

GENERAL INFORMATION

Capital: Nairobi	Population: 53,01 (2021)	GDP: USD 110,3 billion (2021)
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LEGAL AND INSTITUTIONAL FRAMEWORK

PPP Law and other applicable texts

- Public Private Partnership Act, 2021 (PPPA)
- Proposed Public Private Partnerships Regulations, 2022
- PPP (Project Facilitation Fund) Regulations 2017
- Public Private Partnership Regulations, 2014 (PPP Regulations)
- Public Finance Management Act No 18 of 2012
- Policy Statement on Public Private Partnerships, 2011
- The Privatization Act, 2005
- The Public Roads Toll Act Cap.407, and
- The Public Procurement and Disposal Act, 2005

Note: The President signed the PPPA into law on 7 December 2021.

In 2017, the PPP Unit moved to amend the PPP Act, 2013 through the Public Private Partnerships (Amendment) Bill, 2018 (the Bill).

Other Applicable Sectoral Law

- Water Act, 2002
- Energy Act, 2006
- The Privatization Act, 2005

PPP Unit

- Public Private Partnerships Committee (PPPC) in charge of PPP policy guidelines formulation, project approvals, monitoring and evaluation of projects, ensures efficient implementation of any project agreement etc.
- The PPPA provides for the creation of a PPP Directorate instead of the previous PPP Unit. It shall be the lead institution in the implementation of a public private partnership under the PPPA.

Definition

(PPPA, 2021, Part I, Section 2)

“Public private partnership” is defined as a contractual arrangement between a contracting authority and a private party under which a private party:

- (a) undertakes to perform a public function or provide a service on behalf of the contracting authority;
- (b) receives a benefit for performing a public function by way of:
 - (i) compensation from public fund;
 - (ii) charges or fees collected by the private party from users or consumers of a service provided to them; or
 - (iii) a combination of such compensation and such charges or fees; and
- (c) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement; and
- (d) transfers the facility to the contracting authority

“Concession” is defined as a contractual license formalized by a project agreement, which may be linked to a separate interest or right over real property, entitling a person who is granted the license to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession.

Contracting Authorities also authorised to enter into PPP Arrangements under Schedule 2 of the PPPA. Examples of PPP Arrangements include: (i) management contracts where a private party is responsible for the management and performance of a specified obligation, within well-defined specifications for a specified period of time not exceeding 10 years; (ii) output based contracts where the private party is responsible for the operation, maintenance and management of an infrastructure facility for a period not exceeding 10 years and Contracting Authority retains ownership of facility; (iii) build-own operate scheme where the private party designs, finances, constructs, operates and maintains the infrastructure facility and provides services for a specified time etc.

The PPPA widens scope of PPP Arrangements to facilitate greater participation by private parties e.g. Annuity-based Design, Build, Finance and Operate, Strategic Partnerships and Joint Venture Partnerships.

General Principles

(PPPA, Sections 25, 26,37)

- Contracting Authorities to prepare lists of projects that they intend to undertake on a priority basis and submit the same to the Directorate for approval.
- The Directorate shall establish and maintain an up-to-date national list of approved projects and biannually

notify the PPPC, Cabinet Secretary, and Cabinet of all projects it approves.

- In the performance of its functions, the Directorate shall “establish an open, efficient, and equitable process for the management of the identification, screening, prioritization, development, procurement, implementation and monitoring of projects.”
- In procuring a PPP project, a contracting authority shall be guided by the principles of transparency, cost effectiveness and equal opportunity.
- Contracting Authority to undertake a feasibility study under the direction of the Directorate to determine viability.
- A Contracting Authority shall submit the feasibility report to the Directorate for evaluation. The Directorate shall submit an evaluation report together with its recommendations to the PPPC.
- The Cabinet Secretary shall approve a limit for contingent liabilities that the Committee may assign to projects under the Act.
- Upon approval of PPPC, Contracting Authority to invite requests for qualification.
- Prequalification committee to consider the requests for qualification and shortlist qualified bidders.
- Contracting Authority to, in consultation with the Directorate, prepare an invitation to bid and tender documents.
- Content of Tender documents to include general information related to the project, project specifications including technical and financial conditions to be met by the bidder etc.
- Contracting Authority permitted to, with the approval of the directorate, hold a competitive dialogue with each bidder to define the technical or financial aspects of the project.
- Evaluation to be done by a proposal evaluation team and approved by the PPPC.

PPPA introduces direct procurement and restricted bidding in the event that certain circumstances exist.

Tendering and contracting procedures / Choice of the private partnership

(Sections 30 to 56 of PPPA and PPP Regulations)

Privately Initiated Investment Proposals
(PPPA, Section 44)

A Contracting Authority to consider a privately initiated investment proposal without subjecting the proposal to a competitive process where:

- The PPPC determines that the proposal shall not generate market interest under competitive procurement;
- The proposal is anchored on unique elements; or direct negotiations are justified for any other reason in the public interest.

Negotiation and Signature of PPP Contracts
(PPPA, Sections 57, 24)

- Contracting Authority shall, in consultation with the Directorate, constitute a negotiating committee to enter into negotiations with a successful bidder and request the second ranked bidder to extend the viability of its bid pending the completion of negotiations with the successful bidder.
- The negotiating committee to prepare and submit to the Contracting Authority a project report specifying the negotiated terms together with recommendations. Upon review and approval of the project report, the Contracting Authority to submit the report to the Directorate for Approval.
- The Directorate submits the project and financial risk assessment report and its recommendations to the PPPC for approval.
- Once the PPPC approves, the Contracting Authority must inform Cabinet of the PPPC’s approval then execute the project agreement with the successful bidder.
- Only the Accounting Officer of the Contracting Authority can enter into a PPP agreement on behalf of the Contracting Authority.
- Natural resource PPPs must be approved by Parliament

Rights and Obligations of the public partner
(PPPA Section 22, PPP Regulations)

- Contracting Authorities’ duties include, preparing each project to ensure legal, regulatory, social, economic, and commercial viability, ensuring public participation on a project, providing technical expertise to the Directorate, among others.

Rights and Obligations of the private partner
(PPPA Section 70, PPP)

- Minimum contractual obligations required to be specified in a project agreement outlined in the Third Schedule without specific mention of rights and obligations of the public party.

Regulations)

Dispute resolution (PPPA 71)

- The parties to a project agreement may agree to resolve any disputes arising under the project agreement through arbitration or any other non-judicial means of dispute resolution as may be provided for in the project agreement.

EXAMPLES OF PROJECTS STRUCTURED AS PPP

	Thermal Power Generation (80MG) (Gulf Power)
Energy	Ngong Wind Farm (26 MW)
	Thika Power Plant (88 MW)
	Lake Turkana Wind Power (300 MW)
Urban Transports	Kenya-Uganda Railway Line
Roads	Nairobi-Thika Road
	2nd Nyali Bridge in Msa
Ports	2nd Container Terminal Mombasa
	Kisumu Lake Port