



Bill No. 17 *Public Private Partnerships Bill*

THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2012

MEMORANDUM

1. Policy and principles of the Bill

The objects and principles of the Public Private Partnerships Bill, 2012 are to; provide for public private partnership agreements, to provide for the functions of contracting authorities, accounting officers, project officers, project teams and evaluation committees, to provide for the role of the private party in a public private partnership, to provide for the management of public private partnerships, to provide for project inception and feasibility studies for public private partnerships, to provide for the disqualification of bidders and the evaluation of public private partnership bids, to provide for public private partnership agreements and the monitoring of projects, to provide for the bidding methods, procurement procedures and types of public private partnership agreements and for related matters.

A public private partnership exists where a contracting party, for instance a Ministry, department of Government or any other public body enters into a commercial transaction with and a private party, where the private party performs a function on behalf of the contracting authority.

2. Defects in the existing law

Uganda does not at present have a distinct piece of legislation governing public private partnerships. Uganda's experience with public private partnerships to date has been limited to a few

projects including energy infrastructure development and concessions of the existing assets in the energy, transport, water and tourism sectors. The implementation of these public private partnerships has occurred without a clear policy, legal and institutional framework and this has sometimes been poorly coordinated with ad hoc processes and responsibilities leading to mixed results.

The Bill therefore provides for the policy, legal and institutional framework for public private partnership agreements.

The proposed legislation will govern the relationship between Government and the private parties, provide guidelines and procedures for public private partnership procurement, and set out the roles and responsibilities of the various government offices during public private partnership project implementation.

3. Provisions of the Bill

The Bill consists of five Parts and a Schedule

PART I—PRELIMINARY

This Part deals with preliminary matters relating to the commencement of the Act, application of the Act, principles to govern the implementation of public private partnerships and the interpretation of the words and phrases used in the Act.

PART II—MANAGEMENT OF PUBLIC PRIVATE PARTNERSHIPS

Clauses 5-10 provides for contracting authority

According to clause 5(1), a contracting authority shall identify, appraise, develop, procure and monitor a public private partnership in accordance with the Act.

Clause 6 provides for the functions of the accounting officer including signing an agreement on behalf of the contracting authority with the private party in accordance with the Act.

Clauses 7 to 10 provide for the functions of the project officer, project auditor, project team and the evaluation committee respectively, in public private partnerships process.

Clause 11 provides that a private party in a public private partnership shall be a special purpose company incorporated under the laws of Uganda to implement a specific public private partnership.

Clause 12 provides for the establishment of a department for public private partnerships in the Ministry responsible for finance after consultation with the Ministry responsible for public service.

PART III—PUBLIC PRIVATE PARTNERSHIP PROCESSES

Clause 13 provides for project inception. Where a contracting authority identifies a project for implementation as a public private partnership, the contracting authority shall conduct a preliminary economic cost-benefit analysis of the project.

Under clause 14, the accounting officer is to undertake or cause to be undertaken a feasibility study to assess whether the project is feasible as a public-private partnership.

Clause 15 provides for the procurement of a private party of a public private partnership to be by an invitation to tender issued by a contracting authority in accordance with the procurement methods and procedures prescribed in Part IV of the Bill.

Clause 16 provides for the disqualification of a bidder by a contracting authority from participating in a bidding process where the bidder or the representative of the bidder is convicted of a criminal offence punishable by imprisonment of at least three months.

Clause 17 provides for the evaluation of bids. Under clause 17 (1), the evaluation committee is to verify the economic and financial standing of a bidder, the ability of a bidder to secure credit and the technical and professional capacity of a bidder.

Clause 18 provides the conditions for entering into a public private partnership agreement and the contents of the agreement.

Clause 19 provides for the monitoring of public private partnerships by a contracting authority.

Under clause 20, the Auditor General or an auditor appointed by Auditor General is to audit each public private partnership entered into by a contracting authority in each financial year.

PART IV—PUBLIC PRIVATE PARTNERSHIP PROCUREMENT RULES AND METHODS

Clauses 21-22 deal with competitive bidding methods

Clause 21 provides for open bidding to be a direct invitation to participation by all interested bidders and to be by an invitation to tender or a call for expression of interest for the public private partnership.

Clause 22 provides for restricted bidding to be used to obtain bids by direct invitation without open advertisement.

Clauses 23-24 deal with non competitive bidding methods

Clause 23 (1) provides for direct procurement as a sole procurement method used where the circumstances do not allow the use of competition and under clause 23(2), the direct procurement shall be used to achieve efficient and timely procurement, where the circumstances do not allow the use of a competitive method.

Clause 24 provides for an unsolicited proposal as a proposal for a public private partnership that is independently originated and developed by the proposer of the unsolicited proposal and is prepared without the supervision of the contracting authority.

Clauses 25-26 deal with public private partnership procurement procedures

Under clause 25 a contracting authority shall use the competitive dialogue procedure, by simultaneously inviting the selected bidders to participate in the competitive dialogue.

According to clause 26, a contracting authority shall use negotiated procedure where the open or restricted bidding methods and the competitive dialogue procedure are used, but where the bids submitted do not satisfy the requirements of this Act or where the terms of the proposed contract are not substantially altered from the terms proposed during the open bidding, or restricted bidding methods or competitive dialogue procedure.

Clauses 27-35 indicate the different types of public private partnerships agreements to be used in Uganda.

PART V—MISCELLANEOUS

Clauses 36 to clause 40 provides for an offence for any person who interferes with the work of an official of a contracting party, a contracting party to disclose information, disclosure of interest by an official of a contracting party, power of the Minister to amend the Schedule with the approval of Cabinet and to make regulations for giving full effect to the provisions of the Act respectively.

Clause 41 seeks to amend section 88L of the Public Procurement and Disposal of Assets Act, 2003 to stop the Public Procurement and Disposal of Public Assets Authority from handling public private partnerships.

MARIA KIWANUKA,
Minister of Finance Planning and Economic Development.

THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2012

ARRANGEMENT OF CLAUSES

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20. Audit.

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A BILL for an Act

ENTITLED

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2012

An Act to provide for public private partnership agreements; to provide for the functions of contracting authorities, accounting officers, project officers, project teams and evaluation committees; to provide for the role of the private party in a public private partnership; to provide for the management of public private partnerships; to provide for project inception and feasibility studies for public private partnerships; to provide for the procurement of public private partnerships; to provide for the disqualification of bidders and the evaluation of public private partnership bids; to provide for public private partnership agreements and the monitoring of projects; to provide for the bidding methods, procurement procedures and types of public private partnership agreements and for related matters.

BE IT ENACTED by Parliament as follows:

PART I—PRELIMINARY.

1. Commencement.

This Act shall come into force on a date appointed by the Minister by statutory instrument.

2. Application of Act.

(1) This Act shall apply to all public private partnerships and in particular shall apply to the design, construction, maintenance and operation of infrastructure or services provided under the following projects—

- (a) road, rail, water and air transport facilities including harbor and port facilities, airports and airport facilities;
- (b) information and computer technology, telecommunication and telecommunication networks;
- (c) social infrastructure including health care facilities, correctional facilities, education facilities, accommodation facilities, public housing and court facilities;
- (d) water management facilities, including dams and water storages, water supply and distribution systems, irrigation and drainage systems and sanitation, sewerage and waste management systems;
- (e) oil pipelines, gas pipelines and gas storage, refinery, conveyance and distribution facilities;
- (f) energy-related facilities and other facilities for the generation, preservation, transmission and distribution of electricity;
- (g) sports and recreational facilities, sport grounds and space for sports and recreation, including facilities for recreational, sports and cultural activities;
- (h) tourist infrastructure facilities;
- (i) prospecting for and mining, extraction and processing of mineral raw materials; and
- (j) strategic industries.

(2) A project specified in subsection (1) qualifies for implementation under this Act where it fulfills the objectives of the National Development Plan.

3. Principles to govern the implementation of public private partnerships.

The implementation of a public private partnership shall be governed by the following principles—

- (a) ensuring value for money, by optimal allocation of risks to private parties and maximization of the benefits to be obtained from the expertise and financing by the private parties;
- (b) protection and respect of the rights and interests of users of the infrastructure or services offered under a project;
- (c) ensuring that the procurement of a public private partnership does not restrict competition among the bidders and that it is conducted on equal terms and uses objective criteria;
- (d) transparency, by ensuring that all bid notices are advertised as prescribed and that the bidders have access to the same information;
- (e) accountability of the contracting authority to the users of the infrastructure or service to be offered under a project;
- (f) promotion of the participation of Ugandans as private parties in public private partnerships;
- (g) ensuring that the terms and conditions of service of the employees affected by a project are in accordance with the relevant laws; and
- (h) protection of the intellectual property of bidders at all stages of a project.

4. Interpretation.

In this Act, unless the context otherwise requires—

“accounting officer” means a person designated as such under the law, to perform the functions of accounting officer of a contracting authority;

“agreement” means a public-private partnership agreement entered into in accordance with this Act;

“contracting authority” means a Ministry, department of Government or any other body established by Government and mandated to carry out a public function but does not include a local government;

“Minister” means the Minister responsible for finance;

“Ministry” means Ministry responsible for finance;

“private party” means the private party provided for under section 11;

“project” means a public private partnership;

“public-private partnership” means a commercial transaction between a contracting authority and a private party where the private party performs a function of the contracting authority on behalf of the contracting authority, for a specified period, and

- (a) acquires the use of the property, equipment or other resource of the contracting authority for the purposes of executing the agreement;
- (b) assumes substantial financial, technical and operational risks in connection with the performance of the function or use of the property; or

- (c) receives a benefit for performing the function through payment by the contracting authority or charges or fees collected by the private party from the users of the infrastructure or service, or both;

“public private partnership agreement” means a written contract recording the terms of a public private partnership concluded between a contracting party and a private party;

“transaction advisor” means a person appointed as such by the accounting officer of a contracting authority;

“value for money” means the optimal benefit of a public private partnership to a contracting authority, defined in terms of the cost, quality and quantity of the project and the risk transferred to the private party.

PART II—MANAGEMENT OF PUBLIC PRIVATE PARTNERSHIPS

Contracting authority

5. Contracting authority.

(1) A contracting authority shall identify, appraise, develop, procure and monitor a public private partnership in accordance with this Act.

(2) A contracting authority may participate in the financing of a project by—

- (a) making a monetary contribution to the capital of the project;
- (b) concessioning the use of an asset of the contracting authority or of Government, partially or in whole; or
- (c) assigning a right to operate and exploit an asset of the contracting authority or of Government, for the duration of an agreement.

(3) For the avoidance of doubt, Government or a contracting authority shall not borrow, guarantee or raise a loan for a public private partnership, except as authorised by Article 159 of the Constitution.

(4) A contracting authority may participate in the operation or exploitation of a project, and where a contracting authority participates, the form of participation which the contracting authority is to take shall be clearly defined in the invitation to tender.

(5) For the purposes of subsection (1), a project shall be implemented by—

- (a) the accounting officer;
- (b) a project officer;
- (c) transaction advisor;
- (d) a process auditor;
- (e) a project team; and
- (f) an evaluation committee.

(6) Where due to the technical requirements of a public private partnership, a contracting authority does not have the appropriate staff to be appointed as a project officer or process auditor, the contracting authority shall, using the procedures prescribed under the Public Procurement and Disposal of Public Assets Act, appoint a person with the appropriate skills and experience from outside the contracting authority, to act as such.

6. Functions of accounting officer.

(1) The functions of the accounting officer are—

- (a) to appoint the project officer, transaction advisor, process auditor and the project team;

- (b) to protect against forfeiture, theft, loss, wastage or misuse, any property of the contracting authority or Government, placed under the control of a private party; and
- (c) to sign an agreement on behalf of the contracting authority, with the private party, in accordance with this Act.

(2) An accounting officer shall not enter into an agreement that in any way binds the contracting authority to a future financial commitment or which results in a contingent liability, except where the future financial commitment or contingent liability is authorised by Parliament in the budget of the contracting authority.

(3) An accounting officer shall be personally responsible for the effective and efficient execution of the agreement.

(4) An accounting officer who signs an agreement contrary to this Act commits an offence and is, on conviction liable to a fine not exceeding five hundred currency points or imprisonment not exceeding two years and ten months or both.

7. Functions of project officer.

- (1) The functions of the project officer are—
- (a) to manage the procurement and implementation of a project;
 - (b) to monitor the performance of the private party in the management and execution of a project;
 - (c) to solicit for a private party for a project; and
 - (d) to perform any other functions as may be assigned by the accounting officer.

(2) A project officer shall be under the direct supervision of the accounting officer.

8. Functions of process auditor.

(1) The process auditor shall ensure that the contracting authority complies with the requirements for implementing public private partnerships as provided in this Act.

(2) Before an agreement is signed, the process auditor shall prepare a report indicating whether the contracting authority has complied with the requirements for this Act.

(3) Where the requirements of this Act have not been complied with, the accounting officer shall prior to forwarding the agreement to Cabinet for approval, address all the issues raised by the process auditor.

9. Functions of project team.

(1) The functions of the project team are—

- (a) to develop the project for procurement;
- (b) to procure the private party in accordance with this Act;
- (c) to recommend to the accounting officer the composition of an evaluation committee;
- (d) to advise the accounting officer on the award of tenders;
- (e) to inform the accounting officer of the progress of the project; and
- (f) to prepare and submit to the accounting officer the documents necessary for the procurement of a project, required under this Act.

(2) A project team shall be headed by the project officer and shall be composed of officials with the required technical skills appointed from the staff of the contracting authority and may include any other person appointed from outside the contracting authority.

10. Evaluation committee.

(1) The accounting officer shall for each project, on the recommendation of the project team, appoint an evaluation committee.

(2) An evaluation committee shall be composed of officials with the technical skills required for the evaluation of a bid, appointed from the staff of the contracting authority and may include any other person appointed from outside the contracting authority.

(3) An evaluation committee shall evaluate the bids submitted under this Act, as may be prescribed by law.

*Private party***11. The private party.**

(1) The private party in a public private partnership shall be a special purpose company incorporated under the laws of Uganda, to implement a specific public private partnership.

(2) Any transfer of shares, increase in share capital or changes in the corporate status of a special purpose company shall be with the written approval of the Minister and the Minister of the contracting authority.

(3) Notwithstanding section 5 (2), the private party shall bear all the responsibility and risks of the financing required for the proper performance of the obligations of the private party under an agreement.

(4) The private party shall furnish the accounting officer with evidence of the funding available to the private party for the performance of the obligations to be undertaken by the private party under a project.

(5) The evidence of funding shall indicate—

(a) the capital of the private party;

- (b) the capital secured by the private party in the form of credit or loan, and especially in the form of loans, bonds and securitisation of future and existing receivables; and
- (c) the necessary guarantees or assurances required for obtaining the capital or credits required under paragraphs (a) and (b).

(6) Any permit required for the financing or the design, construction, maintenance and operation of infrastructure or services under an agreement, as the case may be, shall be issued in the name and for the account of the private party.

The role of the Ministry

12. Establishment of department for public private partnerships.

(1) The Ministry shall, in consultation with the Ministry responsible for the public service, establish within the Ministry, a department for public private partnerships.

(2) The department established under subsection (1), shall—

- (a) provide the necessary guidance and assistance to contracting authorities in the development of projects;
- (b) assess projects for public private partnerships to confirm that they are affordable and that the financial commitments are manageable in terms of the debt management policy and that they are within the Government policies;
- (c) where requested, assist the Auditor General in auditing projects;
- (d) give advice to Government on policy on public private partnerships;
- (e) provide training on public private partnerships to the staff of contracting authorities;

- (f) promote public awareness on public private partnerships; and
- (g) perform any other function that the Permanent Secretary of the Ministry may assign.

PART III—PUBLIC PRIVATE PARTNERSHIP PROCESSES

13. Project inception

(1) Where a contracting authority identifies a project for implementation as a public private partnership, the contracting authority shall conduct a preliminary economic cost-benefit analysis of the project.

(2) The preliminary economic cost-benefit analysis conducted under subsection (1) shall outline—

- (a) the strategic objectives of implementing the project as a public private partnership;
- (b) the projected cost of the project;
- (c) the benefit of the project to the contracting authority;
- (d) the rationale for the project;
- (e) the projected policy outcomes of the project; and
- (f) how the project is to be managed by the contracting authority.

(3) Where a contracting authority confirms from the preliminary economic cost-benefit analysis that the project is suitable for implementation as a public private partnership, the accounting officer shall—

- (a) register the project with the Ministry, specifying the type of the project, the value or size of the project and any other information that is relevant to the project;

- (b) inform the Ministry of the expertise available within the contracting authority to execute the project and where the contracting authority does not have the expertise, appoint competent persons from outside the contracting authority; and
- (c) where necessary, appoint a transaction advisor, to undertake the feasibility study, contract negotiations and the preparation of the contract.

(4) A contracting authority shall before registering a project under (3) (a), appoint a project officer and establish a project team, for the project.

14. Feasibility study.

(1) Where a project is registered with the Ministry as a public private partnership, the accounting officer shall undertake or cause to be undertaken a feasibility study, to assess whether the project is feasible as a public-private partnership.

(2) The feasibility study shall—

- (a) identify and define the function which the private party is to perform on behalf of the contracting authority;
- (b) project the impact of performing the function by the private party, on the staff, assets, liabilities and revenues of the contracting authority;
- (c) assess the need of the contracting authority in relation to its function including the options available to the contracting authority to satisfy the need, and the advantages and disadvantages of each of the options identified;
- (d) identify the comparative advantage of implementing the project as a public private partnership and explain the strategic and operational benefits of the project for the contracting authority, using the strategic objectives of the contracting authority;

- (e) describe in specific terms—
 - (i) the nature of the functions of the contracting authority, the specific functions to be performed by the private party under the project, and the expected inputs and outputs of the project;
 - (ii) where the project involves the transfer of the performance of a function of the contracting authority to the private party, the nature of the function to be transferred;
 - (iii) the extent to which the function in paragraph (e) (ii) may be legally and effectively performed by a private party;
 - (iv) the most appropriate type of public private partnership which the contracting authority should use to implement the project; and
 - (v) where the project involves the use of property of the contracting authority or of Government, a description of the property, the current use, if any, of the property and a description of the type of use that the private party may legally subject the property;
- (f) demonstrate that the project will—
 - (i) be affordable to the contracting authority;
 - (ii) appropriately transfer the financial, technical and operational risks involved, to the private party; and
 - (iii) provide value for money for the contracting authority;
- (g) indicate the capacity of the contracting authority to procure, manage, and monitor the project; and

(h) assess the capacity of the private party to implement the project.

(3) The assessment under subsection (2) (c) shall indicate the comparative projections of—

(a) the full cost of the project, to the contracting authority, if the project is not carried out as a public private partnership; and

(b) the full cost of the project, to the contracting authority, if the project is carried out as a public private partnership.

(4) The contracting authority shall submit a report of the feasibility study to the Ministry for approval.

(5) The contracting authority shall submit with the report of the feasibility study, for the approval of the Ministry, the documents to be used to procure the project, the evaluation criteria to be used and the draft agreement.

(6) A contracting authority shall not procure a private party without the prior written approval of the feasibility study, by the Ministry.

(7) Where the approved feasibility study is revised, the contracting authority shall submit to the Ministry, for approval, the revised feasibility study which shall state the justification for the revision, and the impact of the revision on the affordability of the project and have an evaluation of value for money and risk transfer elements in the revised feasibility study.

15. Procurement of public private partnerships.

(1) The procurement of a private party of a public private partnership shall be by an invitation to tender issued by a contracting authority in accordance with the procurement methods and procedures prescribed in Part IV.

(2) The minimum qualifications required of a bidder of a project shall be specified in the invitation to tender.

(3) The procurement of a private party shall be fair, equitable, transparent, competitive and cost-effective.

(4) Where a project is to be financed by a contracting authority, the contracting authority shall, prior to procuring a private party, obtain written confirmation from the Minister that the financing required shall be available for the implementation of the project.

(5) Where the open bidding or the restricted bidding procurement method is to be used, the contracting authority may, prior to issuing the bid documents, promote the project to the prospective bidders using any method that does not limit competition, including direct marketing, road shows and investment promotion bulletins.

(6) A bid submitted under this Act shall be evaluated using the criteria of the most economically advantageous, or the criteria of the lowest price, as may be prescribed by law.

16. Disqualification of bidders.

A contracting authority may disqualify a bidder from participating in a bidding process where the bidder or the representative of the bidder—

- (a) is convicted of a criminal offence punishable by imprisonment of at least three months;
- (b) is declared bankrupt, ordered into liquidation, or is in any other comparable state arising from a similar procedure, prescribed under the laws of Uganda or the laws of the country of origin of the bidder;
- (c) is convicted of an offence related to professional misconduct under the laws of Uganda or the laws of the country of origin of the bidder;

- (d) is found guilty of an offence or professional misconduct pertaining to the profession of the bidder or of the representative of the bidder;
- (e) does not fulfil the obligations relating to the payment of taxes as required by the laws of Uganda or the laws of the country of origin of the bidder;
- (f) does not fulfil the obligations relating to the payment of social security contributions as required by the laws of Uganda or the laws of the country of origin of the bidder;
- (g) makes serious misrepresentations in the information required for the purposes of this section or fails to provide the required information; or
- (h) is disqualified as may be prescribed by regulations made under this Act.

17. Evaluation of bids.

(1) For the purposes of evaluating bids, the evaluation committee shall, using the prescribed procedure and the principles set out in section 3, verify the economic and financial standing of a bidder, the ability of a bidder to secure credit, and the technical and professional capability of a bidder.

(2) After the evaluation of the bids, the contracting authority shall submit a report of the evaluation to the Ministry, and the report shall indicate—

- (a) how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids;
- (b) how the criteria in paragraph (a) were satisfied in the preferred bid; and
- (c) any other information as may be required by the Ministry.

18. Public-private partnership agreement.

(1) The Minister shall, with the approval of Cabinet, by statutory instrument, prescribe the value of an agreement for which the approval of Cabinet is required before the agreement is signed by an accounting officer.

(2) Where an agreement is of a value for which the approval of Cabinet is required before it is signed by the accounting officer, the accounting officer shall not sign the agreement without the approval of Cabinet.

(3) An agreement shall be forwarded to Cabinet for approval where the contracting authority confirms that—

- (a) the best evaluated bid meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer;
- (b) the contracting authority puts in place a management plan that explains the capacity, including the mechanisms and procedures of the contracting authority, to implement, manage, enforce, monitor and report on the project effectively; and
- (c) satisfactory due diligence is carried out on the private party in relation to the competence and capacity of the private party to enter into the agreement.

(4) Where an agreement is of a value for which the approval of Cabinet is not required before it is signed, the accounting officer shall prior to signing the agreement, confirm that the requirements of subsection (3) are fulfilled by the contracting authority.

(5) A public private partnership agreement shall contain clear and detailed descriptions of the rights and obligations of the contracting authority and the private party.

(6) An agreement shall specifically provide for the following—

- (a) the type of the public private partnership and the specifications of the infrastructure or service to be provided, the sum to be paid to the private party and how the amounts, if any, to be paid for the use of the infrastructure or provision of the service shall be shared by the contracting authority and the private party;
- (b) the time schedule for the performance of the project, the conditions under which the schedule may be amended, the penalties and bonuses to be applied in the event of failure to comply with the time schedule or early completion, the duration of the agreement and the conditions under which its term may be extended or abridged;
- (c) the formal concession to the private party of the use or exploitation of the assets of the contracting authority or of Government, which are necessary for the implementation or operation of the infrastructure or provision of the service, and any payments which may be envisaged;
- (d) the financing of the implementation of the project;
- (e) approval by the contracting authority for the financing of the project by the private party, where necessary, and the procedure for amending that approval;
- (f) the allocation of risk between the contracting authority and the private party and the consequences of events representing *force majeure*;
- (g) the insurance policies for the project or for the private party;
- (h) provisions for the protection of the environment;
- (i) provisions for the protection of intellectual property rights;
- (j) the mode of operation, maintenance and exploitation of the project;

- (k) the amounts to be paid for the use of the infrastructure or service and the manner in which the payments are to be collected and where necessary, the reasons and methods for revision of the payments;
- (l) where necessary, the method of allocating between the contracting authority and the private party the benefits that may accrue from a restructuring of the loan of the private party or after a specific percentage return on the capital of the private party is attained;
- (m) the extent of the guarantees to be provided by the private party, for the proper implementation, operation and maintenance of the infrastructure, or for the proper provision of the service;
- (n) the substitution of the private party or of the creditors by decision of the contracting authority and the circumstances under which the substitution may be permitted;
- (o) the payment of compensation and the reparation of any loss or damage caused where the contracting authority or the private party violates its contractual obligations;
- (p) the grounds for termination of the agreement and the consequences of this;
- (q) the law to govern the agreement;
- (r) the procedure for resolving disputes between the contracting authority and the private party;
- (s) a detailed definition of the minimum operation and maintenance requirements;
- (t) the procedures for the delivery of the project to the contracting authority at the end of the agreement period, specifications of the obligations for training and transfer of know-how from the private party to the contracting authority, the specifications applicable to the project on

handover and the guarantees, as well as their duration, following the handover of the infrastructure or the service by the private party;

- (u) provisions for the hygiene and safety of the employees and the users of the infrastructure or the service;
- (v) the methods to be used for ensuring quality during the implementation and operation of the infrastructure or provision of the service; and
- (w) the methods to be used to monitor the performance and operation of the infrastructure or provision of the service.

19. Monitoring of public private partnerships.

A contracting authority shall monitor a project to determine whether or not—

- (a) the project complies with the conditions of the agreement;
- (b) remedial measures should be taken to correct any defaults;
- (c) any penalties are imposed, where there are defaults;
- (d) the tariffs and levies, if any are charged, are as prescribed; and
- (e) the private party complies with the instructions of the contracting authority.

20. Audit.

(1) The Auditor General or an auditor appointed by the Auditor General shall, in each financial year, in accordance with the National Audit Act, audit each public private partnership entered into by a contracting authority.

(2) For the purposes of subsection (1), the Auditor General or an auditor appointed by the Auditor General shall audit a public private partnership from the project inception stage to the conclusion of the project.

PART IV—PUBLIC PRIVATE PARTNERSHIP PROCUREMENT RULES AND METHODS

*Competitive bidding methods***21. Open bidding.**

(1) Open bidding shall be a direct invitation to participation by all interested bidders and shall be by an invitation to tender or a call for expression of interest for the public private partnership, in at least one news paper of wide national circulation.

(2) Where necessary, a contracting authority may in writing request any or all of the bidders who submit bids in response to an invitation to tender or a call for expression of interest to submit refined bids which shall be considered as the best and final offers of the bidders.

(3) A refined bid submitted as a best and final offer in response to a request made under subsection (2) shall not change or improve the substance of the original bid except in accordance with the request by the contracting authority.

(4) The procurement of a private party under the open bidding method shall be as may be prescribed by law.

22. Restricted bidding.

(1) Restricted bidding shall be used to obtain bids by direct invitation without open advertisement.

(2) The procurement of a private party under the restricted bidding method shall be as may be prescribed by law.

*Non competitive bidding methods***23. Direct procurement.**

(1) Direct procurement is a sole source procurement method used where the circumstances do not allow the use of competition.

(2) The direct procurement method shall be used to achieve efficient and timely procurement, where the circumstances do not allow the use of a competitive method.

24. Unsolicited proposals.

(1) An unsolicited proposal is a proposal for a public private partnership that—

- (a) is independently originated and developed by the proposer of the unsolicited proposal; and
- (b) is prepared without the supervision of the contracting authority.

(2) An unsolicited proposal shall indicate—

- (a) the objectives of the proposed project, the significance of the proposed project and how the proposed project assists the contracting authority to achieve its objectives;
- (b) a description of the proposed project in sufficient technical detail;
- (c) a cost-benefit analysis of the proposed project; and
- (d) an explanation as to why the application merits special treatment outside the competitive bidding process.

(3) An unsolicited proposal shall only be considered by a contracting authority—

(a) where—

- (i) the project proposed satisfies the objectives of the National Development Plan; and
- (ii) a feasibility study of the project which establishes affordability and value for money, is carried out by the proponents of the unsolicited proposal; and

- (b) where the infrastructure or service to be provided under the project involves an innovative design;
 - (c) where the infrastructure or service to be provided under the project involves an innovative approach to project development and management; or
 - (d) where the infrastructure or service to be provided under the project presents a new and cost effective method of service delivery.
- (4) A contracting authority may accept an unsolicited proposal.
- (5) Where a contracting authority accepts an unsolicited proposal, the contracting authority shall evaluate the unsolicited proposal and assess—
- (a) the unique, innovative, researched or meritorious methods, approaches or concepts demonstrated in the unsolicited proposal;
 - (b) the overall scientific, technical, or socio-economic merit of the unsolicited proposal;
 - (c) the potential contribution of the unsolicited proposal to the strategic objectives of the contracting authority as specified in the development plan of the contracting authority;
 - (d) an assessment of whether the proposed cost of the project is realistic, affordable and justified; and
 - (e) any other fact which, in the opinion of the contracting authority is relevant to the unsolicited proposal.
- (6) Where a contracting authority accepts an unsolicited proposal, the proposal shall be subjected to the competitive bidding procedure and shall be open to participation by all interested bidders.

(7) For the purposes of subsection (6), the tender documents prepared shall indicate the method to be used to compensate for the proprietary interests the proponent of an unsolicited proposal, where the proponent is not successful under the competitive bidding procedure.

Public private partnership procurement procedures

25. Competitive dialogue procedure.

(1) A contracting authority shall use the competitive dialogue procedure, by simultaneously inviting the selected bidders to participate in the competitive dialogue, where—

- (a) a project is complex;
- (b) the competitive procedure and open bidding or restricted bidding procedures do not permit the awarding of a contract; or
- (c) the contracting authority is not able to define objectively the technical means to use to determine whether the needs and objectives of the contracting authority will be satisfied by the project or to specify the legal or financial structure of the project.

(2) The competitive dialogue procedure shall be used after the pre-qualification of bidders under the competitive procurement process.

(3) Where the competitive dialogue procedure is to be used, the contracting authority shall notify the bidders of this, using the open bidding method.

(4) The competitive dialogue procedure shall provide equality of treatment of the bidders including the information provided to them and shall not reveal to a bidder a solution proposed by another bidder or any confidential information communicated by a bidder without the consent of that bidder.

(5) The competitive dialogue procedure may take place in successive phases in order to reduce the number of solutions examined during the dialogue phase.

(6) During the competitive dialogue process, the contracting authority may discuss all aspects of the project with the selected bidders.

(7) The contracting authority shall continue the competitive dialogue until a solution for the requirements of the contracting authority is found and the contracting authority may compare the solutions of the different bidders.

(8) The competitive dialogue procedure shall be concluded when the contracting authority identifies the solution that best meets its needs.

(9) Where a contracting authority identifies the solution that best meets its needs, the bidders shall be requested to submit their final bids on the basis of the solution identified.

(10) The bids submitted under subsection (9) shall contain all the elements necessary for implementation of the solution identified.

(11) For the purposes of submitting final bids under subsection (9), the contracting authority may request the bidders, to provide clarifications or additional information concerning their bids.

(12) The clarifications or additional information provided shall not—

- (a) make any change to the basic features of the bid;
- (b) distort competition; or
- (c) introduce a discriminatory effect against any bidder.

(13) The contracting authority may request the bidder who submits the most economically advantageous tender to supply further clarifications or additional information in respect of the bid, using the conditions in subsection (12).

(14) Where the accounting officer considers that the cost of participation in the competitive dialogue procedure will be high, the accounting officer may pay for a part of the expenses incurred by the bidders as shall be prescribed in the invitation to tender.

(15) Where a contracting authority decides to use the competitive dialogue method, the contracting authority shall give reasons for this, to the Ministry.

26. Negotiated procedure.

- (1) A contracting authority shall use the negotiated procedure—
- (a) where the open bidding or restricted bidding methods and the competitive dialogue procedure are used, but where the bids submitted do not satisfy the requirements of this Act or where the terms of the proposed contract are not substantially altered from the terms proposed during the open bidding or restricted bidding methods, or competitive dialogue procedure;
 - (b) where the nature of the project or other non-definable factors of the project do not allow prior overall pricing;
 - (c) where the specifications of the service to be provided under a project cannot be determined with sufficient precision and as a result of which evaluation of the bids cannot be based on the selection of the best bid using the open bidding or restricted bidding methods; or
 - (d) in respect of a project, where the design, construction, maintenance or operation of the infrastructure of the project is exclusively for the purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

(2) Under the negotiated procedure, a contracting authority shall negotiate with each bidder individually, in respect of the bid submitted by the bidder, to adapt the bid to the specifications of the invitation to tender and to achieve the best bid.

(3) The negotiated procedure shall provide equality of treatment of the bidders including the information provided to them.

(4) The negotiated procedure may take place in successive phases in order to reduce the number of bids examined during the negotiations.

Types of public private partnership agreements

27. Choice of public private partnership agreements.

A contracting authority shall for a project, taking into account risk allocation, financing and operating methods, use any of the public private partnership agreements specified in sections 28 to 35 or a combination of any of these, using the procedures in this Act and as may be prescribed by regulations.

28. Concession.

A concession is the lease of an asset of the contracting authority or Government to a private party for a long period of time where the risk of funding, developing, managing and operating the asset is transferred to the private party.

29. Operation and maintenance agreement.

An operation and maintenance agreement shall be used where a private party is to operate and maintain a property of the contracting authority in accordance with an agreement made under this Act.

30. Lease, develop and operate agreement.

A lease, develop and operate agreement shall be used where a private party is to be given a long term lease to operate and expand an existing infrastructure and where the private party is to invest in the operation and expansion of the infrastructure and to recover the cost of the investment over the duration of the lease period.

31. Build, own and maintain agreement.

A build, own and maintain agreement shall be used where a private party is to build, own and maintain an infrastructure, such as a school or a hospital, and the contracting authority is to leases that infrastructure, from the private party.

32. Build, own, operate and transfer agreement.

A build, own, operate and transfer agreement shall be used where a private party is to finance, build, own and operate an infrastructure for a specified period and to hand over the infrastructure to the contracting authority at the end of the period.

33. Design, build, finance and operate agreement.

A design, build, finance and operate agreement shall be used where a private party is to design, build, finance and operate an infrastructure for a specified period and to hand over the infrastructure to the contracting authority at the end of the period.

34. Build, own and operate agreement.

A build, own and operate agreement shall be used where the private party is to own the project in perpetuity.

35. Other public private partnership agreements.

The Minister may by statutory instrument, prescribe another type of public private partnership agreement to be used for a project.

PART V—MISCELLANEOUS**36. Interference with work of officials.**

A person who interferes with the work of, or exerts undue influence on, an official of a contracting authority or of the department for public private partnerships, in the performance of his or her duties, commits an offence and is, on conviction liable to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding five years or both.

37. Confidentiality.

(1) A contracting authority shall upon written request by any person, disclose information regarding a public private partnership.

(2) Notwithstanding subsection (1) information shall not be disclosed where—

- (a) the disclosure is likely to prejudice the security or sovereignty of the State;
- (b) the disclosure interferes with the right to privacy of the person;
- (c) the disclosure would amount to a breach of the law, impede law enforcement or would not be in public interest; or
- (d) the information contains—
 - (i) proprietary information including information relating to any manufacturing process, trade secret, trademark, copyright, patent or formula protected by law or by international treaty to which Uganda is a party;
 - (ii) scientific or technical information, the disclosure of which is likely to cause harm to the interests of the proper functioning of the contracting authority; and
 - (iii) information supplied in confidence by a bidder, the disclosure of which could reasonably be expected to put that bidder at a disadvantage in contractual commercial negotiations or to prejudice the bidder in commercial competition.

38. Disclosure of interest.

(1) An official of a contracting authority or of the department for public private partnerships or a member of the project team or the evaluation committee who has a pecuniary interest, direct or indirect, in a project, shall disclose the interest and where a decision to that effect is made, shall not take part in the procurement of the project or after the agreement is signed, take part in making any decision relating to the project.

(2) An official of a contracting authority or of the department for public private partnerships or a member of the project team or the evaluation committee shall be taken to have pecuniary interest in a project where—

- (a) he or she is a member of the private party or is a holder of a debenture in the private party; or
- (b) he or she is a partner of the private party or is in the employment of the private party.

(3) In this section, "pecuniary interest" of an official of a contracting authority or of the department for public private partnerships or a member of the project team or the evaluation committee, includes the pecuniary interest of a spouse, a biological or adopted child or a business associate of which the official or member has knowledge or would have knowledge of, if he or she exercised due diligence, having regard to all the circumstances.

(4) A person who contravenes subsection (1) commits an offence and is, on conviction liable to a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding five years or both.

39. Amendment of Schedule.

The Minister may, by statutory instrument, with the approval of Cabinet, amend the Schedule to this Act.

40. Regulations.

(1) The Minister may, by statutory instrument, make regulations for giving full effect to this Act.

(2) Without prejudice to the general effect of subsection (1), the Minister may make regulations prescribing for—

- (a) the procedure for project inception and feasibility studies;
- (b) the evaluation of bids;
- (c) bidding methods and procedures;

- (d) negotiation procedures;
- (e) the monitoring of public private partnerships;
- (f) the bidding documents and forms to be used by the contracting authorities.

(3) Regulations made under this section may impose in respect of a contravention of the regulations as penalty a fine not exceeding two hundred and fifty currency points or imprisonment not exceeding five years or both.

41. Amendment of the Public Procurement and Disposal of Public Assets Act, 2003.

Section 88L of the Public Procurement and Disposal of Public Assets Act, 2003, is amended by—

- (a) substituting for subsection (1), the following—

“For any other type of contract or contracting arrangement, other than those specified in sections 88C to 88K, including acquisition by rental, lease, hire purchase, licence, tenancy and franchise, a procuring and disposing entity shall seek guidance from the Authority on the applicable procurement procedures and documents.”;

- (b) repealing subsection (2).

SCHEDULE

Currency point

One currency point is equivalent to twenty thousand shillings.

Cross reference

The Public Procurement and Disposal of Public Assets Act, Act No. 1 of 2003.