



Memorandum on the Public Private Partnerships (Amendment) Bill 2017 and Review of the Public Private Partnerships Act, 2013

To:

Michael R. Sialai, EBS,
 Clerk of the National Assembly,
 Office of the Clerk,
 Main Parliament Building,
 P. O. Box 41842 – 00100,
 Nairobi.



Cc:

Chairperson,
 Departmental Committee on Finance and National Planning
 National Assembly
 P. O. Box 41842 – 00100,
 Nairobi.

21st February 2018

About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

Introduction

Public Private Partnerships offer a convenient resource base for financing infrastructure projects and service delivery, and thus PPP arrangements must accord with Constitutional principles including the objects of devolution as provided in Article 174 and, to the extent that is applicable, Public Finance as provided in Article 201. Whereas the bill is progressive in that it seeks to make provisions for the recognition of County Governments as distinct authorities for public private partnerships, the Public Private Partnerships Act, 2013 requires further review in order to provide for the following additional issues:

1. **Public Participation and access to information (disclosure requirements for PPPs) in Public Private Partnership**
 - a. **Access to information**

Because there is no consideration for public input in PPP process and arrangements, the provisions for information are tokenistic and insufficient in view of Article 35 of the Constitution. Article 235 of the Constitution also provides for transparency and provision of accurate information to the public as among the values and principles of public service. There must be access to information provisions in the PPP implementation cycle depending on the stage of PPP project proposal and subsequent consideration, from the PPP Committee, Unit and nodes as well as from the negotiating committee to ensure that the public is informed as a measure of accountability.

b. Public Participation

It is noteworthy that the principal Act has no provisions for public participation in matters concerning Public Private Partnerships. This is contrary to Article (1) that provides all sovereign power belongs to the people of Kenya, Article 10 (2) (a) on Public participation as among the national values and principles of governance, Article 69 on participation on matters concerning the environment. Article 174 (c) and (d) outline the objects of devolution to include enabling participation of the people in the exercise of state powers and recognizing the right of communities to manage their own affairs respectively. Article 184 provides for the participation of residents in urban areas and cities and Article 201 provides for public participation in financial matters. Article 232 provides for the participation of the people in policymaking and accountability for administrative acts.

Consequently, Public Participation in Public Private Partnership is an unequivocal right and the PPP Act should make the necessary provisions to enable meaningful public engagement in the PPP implementation cycle including but not limited to:

✓ Public Participation in the development and finalization of project priority list at the National and County government level to be financed by way of PPP arrangements

In the principal Act provisions should be made for public participation in the development of priority lists for PPPs at both the National, and County level.

Public participation is crucial because

- a. Public participation forums ought to educate the citizens on the contracting authority/government contribution to the PPP venture, contribution of the private entity, provide a brief on value for money considerations that inform the PPP and any other consideration depending on the nature of the PPP venture and agreement between the government and the private entity.
- b. The Public must also be informed on any arrangements for revenue share between the national and or county government and the private entity on user fees collected from the operation and maintenance of the project/service as applicable.
 - i. In relation to the above, the public must also be informed on arrangements taken to ensure that any user fees to be paid by the public are predictable and constrained in a manner that ensures private interest will not override the

public interest considerations in view of operation and maintenance arrangements of projects. Such arrangements may include a requirement of user fee compliance to consumer price index or any other index as applicable.

✓ **Public participation prior a determination is made on feasibility studies by National and County governments of potential PPP projects**

Section 33 of the principal Act provides that a contracting authority in conjunction with the Unit to undertake a feasibility study on the PPP project the authority intend to implement under a public private partnership. Section 34 of the Act thereafter provides that the authority shall proceed to develop a report in a prescribed form.

The report format should ensure that sufficient information is provided to enable the public form informed opinions on the feasibility of proposed PPP projects.

Further, the Unit must undertake civic education and public participation based on the feasibility study report, include the views of the people, and transmit public views to the committee together with the feasibility study report for their consideration.

The Act should mandate the committee to make a determination on the sufficiency of the degree of public participation and access to information conducted by the Unit.

2. Linkages between PPP projects and the Budget Policy Statement (BPS) and the County Fiscal Strategy Paper

To make certain that PPP projects are aligned to National and County government planning process, the principal Act should specifically mandate the PPP Unit to ensure that PPPs approved for implementation are reflected in the BPS and the CFSP.

In conclusion

Whereas the bill seeks to strengthen the principal Act in view of the recognition of County Governments in undertaking public private partnerships, the lack of provisions for public participation in the Act underpins questions on the Constitutionality of the Act.

For further information, please contact us at
P.O. Box 48353 -00100 Nairobi
Tel: +254 20 4443676
www.tisa.or.ke