KN LAW LLP

Legal Alert | May 28, 2021

The Public Private Partnerships Bill, 2021

Introduction

The enactment of the Public Private Partnerships Act (No. 15 of 2013, Laws of Kenya (the "Act") provided the participation of the private sector in the financing, construction, development, operation and maintenance of infrastructure projects of the government. The Act brought much-needed improvement and haste in the completion of infrastructure projects. The Act was lauded and a number of projects have since been concluded from its operationalisation. Notwithstanding the above, gaps existed in the Act. It is in this regard that the Public Private Partnership Bill (the "Bill") has been introduced in Parliament, seeking to seal the gaps present in the Act and overhaul the present framework in relation to Public Private Partnerships ("PPPs"). In our newsletter, we highlight the salient features of the Bill and the changes from the Act.

Institutional Changes

The Act established the Public Private Partnerships Committee (the "PPP Committee") whose functions slightly differ in the Bill in comparison with its functions under the Act. Some of the functions of the PPP Committee under the Bill include the formulation of policies on PPPs, overseeing the implementation of PPP contracts and approving negotiated PPP contracts.

The Public Private Partnership Unit (the "PPP Unit") was established under the Act to provide technical, financial and legal expertise to the PPP Committee and the PPP nodes. The Bill replaces the PPP Unit with the Directorate of PPPs (the "Directorate"), which shall be the lead institution in the implementation of a PPP project. The Directorate will also be in charge of originating, guiding and coordinating the selection, ranking and prioritization of PPP projects and overseeing project appraisal and development activities of contracting authorities.

To note is that a Director-General, in charge of the Directorate, has been appointed yet there is no provision for the office in the Act. This is likely to suggest that the Bill will pass as is.

Project Agreements

Under the Act, a PPP Node was established to act on behalf of a contracting authority and prepare project agreements to be entered into between a contracting authority and a private entity. The PPP Node would report to the contracting authority. However, the Bill dispenses with the PPP Node, with the contracting authority now being tasked with and reporting to the Directorate.

The Bill makes it mandatory for the publication, in at least two newspapers of national circulation, of the details of an executed project agreement regarding a PPP. This is a positive step to enhance the principles of public participation and access to information which has in the past been lacking in the procurement and award of PPP projects.

Implementation of PPPs by County Governments

A significant change to the framework of PPPs under the Bill is the entering into PPP agreements between county governments and private entities, and providing more provisions for the implementation of PPPs by County Governments. County Governments are nonetheless required to obtain approval of the county assembly before embarking on a PPP project, as well as obtaining the written approval to undertake the project from the PPP Committee and Cabinet Secretary in charge of finance where the project would require a government support measure; or exceeds the fiscal ability of the county

Procurement Methods

Currently, there are two procurement methods for PPPs under the Act: Competitive Bidding and Privately-Initiated Proposals (PIPs).

PPIs are the subject of much scrutiny due to the concerns of lack of transparency and lack of objectivity associated with the tendering process. The Bill sets out clear circumstances in which PIPs are initiated such as if the project is aligned with national infrastructure priorities and meets a demonstrated societal need and the project provides value for money. The Bill introduces Direct Procurement but reserves this method for exceptional circumstances. These include where the works or services are only available from a limited number of private parties and where direct procurement shall significantly lower the cost of delivering the project etc. The Bill also specifies projects that qualify for direct procurement as projects linked to specific parties on account of national interest or external trade.

Local Content

The Bill makes it mandatory for PPPs to give priority to local content. Local content has been defined by the Bill as the added value brought to the Kenyan economy from PPPs by way of local distribution of accruing benefits including through the procurement of locally available workforce, services and supplies and systematic development of national capacity and capabilities. The PPP Committee, on advice of the Directorate, is to issue such guidelines, standards and practice notes on local content.

PPP Arrangements

The Bill introduces new arrangements to the PPP structure. The new structures to be considered for PPP arrangements include: Brownfield Concessions; Build Transfer; Annuity-based Design, Building, Finance and Operate; Joint Venture Partnerships and Strategic Partnerships. This allows PPPs to consider more options in their structure and evaluate risks based on the additional structure.

Fees payable

The Bill gives the Directorate the power to impose a mandatory success fee of not more than one per cent (1%) of the total project cost, payable into the Public Private Partnership Facilitation Fund ("the Fund"), on a private entity that achieves financial close on a Project. Financial close, unlike in the Act, is defined under the Bill to mean the date when all conditions precedent required to be met to achieve first drawdown on senior debt under a project agreement are met.

Under the Act, it is not mandatory for the private entity to pay the success fee. For Privately-Initiated Proposals, the Bill introduces a non-refundable review fee payable into the Fund by the private entity. The fee is to be calculated at zero-point-five percent (0.5%) of the estimated project cost or fifty thousand United States dollars (US$ 50,000), whichever is higher. This change may discourage investors as they would have to part with the fees or otherwise face a penalty.

Conclusion

The Bill is a positive step taken towards sealing the existing gaps in the Act. It is likely to create a conducive business environment that will push Kenya to achieve its developmental goals. However, the implementation of some provisions may be difficult to achieve, for instance, the local content requirements. The introduction of direct procurement as a procurement method may also be misused given the procurement scandals that have rocked the country in the past. However, the Bill is laudable for bringing into focus the role that county governments can play in the PPP framework, as envisioned under the Constitution.

We will keep you updated on any developments regarding the Bill as it goes through the legislative processes in Parliament.