

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY SUBMISSION ON THE PUBLIC  
PRIVATE PARTNERSHIPS (COUNTY GOVERNMENTS) REGULATIONS, 2014

30<sup>TH</sup> December 2014

Submitted by Caroline Kioko

[caroline.kioko@tisa.or.ke](mailto:caroline.kioko@tisa.or.ke)

Phone contact: 0721-414399/4443676

Postal Address: P O Box 48353, 00100 Nairobi

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.

Public Private Partnerships (PPP) serve an important function in enabling governments attract private financing and technical expertise for service delivery while transferring some of the risks. For the benefits of the PPP to be realized transparency and accountability are critical alongside prudent financial management standards.

The Draft Public Private Partnerships County Government Regulations (2014) are timely and useful in directing the interaction by County Government with Private entities. We are concerned however that they fail to provide adequate provisions for public participation and accountability as required in the Constitution of Kenya.

#### Significance of public participation and accountability in PPP's

Through articles 1, 10, 35, 174, 201, 232 the constitution of Kenya compels public institutions to open up to public participation in decision making, implementation and scrutiny. The benefits of public participation and transparency include lower levels of corruption through increased scrutiny, between decisions making in line with local needs, sustainability of projects through increased local ownership, all of which lead to between development outcomes. Thus the PPP framework should be participatory, open and accountable to adhere to the constitution. It is noteworthy that whilst the Act anticipates transparency, accountability and civic education for the public, the proposed draft regulations entirely ignore these provisions.

Whereas the PPP Act assigns the PPP Unit responsibility for civic education, capacity building, transparency and accountability in the implementation process of PPP's, the draft proposed regulations to not make any attempt to operationalise these requirements. We therefore make the following suggested inputs into the proposed draft regulations.

## A: TRANSPARENCY

The regulations should expressly provide for transparency at all stages of the PPP process. This includes disclosing and enabling robust public discourse on the following:

- ❖ County PPP project list
- ❖ Profile of the private entities and their directors
- ❖ Scope of the PPP,
- ❖ Benefits sharing agreements
- ❖ Financing terms of the PPP
- ❖ Access to information: Expressly provide for access to information through publishing of PPP reports and access to PPP records (see annex 2)

## B: PUBLIC PARTICIPATION

The PPP regulations should provide for public participation (stakeholder engagement) through the following:

- ❖ Citizen Education: Expressly provide sustained public education to enable the public understand PPP processes and how to engage in the same.
- ❖ Citizen participation: Expressly provide for public participation at the various stages of the PPP process.
- ❖ Reporting: Expressly provide for comprehensive reporting to the public on service quality, price consistency and cost effectiveness of the PPP. Implementation reports of the accounting officer (PPP node) and reports of the PPP unit should be published within a stipulated timeframe.

## C: INTEGRITY

The proposed draft PPP regulations should make express provision for integrity on the part of public officers and service providers/contractors under the framework. It should cross reference with enabling laws and also provide its own express standards.

## D: LINKAGES WITH PUBLIC PARTICIPATION MECHANISMS IN THE BUDGET PROCESS

The PFM and CGA provide mechanisms for public engagement and accountability. The regulations should provide linkages with these mechanisms. For instance it is noteworthy that the regulations require that the project be listed in the CIDP in line with PFM section 126. However, they offer no guidelines on how the PPP's will link to other county budgeting processes such as the CBROP. They also do not expressly provide for robust public discussions on the proposed PPP's.

#### E: LOCAL OPPORTUNITIES IN PPPs

The PPP regulations should ensure that as far as possible the benefits of the PPP accrue to local communities through creation of jobs, profit sharing and opportunities for local contractors. In this regard the county government should be required to ensure an enabling environment including capacity development of target groups. This in turn has an intergovernmental aspect as capacity building is a national government function.

#### F: RIGHT TO INFORMATION ON PUBLIC PRIVATE PARTNERSHIPS (RTI-PPPs)

The regulations should address questions on proper definitions of who can request for this information, the timeline for processing the request, who to process the request, who the request is directed to, and the shape and form of the request and response. These are but parts of a larger question of facilitating participation and ultimately securing the taxpayers' contributions and the rights of the citizen. The right to information includes but is not limited to the aforementioned. As a guide, the annex below provides a possible sample template for RTI guidelines for PPPs.

#### G: LIMITATIONS TO ACCESS TO INFORMATION

Where information is considered proprietary to the service provider it may be redacted from public documents. However, the regulations should be clear limitations to avoid their abuse.

#### H: USE OF ICT

County governments should be required to publish key documents, opportunities and processes within a stipulated time frame and in so doing make use of the county website. e.g. The website should contain minimum records such as the priority list of projects; project documents and procurement documents; announcements on stages of the process and the final project agreement.

#### I: SIGNIFICANCE OF INTERGOVERNMENTAL RELATIONS IN PPPs

Under Article 6(2) the coordinative nature of Kenya's Devolved governance is anticipated. The regulations have a strong IGR component through the approval process of certain classification of PPP's by the PPP Committee. This section draws a concern in that the threshold for PPP's that require national approval will be arbitrarily set by the Cabinet Secretary (National). Secondly the scope of the PPP committee extends to approvals during the entire process of identification, negotiation, proposal approval which appears to be overstepping the mandate of the national government. Lastly, the PPP committee is not defined in the draft proposed regulations.

Another critical aspect of successful PPP's includes civic education and capacity building. Whereas these are anticipated by the Act, the regulations are silent. This matter needs urgent attention if county PPP processes are to meet the set requirements.

ANNEX 1:

Key Public Documents for Procurement Monitoring
1. Work plan
2. Bill of Quantities
3. List of all tenderers who participated in the tender The list must include (a) Full names and description of each tenderer (b) The tenderers postal and physical address (c) The tenderers telephone number, fax number and email (if applicable) (d) Tender advertisement notice
4. Minutes of tender opening committee
5. Original tender opening supply register
6. Original technical evaluation report and recommendations
7. Original financial/commercial evaluation report/minutes
8. Confirmed minutes of the tender Committee approving the award of tender
9. Copies of notification to the successful/unsuccessful tenderers
10. Final contract document
11. Supplier information as contained in the supplier questionnaire (see implementation guidelines)

## Annex 2:

### Sample RTI-PPP guidelines template

#### Part 1: Right to access

This part may cover the right to be given access to particular documents, citing the relevant bodies and authorities who are custodians of PPP information.

#### Part 2: Access application

This may cover direction on how one can apply for information access in an easy step-by-step format. This can include website for downloading request application documents, physical address for accessing or submitting documents/requests, phone numbers, email addresses and postal addresses of relevant bodies and officers.

#### Part 3: Dealing with application

This may cover how an application for PPP information is dealt with, i.e. who makes the decision for information request made to the County Government, how information requests not adhering to set guidelines are handled, and even the timeframe anticipated for processing the application.

#### Part 4: Grounds for application refusal

This part may offer guidelines on reasons for which a request for information may be denied, but attempts be made to minimize ambiguity, e.g. by specifying documents or information for which such refusal apply as opposed to all requested information.

#### Part 5: Decision

This part may cover procedures for informing the applicant on decision reached whether to grant or not to grant requested access to information. This may also cover, if access is granted, the steps the applicant will follow to gain this access, or if denied, the process through which the applicant will be informed of this decision, mode of communication and even timelines for conveying the reached decision. If there is a specific location for such information on decision reached, this too may be communicated.

#### Part 6: Disclosure other than by specified application process

This part may offer guidelines on other ways of accessing information if such information is available elsewhere, e.g. policy documents publicly available, websites with such information, and any other related documentation.