary in writing and obtain a pre-approval, that the project will require a Government support measure.</p> <p>(3) The Cabinet Secretary before providing a pre-approval under sub regulation (2), will consider the strategic nature of the proposed project and such other parameters as the Cabinet Secretary may prescribe.</p> <p>(4) The Cabinet Secretary shall inform the contracting authority in writing, whether or not a Government support measure can be issued for the proposed project.</p>	Pre-Approval from the Cabinet Secretary of the intention to use Government support measure

65.	<p>(1) Following the negotiation and execution of a project agreement, the contracting authority, having previously received a pre-approval from the Cabinet Secretary in accordance with regulation 65, shall make a formal application to the Cabinet Secretary for the issuance of the Government support measure in question.</p> <p>(2) The private party in the project shall make a formal application in writing to the contracting authority requesting for the Government support measure in question.</p> <p>(3) The contracting authority shall review the application and if in support of the content of the application, the contracting authority shall certify the application and forward the application together with its recommendation to the Cabinet Secretary that a Government support measure be issued.</p> <p>(4) An application for a Government support measure shall include the following supporting documents:</p> <ul style="list-style-type: none"> (a) a feasibility study report for the proposed project demonstrating the viability of the project, including a confirmation in writing that the feasibility study has been approved in accordance with the Act and these Regulations; (b) a due diligence report conducted by the contracting authority on the investors confirming that the private party has the legal capacity and financial capability to undertake the project. The due diligence report should also confirm whether the private party possesses the relevant technical experience in undertaking similar projects and demonstrated expertise in undertaking projects of a similar nature; (c) an environmental and social impact assessment report approved by the implementing public sector partner; (d) initialled project agreement; (e) a draft of the proposed Government support measure instrument, aligned in principle terms with the provisions of the law, regulations and policy in relation to public finance management; (f) a comprehensive risk matrix for the proposed project highlighting the following: <ul style="list-style-type: none"> (a) key project risks allocated to the private party and the contracting authority; (b) an estimated financial impact value for the risks allocated to the contracting authority; (c) main areas, events and circumstances likely to 	Application process
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	<p>trigger risk crystallization for risks borne by the contracting authority</p> <p>(g) a risk management and mitigation plan to reduce the likely impact of the identified risks if and when they occur;</p> <p>(h) a report by the contracting authority confirming how the proposed project fits into its larger development program within the wider national development agenda;</p> <p>(i) a confirmation in writing by the contracting authority that the application for the Government support measure meets all the requirements and the documents submitted are in order.</p>	
66.	<p>(1) The Cabinet Secretary shall consider the application and such recommendations made by the contracting authority.</p> <p>(2) The Cabinet Secretary shall upon reviewing the application, submit its recommendations to the Cabinet and provide the Cabinet with the following:</p> <p>(a) the broad elements of the proposed Government support measure to be issued;</p> <p>(b) a confirmation that a cost benefit analysis with an assessment of the implication of the terms of the Government support measure has been undertaken by the Cabinet Secretary;</p> <p>(c) a confirmation that a detailed allocation of risks in the project and the proposed mitigation measures has been undertaken by the Cabinet Secretary;</p> <p>(d) an outline of the financial risks to the Government should the Government support measure crystallise; and</p> <p>(e) an outline of the monitoring and evaluation framework that will be implemented to ensure that the fiscal commitments and contingent liabilities of the Government under the Government support measure are managed.</p> <p>(3) Once the Cabinet makes its determination on the terms of the proposed Government support measure, the Cabinet Secretary shall communicate the same to the contracting authority in writing and thereafter commence the process of issuing the requested Government support measure.</p>	Approval of application for Government support measure
	PART XI - NEGOTIATIONS GENERALLY	
67.	Where a contracting authority enters into negotiations with a successful bidder under section 57 of the Act, the contracting authority shall —	Negotiations by a contracting authority

	<ul style="list-style-type: none"> (a) take all reasonable steps to prevent a conflict of interest by officers of the contracting authority; (b) take all reasonable steps to ensure that the contracting authority obtains value for money in relation to the negotiations; (c) ensure that the negotiations are only held at — <ul style="list-style-type: none"> (i) the offices of the contracting authority; (ii) the registered offices of the private party; or (iii) such other venue as the contracting authority may specify, (d) take all reasonable steps to avoid private solicitations in relation to the negotiations and where private solicitations have been made, determine whether or not to discontinue the negotiations; (e) ensure that the laws relating to public financial management, ethics and integrity of public officers are complied with at all times during the negotiations; (f) take all reasonable steps to ensure that the laws relating to management of environment and climate change are complied with; and (g) take all necessary steps to prevent any impropriety in relation to the negotiations. 	
	PART XII — PROJECT COMPANIES	
68.	<ul style="list-style-type: none"> (1) A contracting authority may hold shares in a project company in accordance with the provisions of the Act. (2) A project company shall be a company — <ul style="list-style-type: none"> (a) that is incorporated in Kenya in accordance with the Companies Act, No 17 of 2015; (b) that is incorporated specifically to execute the project in accordance with the Act and these Regulations; (c) whose shareholding arrangement is in accordance with the project agreement; and (d) whose shareholding arrangement shall not be altered by the shareholders except as provided in the Act. 	Project company
69.	<ul style="list-style-type: none"> (1) A project company shall submit a performance security in relation to a project, as specified in the project agreement, but in any event before expiry of the validity of the bid security. (3) The performance security shall remain valid and enforceable for a period of not less than 6 months after; <ul style="list-style-type: none"> (a) the completion of the project (or a specific phase of the project); or 	Performance security

	<p>(b) termination of the project agreement.</p> <p>(4) A performance security shall be:</p> <p style="padding-left: 40px;">a. in the form of an unconditional and irrevocable letter of guarantee in favour of the contracting authority issued by a bank licenced to operate in Kenya or a correspondent bank recognised by the Central Bank of Kenya.</p> <p style="padding-left: 40px;">b. an undertaking by the issuing bank to pay the contracting authority on the first formal claim to pay, in writing, by the contracting authority regardless of any objection by the bidder.</p> <p>(5) The annual value of a performance security shall not be altered for the duration specified in the tender documents and where the period for the completion of the project has been extended, the period of validity of the performance security shall be extended to cover the extended period.</p> <p>(6) The value of a performance security during the construction phase of a project shall be a percentage of the annual value of the construction works specified in the financial offer.</p> <p>(7) The contracting authority may prescribe such performance security arrangements that may be appropriate or that may be specified in the tender documents during the operation phase and service phase of the project.</p>	
	PART XIII — PROJECT AGREEMENTS	
70.	<p>(1) The Directorate shall publish on its website or other similar communications medium —</p> <p style="padding-left: 40px;">(a) model bid documents;</p> <p style="padding-left: 40px;">(b) guidelines relating to model bid documents; and</p> <p style="padding-left: 40px;">(c) model contracts or agreements.</p> <p>(2) The terms of a project agreement shall at a minimum include the provisions of the Third Schedule to the Act.</p>	Bid documents and project agreements
71.	<p>(1) The Accounting Officer of a contracting authority shall, cause a notice of the execution of a project agreement to be published in accordance with the provisions of section 69 of the Act within thirty (30) days of execution of the project agreement.</p> <p>(2) The notice shall identify the successful bidder and include a summary of the essential terms of the project agreement as provided in section 69 (1) of the Act.</p>	Publication of executed project agreement
72.	<p>(1) For purposes of section 73 (2) of the Act, the appointment of the independent expert shall only be made where required taking into consideration the nature of the project.</p>	Independent experts

	<p>(2) In the event an independent expert is appointed for a project, such appointment shall be terminated when all the terms of the project agreement have been fulfilled, in line with the contract for the appointment of such independent expert.</p> <p>(3) The project agreement shall provide for the manner in which an independent expert shall be selected, the remuneration and expense of the independent expert (including the payment mechanisms) and how the independent expert shall perform his or her duties.</p> <p>(4) The agreement between a party to a project agreement and an independent expert shall be considered to be part of the project agreement.</p> <p>(5) The Directorate shall publish guidelines to be applied by contracting authorities when appointing independent experts in relation to a project.</p> <p>(6) Any guidelines published under this regulation may provide for how independent experts may assist the contracting authority with the reviewing, inspection and monitoring of construction works, and the monitoring of compliance with performance and maintenance standards during the operational phase of a project.</p>	
	<p>PART XIV- PETITION COMMITTEE</p>	
<p>73.</p>	<p>(1) The Cabinet Secretary shall, in consultation with the Salaries and Remuneration Commission, determine the remuneration, fees or allowances that shall be payable to members of the Petition Committee.</p> <p>(2) A person may be appointed as a member of the Petition Committee under section 75(2)(b) of the Act if that person —</p> <p style="padding-left: 40px;">(a) is a Kenyan;</p> <p style="padding-left: 40px;">(b) is of good standing with a recognized professional body.</p> <p style="padding-left: 40px;">(c) has not been convicted of any offence involving corruption under the Anti-Corruption and Economic Crimes Act No. 3 of 2003; and</p> <p style="padding-left: 40px;">(d) meets the requirements of Chapter Six of the Constitution.</p> <p>(3) A person who is appointed a member of the Committee shall, before assuming the duties of the office, take and subscribe to the oath of allegiance to the office.</p> <p>(4) The Cabinet Secretary shall establish a secretariat to support the Petition Committee in the performance of its functions.</p> <p>(5) The secretariat shall be headed by the secretary of the Petition Committee appointed by the Cabinet Secretary under section 76 of the Act.</p> <p>(6) The secretariat of the Petition Committee shall —</p>	<p>Petition Committee and Petition Committee's secretariat</p>

	<ul style="list-style-type: none"> (a) receive, date, catalogue, and file all petitions submitted to the Petition Committee by private parties; (b) record the proceedings of the Petition Committee when the Committee is investigating a petition; (c) provide research and documentation support services to the Petition Committee; and (d) provide any other administrative support required by the Petition Committee. 	
74.	<ul style="list-style-type: none"> (1) When the secretariat for the Petition Committee receives a petition, the secretariat shall assign a serial number to that petition. (2) The secretariat of the Petition Committee shall, within three working days after the filing of the petition, inform the chairperson of the Petition Committee and the relevant contracting authority that a petition has been received. The notification of the filing of a petition shall be communicated in writing by email or registered mail. (3) Notwithstanding sub-regulation (2), the petitioner shall serve the contracting authority and any other party named in the petition with a copy of the petition and file an affidavit of service with the Petition Committee within three working days of filing the petition. (4) Upon being served with a copy of the petition by the petitioner, the contracting authority and any other party named in the petition shall, within five working days or such lesser period from the date of service as may be stated by the secretariat of the Petition Committee, submit to the secretariat a written memorandum of response to the petition together with such statements or documents as the contracting authority considers necessary and a preliminary objection, if any, in response to the petition. (5) The secretariat of the Petition Committee shall immediately notify the Petition Committee and all other parties to the petition upon receipt of such documents from a contracting authority under sub-regulation (3). (6) The Petition Committee may hear the preliminary objection either separately or as part of the substantive petition. (7) The chairperson of the Petition Committee shall give reasonable notice of the date fixed for the hearing of a petition to all parties to the petition. (8) Where the Petition Committee is required to notify a petitioner or a contracting authority of any matter related to the determination of a petition, the Petition Committee shall notify that petitioner in writing by email or registered mail. 	Petitions
75.	<ul style="list-style-type: none"> (1) The quorum of the business of the Petition Committee shall be at least three members. 	Determination of petitions

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| <p>(2) The Petition Committee may—</p> <ul style="list-style-type: none">(a) require a petitioner to appear before the Petition Committee;(b) require a petitioner to provide further information in addition to the information contained in the petition;(c) compel a person in relation to the petition to produce documents for examination by the Petition Committee;(d) issue summons to any person in relation to the petition who is likely to help in the resolution of the petition; or <p style="padding-left: 40px;">allocate the costs of hearing the petition to the parties to the petition.</p> <p>(3) The parties to a petition shall appear before the Petition Committee either in person or by an advocate of their choice on the day and at the time fixed for the hearing of the petition. If it is proved to the satisfaction of the Petition Committee that, owing to absence of the relevant party from Kenya, sickness, or other reasonable cause, a person is prevented from attending the hearing on the day and at the time fixed for that purpose, the Petition Committee may postpone the hearing to such reasonable time as it deems necessary.</p> <p>(4) At the hearing of the petition, unless decided otherwise by the Petition Committee, the petitioner shall be given the first opportunity to present the case in support of the petition and the contracting authority and any other party named in the petition shall be given an opportunity to reply thereto.</p> <p>(5) The Petition Committee may engage an expert to assist it in any proceedings in which it feels it lacks the necessary expertise, but the opinion of the expert shall not be binding on the Petition Committee.</p> <p>(6) The Petition Committee shall not be bound to observe the rules of evidence in the hearing of a petition.</p> <p>(7) The secretariat shall promptly notify the parties to the petition in writing of the determination, but in any case, not later than three days after the determination is made.</p> <p>(8) The Petition Committee shall develop and publish standardised forms for use by private parties in the submission of petitions to the Petition Committee and the standardised forms may provide for —</p> <ul style="list-style-type: none">(a) the identity of the petitioner;(b) the date the petition is made;(c) the tendering process against which the petition is being made;(d) the nature of the decision against which the petition is being made; | |
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	<p>(e) the reasons for the petition including any alleged breach of the Act or these Regulations; and</p> <p>(f) documents, if any, that the petitioner shall rely on in the petition.</p> <p>(9) All communications to the Petition Committee relating to matters pending before the Petition Committee shall be through the secretariat of the Petition Committee.</p> <p>(10) The filing fees to be paid to the Petition Committee in relation to the filing and determination of a petition are as prescribed in the First Schedule.</p>	
76.	<p>(1) Except as provided in sub-regulation (2), where a petition has been filed, the tender process shall not be suspended.</p> <p>(2) Notwithstanding the provisions of sub-regulation (1), the Petition Committee may suspend the tender process where:</p> <p>(a) the petition is against the tender process selected by the contracting authority for procurement of the project;</p> <p>(b) the petition is against the decision of the contracting authority to enter into negotiations with the preferred bidder; or</p> <p>(c) the Petition Committee determines it is just to do so.</p> <p>(3) A contracting authority shall not enter into negotiations with a successful bidder where a private party has filed a petition in relation to a tender with the Petition Committee within the prescribed time under the Act and these Regulations.</p> <p>(4) Notwithstanding the provisions of sub-regulation (3) above, a contracting authority may enter into negotiations:</p> <p>(a) with a successful bidder if the petition is dismissed by the Petition Committee before a determination is made; or</p> <p>(b) with a successful bidder if the Petition Committee determines the petition in favour of the successful bidder.</p>	Effects petitions
	PART XV - MISCELLANEOUS PROVISIONS	
77.	<p>(1) The Directorate shall preserve an electronic copy and a paper copy of each project agreement</p> <p>(a) feasibility studies;</p> <p>(b) project evaluation reports;</p> <p>(c) project and financial risk assessment reports;</p> <p>(d) determinations received from the Committee;</p> <p>(e) tender advertisements;</p>	Preservation of project agreements

	<p>(f) requests for qualifications and request for proposals;</p> <p>(g) petitions filed with the Petition Committee; and</p> <p>(h) security instruments.</p> <p>(2) Every contracting authority shall keep a duly signed original of the project agreement in which the contracting authority is involved.</p>	
	PART XVI - GENERAL PRINCIPLES	
78.	<p>(1) A person to whom the Act and these Regulations applies shall not be involved in any corrupt, coercive, obstructive, collusive or fraudulent practice; in relation to any project or procurement process.</p> <p>(2) A person for purposes of sub-regulation (1) includes a contracting authority, a private party, a project company, a transaction advisor, an independent expert and their representatives.</p> <p>(3) Any person who contravenes the provisions of this regulation commits an offence.</p> <p>(4) Without limiting the generality of the sub-regulations (1) and (3), the person shall be —</p> <p style="padding-left: 40px;">(a) disqualified from entering into a project agreement for the execution of a project; or</p> <p style="padding-left: 40px;">(b) if a project agreement has already been entered into with the person, the project agreement shall be voidable.</p> <p>(5) The voiding of a contract by the contracting authority under sub-regulation (4) does not limit any legal remedy the contracting authority may have.</p>	Corrupt, coercive, obstructive, collusive, or fraudulent practice
	PART XVII – EFFECTS OF EXISTING LAWS	
79.	<p>Any written law by the national and county governments relating to the management of the environment and climate change, including but not limited to the following laws, shall apply to the Act and these Regulations, subject to such modifications as may be necessary to give effect to the Act and these Regulations;</p> <p style="padding-left: 40px;">(a) Environmental Management and Co-ordination Act No. 8 of 1999; and</p> <p style="padding-left: 40px;">(b) Climate Change Act No. 11 of 2016.</p>	Application of laws relating to management of environment and climate change
	PART XVIII – OFFENCES, SANCTIONS AND REVOCATIONS	
80.	<p>(1) Subject to the provisions of section 84 of the Act:</p> <p style="padding-left: 40px;">(a) a person shall not knowingly lie to or mislead a person carrying out a duty or function or exercising a power under</p>	Offences and sanctions

	<p>the Act and these Regulations;</p> <p>(b) a person shall not unduly exert pressure or influence any member of the pre-qualification committee, negotiation committee or Petition Committee or on any employee or agent of a contracting authority or the accounting officer to take a particular action which favours or tends to favour a particular private party;</p> <p>(c) a contracting authority shall not knowingly withhold the notification to an unsuccessful private party; or</p> <p>(d) a project company constituted in accordance with the Act and these Regulations shall not fail to maintain proper books of accounts and records relating to a project as provided under section 82 of the Act and these Regulations.</p> <p>(2) A person who contravenes the provisions of sub-regulation (1) above commits an offence and shall upon conviction be liable for the penalties provided in section 84 (2), (3) and (4) of the Act.</p>	
81.	(1) The Public Private Partnerships Regulations, 2014 are hereby revoked.	Revocation of Legal Notice 171 of 2014

FIRST SCHEDULE

FORM PC 1

PETITION NO.....OF.....20.....

BETWEEN

.....APPLICANT

AND

..... RESPONDENT (*Contracting Authority*)

Request for review of the decision of the..... (*Name of the Contracting Authority*)

ofdated the..... day of20.....in the matter of Tender No.....of
.....20.....

PETITION NOTICE

I/We....., the above named Applicant(s), of

address:

Physical address.....Fax No.....

Tel. No.....Email, Country.....

hereby request the Public Private Partnerships Petition Committee to review the whole/part of the above mentioned decision on the following grounds, namely:

1.

2.

By this memorandum, the Applicant requests the Petition Committee for order or orders that:

1.

2.

SIGNED(Applicant)

Dated on.....day of/.....20.....

FOR OFFICIAL USE ONLY

Lodged with the Secretary Public Private Partnerships Petition Committee on.....day
of.....20.....

Petition Committee Secretary

FORM PC 2

REQUEST NO.....OF.....20.....

BETWEEN

.....APPLICANT

AND

..... RESPONDENT (Contracting Authority)

- TO: (1) (Contracting Authority)
- (2)(Applicant)

HEARING NOTICE

Whereasthe Applicant herein has instituted a complaint against.....(Contracting Authority) on..... (Date) particulars of which were set out in a Petition served upon you on

You are hereby required to appear on the.....day of 20.....at.....a.m./p.m. when the complaint against you will be heard by this Petition Committee sitting at

If you fail to appear the Applicant may proceed with the complaint and determination by order of the Petition Committee may be made in your absence.

Dated on the.....day of.....20.....

Petition Committee Secretary

SECOND SCHEDULE

Administrative fee

KES 20,000

Upon filing a Petition, the fees payable shall be as follows—

	<i>Subject of Petition</i>	<i>Fees</i>
1.	The short-listing of bidders under section 49(1) of the Act	0.01% of the estimate project cost, as established in the project feasibility study undertaken pursuant to section 32 (1) of the Act, but not less than KES 250,000.
2.	The disqualification of a private party under section 49 (2) of the Act	0.01% of the estimate project cost, as established in the project feasibility study undertaken pursuant to section 32 (1) of the Act, but not less than KES 250,000.
3.	The prequalification of bidders on the basis of the bidders' technical bids under section 54 of the Act.	0.03% of the estimate project cost, as established in the project feasibility study undertaken pursuant to section 32 (1) of the Act, but not less than KES 500,000.
4.	The decision of the contracting authority to enter into negotiations with a successful bidder under section 57 (1) of the Act.	0.05% of the estimate project cost, as established in the project feasibility study undertaken pursuant to section 32(1) of the Act, but not less than KES 750,000.
5.	Upon grant of an adjournment to a party by the Committee	KES 125,000
6.	Fee for filing preliminary objection	KES 125,000
7.	Fee for filing a defence or a Reply or an Affidavit	KES 15,000
8.	The Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable	