

SPECIAL ISSUE

Kerya Gazette Supplement No. 68

NATIONAL COUNCIL FOR
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12th May, 2017

(Legislative Supplement No. 33)

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013

(No. 15 of 2013)

IN EXERCISE of the powers conferred by section 68 (4) of the Public Private Partnerships Act, 2013, the Cabinet Secretary makes the following Regulations—

THE PUBLIC PRIVATE PARTNERSHIPS (PROJECT FACILITATION FUND) REGULATIONS, 2017

PART I—PRELIMINARY

1. These Regulations may be cited as the Public Private Partnerships (Project Facilitation Fund) Regulations, 2017. Citation.
2. In these Regulations, unless the context otherwise requires — Interpretation.
“Act” means the Public Private Partnerships Act, 2013;

“approved transaction advisor” means a transaction advisor appointed by a contracting authority;

“capital subsidy” means a financial contribution to construction costs of a project whether in the form of a grant, loan, equity or other financial instrument;

“Committee” means the Public Private Partnerships Committee established under section 4 of the Act;

“Contingent Liability Reserve Account” is an account by that name opened by the Officer Administering the Fund, as a dedicated sub-account within the Fund, for the sole purpose of ensuring ready liquidity to meet contingent liability disbursement requirements of the Fund;

“eligible projects” means projects that meet the requirements provided in these Regulations for support under the Fund;

“eligible services” means services for which payments out of the Fund are supportable;

“Fund” means the Public Private Partnerships Project Facilitation Fund established under section 68 of the Act;

“funding agreement” means an agreement entered into under these Regulations as a condition precedent to disbursements from the Fund;

“funding window” means the category of support available to projects under the Fund;

“implementation” means development, procurement, construction, operation and maintenance, as well as other related activities, of a public private partnership project;

“Officer Administering the Fund” means the Officer designated as such under regulation 20;

“private party” means a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority under the Act;

“project” has the same meaning as assigned to it under the Act;

“recoverable land acquisition costs” means monetary advances made by the Fund to a contracting authority to support that contracting authority’s shortfalls in land acquisition costs, and are refundable to the Fund by the contracting authority within the immediate next budgeting cycle, and includes the cost of land acquisition, compensation, resettlement, and environmental remediation;

“secretariat” means the secretariat established under regulation 23(1);

“unit” means the public private partnerships unit under section 11 of the Act;

“viability gap funding” means payment that is made under these Regulations to a project whether by way of loan, grant, equity or other financial instrument to promote the financial capability of a project.

3. The object of the Fund is to provide financial support for the implementation of public private partnership projects under the Act, which may be provided in the form of grants, loans, equity, guarantees and other financial instruments as may from time to time be approved by the Cabinet Secretary.

Object of the Fund.

PART II—ELIGIBILITY AND APPLICATIONS

4. The Fund shall be applied to the following purposes with respect to eligible projects under these Regulations—

Eligible projects.

- (a) support to contracting authorities' third party costs in the preparation of public private partnership projects, including settlement of transaction advisory costs;
- (b) support to the activities of the Unit;
- (c) provision of viability gap funding to projects; and
- (d) provision of a source of liquidity to meet contingent liabilities arising from a project.

5. (1) In supporting contracting authorities in project preparation, the Fund may be applied to meet the cost of —

Support to the contracting authorities.

- (a) recoverable land acquisition costs;
- (b) consultancy services related to the public private partnerships programme including the conduct of sector diagnostic and studies, project proposal and feasibility studies;
- (c) conduct of tender processes including project advertisements, marketing and communications, tender documentation and due diligence;
- (d) transaction and associated advisory services; or
- (e) other project preparation activities as may be approved from time to time by the Committee.

(2) Subject to guidelines to be issued by the Committee, project preparation funding provided under paragraph (1) (c) and (d) may be recoverable.

6. (1) In supporting the unit in project related activities, the Fund may be applied to fund the budget of the unit including costs relating but not limited to—

Support to the unit.

- (a) consultancy and advisory services;
- (b) capacity building programmes;
- (c) purchase of office equipment, systems and associated software;
- (d) research activities;

- (e) establishment of knowledge management systems and frameworks; or
- (f) recurrent operation and maintenance costs for the secretariat.

(2) Funding for the unit shall be approved by the Committee in accordance with these Regulations.

7. (1) In supporting the provision of viability gap funding for eligible projects, the Fund may, among others, be applied to fund—

Viability gap funding.

- (a) capital grants made to a project during construction;
- (b) recoverable advances made to a contracting authority;
- (c) any other recoverable advances that may be made to a project under these regulations; or
- (d) loans, equity or other financing arrangement as may be made available to a project in accordance with a project agreement and guidelines governing the operations of the Fund.

(2) The Officer Administering the Fund shall regularly advise the Committee on new categories of viability gap funding necessary to enable the Fund to better support the objectives for which it has been established.

8. (1) As a source of liquidity to meet short term liquidity gaps, the Fund shall be used to meet contingent liabilities arising from the implementation of a project agreement where the liability—

Liquidity for contingent liabilities.

- (a) cannot be handled by the National Treasury under alternative frameworks;
- (b) cannot be handled under the National Government Contingency Fund; and
- (c) does not arise from a contracted obligation of a contracting authority under a project agreement for which a budgetary allocation has been made by that contracting authority.

(2) Without prejudice to the provisions of paragraph (1) —

contingent liabilities materialising out of national government default and not recoverable from a contracting authority under a project agreement shall be eligible for settlement under the Fund and shall not be recoverable;

- (a) contingent liabilities arising out of contracting authority default under a project agreement shall remain the responsibility of the contracting authority to settle, but as a last resort in exceptional circumstances, a contracting authority may apply to the Fund for a recoverable advance in settling such liabilities; or
- (b) contingent liabilities which are neither the responsibility of a contracting authority or a private party, and which arise from the implementation of a project agreement shall be eligible for settlement under the Fund, subject to any guidelines that may for this purpose be issued from time to time by the Committee.

(3) The Officer Administering the Fund shall establish and maintain a separately designated revolving Contingent Liability Reserve Account within the Fund for the purposes of this Regulation.

(4) For purposes of paragraph (3), contracting authorities shall, in conjunction with the debt management office, submit annually to the Officer Administering the Fund estimates of contingent liability arising from their eligible projects, provided that the Fund may finance short-term liquidity gaps in support of a project.

(5) For purposes of this regulation, every contracting authority shall in each financial year remit into the Fund a percentage of their estimated contingent liability funding requirements in accordance with guidelines issued by the Committee from time to time.

(6) Where payments out of the Fund are made towards satisfying materialised contingent liabilities under a project at the request of a contracting authority, the contracting authority shall refund the Fund in its immediate subsequent budget cycle.

(7) The Officer Administering the Fund shall base the annual estimates of expenditure under this Regulation on the assessment of the debt management office with respect to the amount of funds to set aside for payments in any given financial year.

(8) The debt management office shall assess, manage and monitor all contingent liabilities arising from projects under the Act.

(9) The Committee shall adopt rules within the Fund Governance Manual for addressing default in repayment of recoverable advances with the view to promoting the sustainability of the Fund.

9. The following shall not be eligible for support under the Fund—

Exclusions.

- (a) viability gap funding for privately initiated investment proposals; and
- (b) projects procured before the Act came into operation.

10. Any application to the Fund shall satisfy the following eligibility requirements when seeking support for project preparation under the Fund —

Eligibility for support under project preparation.

- (a) for sector diagnostic studies and preparation of project proposal documentation, the contracting authority shall have established a node under the Act, and provided evidence of a function capable of performance by a private party;
- (b) for feasibility study preparation, evidence that the project is included in the approved list of projects under the Act, and the contracting authority engages an approved transaction advisor to undertake the study;
- (c) for land acquisition, evidence of an approved feasibility under the Act, land acquisition, compensation and resettlement plans; and

- (d) for procurement of a private party under the act, evidence of an approved feasibility study and the contracting authority engages an approved transaction advisor.

11. (1) To be eligible for viability gap funding, a project requires to have had its contingent liability requirements estimated and approved at feasibility stage, and re-estimated and re-confirmed under section 53(4) of the Act.

Eligibility for viability gap funding and contingent liability support.

(2) Viability gap funding shall only be available to support project capital costs and recoverable land acquisition costs.

(3) When applying for viability gap funding and contingent liability liquidity support under the Fund, contracting authorities shall be required to provide to the Fund—

- (a) an approved feasibility study report, which approval shall include approval of contingent liability estimates in a proposed project; and
- (b) approved project report and financial risk assessment report.

(4) Where a variation to a project agreement being undertaken is implemented and the variation results in a change to the project's financial risk and contingent liability profile, the prior approval of the debt management office shall be sought and obtained to preserve the project's eligibility under these Regulations.

(5) In addition to any other requirement under these Regulations, a project shall qualify for support under the viability gap funding window of the Fund where—

- (a) it relates to a project which is based on a project agreement between a contracting authority on the one side and a private party on the other side, for delivering a project on payment of user charges;
- (b) the private party holds and controls fifty one per centum or more of the subscribed and paid up equity in the project company;
- (c) the private party was selected on the basis of open competitive bidding and is responsible for financing, construction, maintenance and operation of the project; and
- (d) the project provides a service against payment of a tariff or user charge.

(6) Despite any provision in these Regulations but subject to paragraph (7), viability gap funding for any one project shall not exceed fifty per centum of the total project capital cost, whether the support is funded entirely by the Fund or co-funded by the sponsoring contracting authority.

(7) Despite paragraph (6), the Cabinet Secretary may, in exceptional circumstances, approve higher thresholds of support for any one project under the Fund.

12. In making a determination on which of the eligible applications to the Fund should be funded, the Fund shall apply the

Prioritization criteria.

principle of first come-first serve, and in addition the following selection criteria —

- (a) the extent to which a contracting authority is able to co-fund the requested support;
- (b) potential economic impact of the project;
- (c) potential value for money impact of the support;
- (d) equitable application of support under the Fund;
- (e) any specific requirements applying to the resources available within the Fund;
- (f) a contracting authority's compliance history under the Act and track record of effective use of the Fund support; and
- (g) quantum of the viability gap funding and its impact on the continued availability of the Fund to support other eligible projects.

13. Contracting authorities shall adopt prior planning strategies to support a clear and efficient budgetary process for purposes of enabling the Fund to be efficient in meeting requests for support.

Prior planning.

14. (1) A request to the Fund with respect to project preparation funding support shall be made as follows —

Forms for applications.

- (a) on a form provided by the secretariat which application shall be supported by the relevant documents; and
- (b) evidence of Committee approval of a project proposal and approval of an application for funding by a contracting authority for support by the Fund of the activity specified.

(2) A request to the Fund with respect to funding support to the Unit shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by evidence of the Unit's annual approved budget estimates.

(3) A request to the Fund with respect to viability gap funding support shall be made as follows —

- (a) on the prescribed form; and
- (b) supported by a signed project agreement and evidence of the approved viability gap funding requirement.

(4) An application to the Fund with respect to contingent liability liquidity support shall be made as follows —

- (a) on the prescribed form;
- (b) evidence of Committee approval of the Contingent Liability Funding requirement;
- (c) evidence that the Contingent Liability was notified to the Fund upon execution of a project agreement or as a

consequence to agreement variation during project implementation; and

(d) evidence that the Contingent Liability has materialised.

15. (1) Except as provided for in this Regulation, all disbursements under the Fund shall be made in accordance with the Funding Agreement.

Disbursements.

(2) Disbursements relating to acquisition of land, compensation and resettlement shall be made to the contracting authority.

(3) Disbursements relating to obligations that are co-funded by the contracting authority shall be made to the contracting authority.

(4) Viability gap funding shall be disbursed in accordance with the disbursement schedule set out in the project agreement.

16. (1) The Officer Administering the Fund shall prepare a funding agreement for each funding support provided under the Fund.

Funding agreement.

(2) The funding agreement shall be a tripartite instrument between the Fund, the contracting authority and the project company where such agreement relates to viability gap funding.

(3) The Officer Administering the Fund shall, subject to any guidelines that may from time to time be issued by the Committee, establish standards, practices and documents to be utilised in documenting financing arrangements between the Fund and all applicants, other than applications for viability gap funding.

(4) A disbursements from the Fund shall not be effected in the absence of an appropriate agreement made under this Regulation.

PART II – MANAGEMENT OF THE FUND

17. (1) The Committee shall, pursuant to section 7 of the Act, oversee the operations and management of the Fund.

Responsibility of the Committee.

(2) In discharging its mandate, the Committee may delegate its functions under these Regulations to a sub-committee in accordance with section 9 of the Act.

(3) The Committee shall meet at least once in every quarter to exclusively consider matters relating to the Fund and the conduct of its business at such meetings shall be in accordance with the Act.

18. The functions of the Committee in relation to the Fund shall be to —

Functions of the Committee.

(a) inform the Cabinet Secretary on the funding requirements for the Fund;

(b) approve the estimates of annual revenue and expenditure of the Fund and recommend the estimates to the Cabinet Secretary for approval;

(c) ensure that the annual estimates of revenue and expenditure for all funding window include cumulative commitments for the financial year under review;

- (d) ensure that only eligible projects are authorised for funding under these Regulations;
- (e) approve all funding applications to the Fund;
- (f) inform the Cabinet Secretary on amounts and timing for Exchequer transfers into the Fund;
- (g) approve and review the investment of surplus funds in the Fund; and
- (h) advise the Cabinet Secretary on additional sources of funds for the Fund.

19. The Committee shall have power to—

Powers of the
Committee.

- (a) authorise allocations from the Fund;
- (b) approve proposals for re-allocations of funds not earmarked for specific purposes within the Fund;
- (c) approve all operational and management procedures of the Fund;
- (d) approve the criteria for the selection and evaluation of projects for funding;
- (e) approve all reporting policies;
- (f) approve financial statements and management reports;
- (g) adopt the financial statements prepared by the Officer Administering the Fund before submission to the Auditor-General; and
- (h) adopt the non-financial reports of the Fund and submit them to the Cabinet Secretary.

20. The Director of the Unit shall be the Officer Administering the Fund.

Officer
Administering the
Fund.

21. (1) The functions of the Officer Administering the Fund shall be to —

Functions of
Officers
Administering the
Fund

- (a) act as secretariat and technical arm of the Committee;
- (b) supervise and control the administration of the Fund;
- (c) prescribe all forms and prepare all funding documentation necessary for the proper administration of the Fund;
- (d) prepare estimates of annual revenue and expenditure of the Fund relating to the public private partnerships programme and the Funds' operational expenses and submit it to the Committee for adoption;
- (e) cause to be established proper systems of control and oversight over the operations of the Fund;
- (f) advise and consult the Committee on matters relating to the administration of the Fund;

- (g) advise and consult with the Cabinet Secretary on matters relating to the administration of the Fund as may, from time to time, be necessary;
- (h) keep and maintain complete financial records of all projects supported under the Fund;
- (i) advise the Committee on trends and projections relating to the financing requirements under the Fund;
- (j) prepare non-financial performance report of the Fund and submit it to the Committee for adoption;
- (k) cause to be kept proper books of accounts and other books and records relating to the Fund and to the activities financed under the Fund;
- (l) prepare, sign and submit to the Auditor-General in respect of each financial year and within three months after the end of the financial year, a statement of accounts relating to the Fund in such form as the Public Sector Accounting Standards Board may from time to time prescribe, and in accordance with Public Finance Management Act, 2012, a copy of which statement of account shall be filed with the National Treasury, Commission on Revenue Allocation and the Controller of the Budget; and
- (m) furnish any additional information which is proper and sufficient for the proper discharge of the mandate of the Auditor-General.

(2) The Officer Administering the Fund shall comply with the ordinary budget cycle in the preparation of estimates for the Fund, especially with regard to components supported through the Exchequer.

(3) The Officer Administering the Fund shall submit estimates of revenue and expenditure to the Cabinet Secretary each year for approval.

No. 18 of 2012.

(4) For purposes of paragraph (3), and with respect to viability gap funding and project preparation activities, contracting authorities and the Unit shall prepare and submit to the Officer Administering the Fund estimates of project preparation funding requirements in accordance with the annual budget cycle in each year.

(5) For purposes of paragraph (3), and with respect to contingent liabilities, the debt management office shall prepare and submit to the Officer Administering the Fund estimates of contingent liability liquidity funding requirements by the thirtieth day of September in each year.

22. The Officer Administering the Fund shall have power to —

- (a) access any project related data that may be required from contracting authorities in furtherance of its functions;
- (b) call for any additional information with respect to requests for payments out of the Fund; and

Powers of Officer Administering the Fund.

- (c) in consultation with the National Treasury, issue financial management guidelines relating to the Fund.

23. (1) The Officer Administering the Fund shall be supported by a secretariat.

Secretariat support for Officer Administering the Fund.

(2) The secretariat shall consist of such staff from the Unit as the Officer Administering the Fund shall, in consultation with the chairperson of the Committee, consider necessary for the proper performance of its functions under these Regulations.

24. The functions of the Secretariat shall be to —

Functions of the Secretariat.

- (a) provide support to the Officer Administering the Fund in the discharge of its functions;
- (b) notify every eligible contracting authority of the Fund and the Fund's mandate;
- (c) develop and publish, with the approval of the Committee, standardised documentation requirements for use in making applications to the Fund;
- (d) develop and publish, with the approval of the Committee, guidelines and procedures for making and processing applications made under the Fund by contracting authorities and the Unit;
- (e) prepare all funding agreements and documentation necessary to effectuate disbursements from the Fund;
- (f) ensure that every applicant that has received an allocation from the Fund reports to the Officer Administering the Fund every six months, or within such other frequency as set out in the documents executed for the funding, on the use of the allocation; and
- (g) monitor the progress of projects that have received an allocation from the Fund.

PART III – FINANCIAL PROVISIONS

25. (1) The Officer Administering the Fund shall cause accounts in the name of the Fund to be opened and maintained for the Fund in a bank within Kenya, in accordance with any financial management rules that for the time being govern public funds in Kenya.

Accounts of the Fund.

(2) All monies payable into the Fund shall be received into the relevant bank account of the Fund, in accordance with the funding windows under these Regulations.

(3) The Fund's accounts shall be operated by the Officer Administering the Fund and two other persons from the Secretariat.

26. (1) Upon opening of the accounts of the Fund pursuant to regulation 25, the Cabinet Secretary shall cause to be paid into the Fund such amounts of money as the Cabinet Secretary shall determine, with the view to operationalizing the Fund.

Payments into the Fund.

(2) For each financial year, amounts appropriated by Parliament shall be paid into the Fund on a quarterly basis.

(3) The earnings of, or accruals to the Fund shall be retained in the Fund, and shall be spent only for the purposes for which the Fund is established.

27. (1) Withdrawals from the Fund shall only be for purposes of payment of approved obligations of the Fund.

Withdrawals from the Fund.

(2) The Officer Administering the Fund shall ensure the accounts of the Fund are not overdrawn at any time.

28. The records of expenditure relating to the Fund shall be kept and maintained in accordance with the provisions of the Public Finance Management Act, 2012.

Records.
No. 18 of 2012.

29. In addition to these Regulations, the Fund shall conform to the requirements of all other applicable public financial management laws and regulations for the time being in operation.

Financial and procurement Regulations.

PART IV – MISCELLANEOUS AND TRANSITIONAL PROVISIONS

30. The Officer Administering the Fund shall publish annually on its website the following minimum categories of information —

Publication.

- (a) the amount and source of money received into the Fund, divided by each funding window;
- (b) total number of projects supported under each window of the Fund and divided by the sector and region; and
- (c) any information specifically required to be published in accordance with the requests of the partners supporting the Fund.

31. (1) The Cabinet Secretary shall at the lapse of ten years from the date of commencement of these Regulations cause a review to be conducted on the performance of the Fund in accordance with the requirements of the Public Finance Management Act, 2012.

Review on the performance of the Fund.

(2) The review shall determine whether the Fund has met the objectives for which it was established.

No. 18 of 2012.

(3) The report on the review shall be submitted to the Cabinet for approval.

32. (1) The Cabinet Secretary may wind up the Fund with the approval of the National Assembly where the Cabinet Secretary considers that the Fund has successfully completed the specific objective for which it was established.

Winding up of the Fund.

(2) On the winding up of the Fund—

the Officer Administering the Fund shall pay any amount remaining in the Fund into the National Exchequer Account for the credit of the National Government;

- (a) the Cabinet Secretary shall pay any deficit into the Fund from funds of the National Government in the National Exchequer Account with the approval of the National Assembly;

- (b) assets other than cash of the Fund shall be transferred to the Ministry for the time being responsible for matters relating to finance; and
- (c) if at the time of winding up of the Fund there are outstanding obligations, such obligations shall be transferred to the National Treasury.

(3) The Cabinet Secretary shall submit a final statement of accounts to Parliament and to the Auditor-General for audit within nine months from the date of the decision to wind up the Fund.

33. (1) Contingent liabilities arising from projects that were initiated and concluded outside of the Act, but for which project agreements are subsisting as at the date of effectiveness of these Regulations shall be eligible for liquidity support as prescribed under these Regulations, subject to contracting authorities submitting to the Officer Administering the Fund the following documents within three calendar months from the date of effectiveness —

Projects
concluded outside
of the Act

- (a) a copy of the signed project agreement;
- (b) a copy of the project feasibility study report; and
- (c) a copy of the project's approved financial model.

(2) Submissions outside of the timelines provided in this Regulation shall not be accepted by the Officer Administering the Fund.

34. The Public Private Partnership Regulations, 2014 are amended in the provisions specified in the first column of the Schedule, in the manner respectively specified in the second column of the Schedule.

Amendment of
L.N No 171 of
2014.

SCHEDULE

<i>Regulation</i>	<i>Amendment</i>
2 (2) (a)	Delete the word "more" appearing immediately before the words "than eighty-five million shillings" and substitute thereof with the word "less".
2 (2) (b)	Delete the word "more" appearing immediately before the words "than five million shillings" and substitute thereof with the word "less".
2 (2) (c)	Delete the word "more" appearing immediately before the words "than five million shillings being life cycle costs" and substitute thereof with the word "less".
61	revoked
62	revoked
63	revoked
64	revoked

Dated the 18th April, 2017.

HENRY K. ROTICH.
Cabinet Secretary for the National Treasury.





