

PROCURING INFRASTRUCTURE PUBLIC-PRIVATE PARTNERSHIPS 2018 IN KENYA

SURVEY QUESTION	ANALYSIS
PPP Regulatory Framework	
2. Does the regulatory framework in your country allow procuring PPPs?	Yes
If yes, please specify the relevant regulatory framework and the year of adoption:	<p>The analysis in this Report was based on the following legal framework directly governing PPPs in Kenya as well as on enabling regulations and laws that enable the undertaking of PPPs by various economic sectors, as of 2017: (i) Public Private Partnerships Act, No. 15 of 2013 [hereinafter “PPP Act”]. (ii) The Public Private Partnerships Regulations, gazetted on the 19th of December 2014 [hereinafter “PPP Regulations”]. (iii) The Government of Kenya Policy Statement on Public Private Partnerships, which was issued in November 2011 [hereinafter “PPP Policies”]. (iv) The Draft County Governments Act No.17, 2012. (v) The Public Private Partnerships Petition Committee Guidelines, 2014. (vi) The Public Finance Management Act, (Act 18 of 2012). (vii) The Public Finance Management (Roads Annuity Fund) Regulations, 2015. (viii) The Public Private Partnerships (Project Facilitation Fund) Regulations, 2017 – gazette on May 12, 2017. (ix) Draft Public Finance Management (National Toll Fund) Regulations.</p> <p>The implementation of PPPs in various economic sectors are frequently subject to sector legislation and policies governing private sector participation in sector infrastructure development. In addition, all PPP transactions may depend on the role of the Public Procurement and Asset Disposal Act, 2015 for various transaction components, such as procurement of project land, or the procurement of consultants, and similar transactions.</p> <p>The previously mentioned laws, regulations, and policies shall define the regulatory framework for PPPs in Kenya.</p>
and provide a link to a government-supported website where the mentioned regulatory framework is available or provide an electronic copy of it:	This regulatory framework is available on the Public Private Partnership Unit website - www.pppunit.go.ke . It is also available on the Kenya Law website, formerly National Council for Law Reporting - www.kenyalaw.org
2.1. Are you aware of any reforms (in the regulatory frameworks – laws, regulations, policies, etc.- or in generally followed practices) related to PPPs that: Took place in 2016, are ongoing and/or are planned to be adopted BEFORE June 1, 2017?	Yes
Please describe:	Publication in the Kenya Gazette of the Public Private Partnerships (Project Facilitation Fund) Regulations were adopted on 12 May 2017.

	<p>The Public Private Partnerships (Amendment) Bill, 2016 was developed by the PPP Unit and successfully tabled in Parliament. It was adopted by the National Assembly in December 2016, and is currently pending enactment by the Senate. The amendments aim to clarify PPP implementation by county governments, create sustainable frameworks for contracting of contingent liabilities by county governments, and make changes to the PPP process for easier administration.</p> <p>The Land (Value Index Amendment) Bill, 2016 was developed and submitted to Parliament as a result of a policy paper written by the Unit in 2016 – to address the problem of project land acquisition.</p> <p>The (draft) PPP Petition Regulations 2016 were drafted with the intention of these regulations replacing the PPP Petition Guidelines of 2014.</p>
2.2 Are ongoing and/or are planned to be adopted AFTER June 1, 2017?	<p>Yes</p>
Please describe:	<p>The following law reform measures are anticipated to be adopted between June 1, 2017 and June 30, 2018, (i) the proposed Draft PPP (County Government) Regulations; (ii) the proposed Public Private Partnerships (Amendment) Act, 2016; (iii) The Public Finance Management (National Toll Fund) Regulations; (iv) The Kenya Roads Bill, 2015; (v) the Land (Value Index Amendment) Bill, 2016; (vi) the PPP Petition Regulations</p>
3.1 Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors?: Transportation.	<p>No</p>
If yes, please provide the relevant legal/regulatory provisions:	<p>n/a</p>
3.2 Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors?: Water and Irrigation	<p>No</p>
If yes, please provide the relevant legal/regulatory provisions:	<p>n/a</p>
3.3 Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors?: Energy generation and distribution.	<p>No</p>

If yes, please provide the relevant legal/regulatory provisions:	n/a
3.4 Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors?: Telecom	No
If yes, please provide the relevant legal/regulatory provisions:	n/a
3.5 Besides national defense and other matters of national security, does the regulatory framework explicitly prohibit or restrict PPPs in any of the following sectors?: Other	Yes
If yes, specify and provide the relevant legal/regulatory provisions:	<p>There are tax incentives, which have been extended by the Government to infrastructure projects from which PPPs may benefit.</p> <p>One such incentive is exemption from interest to be paid on loans from foreign sources for investments in energy, water, and infrastructure. This was granted pursuant to Legal Notice 91 made on 22nd May 2015.</p> <p>The second is exemption from payment of stamp duty for instruments executed in respect to the transactions relating to loans from foreign sources received by investors in the infrastructure (energy sector, roads, ports, water sector, railways, and aerodromes) development sector. This was granted pursuant to Legal Notice 106 made on 11 June 2015.</p> <p>The third is exemption from tax on payments made to a non-resident for services rendered under a Power Purchase Agreement (PPA). This was granted pursuant to Legal Notice 165 made on 17 August 2015.</p> <p>Paragraph 29, First Schedule of the Value Added Tax Act provides, "The supply or importation of the following goods shall be exempt supplies. Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in the construction of a power generating plant, by a company, to supply electricity to the national grid approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for energy."</p>
4. Does the regulatory framework provide for a specific tax regime for PPP transactions (i.e. tax incentives, special tax depreciation treatment, etc.)?	No
If yes, please specify and provide the relevant legal/regulatory provision (if any):	n/a

5. Please identify the PPP procuring authorities in Kenya and provide their website(s) (if available):	Contracting authorities, under the PPP Act, 2013, include any state department, agency, state corporation, or county government, which intends to have a function undertaken by it performed by a private party. It is notable that the PPP (Amendment) Bill, 2016 specifically amends the definition of contracting authority by splitting it between national and county government authorities.
6. In addition to the PPP procuring authorities listed above, is there a specialized government entity that facilitates the PPP program (PPP Unit)?	Yes
If yes, please indicate its name, and its website (if available):	The PPP Act under section 4 sets up the Public Private Partnership Committee (the 'Committee') that is charged with implementing the Act and acts as the main regulator. The PPP Act, in section 11, also establishes the Public Private Partnership Unit (PPP Unit) at the National Treasury to serve as the centre for PPP expertise in Kenya, and as secretariat and technical arm of the PPP Committee (www.pppunit.go.ke). Lastly, the Act also establishes under section 67 the PPP Petition Committee as a specialized tribunal to adjudicate all PPP procurement disputes. For bills, they can be accessed from www.parliament.go.ke/billtracker
6.1 If yes, what are the main responsibilities of the PPP Unit (check all that apply): PPP regulation and policy guidance.	Yes
6.2 PPP capacity building for other public authorities.	Yes
6.3 PPP promotion among the public and/or private sectors in national and international forums.	Yes
6.4 Technical support in implementing PPP projects.	Yes
6.5 Identification and selection of PPP projects from the pipeline.	Yes
6.6 Revision of fiscal risks born by the Government.	No
6.7 Consultation with affected communities on potential impact of PPP projects.	No
6.8 Approval of PPP projects.	Yes
6.9 Undertaking the procurement of PPPs.	No
6.10 Oversight of PPP implementation.	Yes
6.11 Other	No
6.11 please specify:	n/a

Please provide the relevant legal/regulatory provisions:

Section 14 of the PPP Act provides, “(1) The functions of the unit are to -

- (a) serve as the secretariat and technical arm of the Committee; and
- (b) provide technical, financial, and legal expertise to the Committee and any node established under this Act.

(2) In the performance of its functions under subsection (1), the unit shall—

- (a) serve as a resource centre on matters relating to public private partnerships;
- (b) conduct civic education to promote the awareness and understanding of the public private partnerships process amongst stakeholders;
- (c) provide capacity building to and advise contracting authorities or other parties involved in the planning, co-ordinating, undertaking, or monitoring of projects under this Act;
- (d) rate, compile, and maintain an inventory of public private partnership projects that are highly rated and likely to attract private sector investment;
- (e) develop an open, transparent, efficient, and equitable process for managing the identification, screening, prioritization, development, procurement, implementation, and monitoring of projects and ensure that the process is applied consistently to all projects;
- (f) conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships;
- (g) collate, analyse, and disseminate information including data on the contingent liabilities of the Government in relation to a project;
- (h) make recommendations on the approval or rejection of projects prior to submission to the Committee for approval;
- (i) assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritise, appraise, evaluate, and negotiate projects;
- (j) maintain a record of all project documentation;
- (k) review and assess requests for Government support in relation to a project and advise the Committee on the support that should be accorded in relation to the project;
- (l) assist the Committee in formulating guidelines and standard documentation required under this Act;
- (m) liaise with and assist the contracting authorities in their roles in the various stages of a project cycle;
- (n) ensure that the tendering process relating to a project conforms to this Act and to procurement best practices;
- (o) put in place measures to eliminate constraints limiting the realisation of benefits expected from a public private partnership;
- (p) monitor contingent liabilities and accounting and budgetary issues related to public private partnerships with the relevant offices within the State department responsible for finance; and
- (q) carry out such other functions as may be conferred on it by the Committee and this Act.

(3) The unit shall prepare financial accounts and an inventory of any monies allocated to it, any financial support received by it, and any success fees received by it from a private party or project company as the case may be, under this Act.”

8. Does the Ministry of Finance or Central Budgetary Authority approve the PPP project before launching the procurement process?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	The regulatory framework provides for the role of the National Treasury in approving PPP projects. Pursuant to Section 24(3) of the PPP Act, The Cabinet Secretary shall prescribe the thresholds for approval and the carrying out of projects by the county governments under this Act. Furthermore, Clause 3.8 of the Policy Statement requires all public entities including county governments, local authorities and the PPP Unit to seek approval from the state department responsible for Finance/Treasury for all direct and contingent exposure arising from any given PPP project.
8.1. Does the Ministry of Finance or Central Budgetary Authority approve the PPP project before signing the PPP contract?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 35 (3) of the PPP Act requires the PPP Unit to submit the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project after completion of negotiations following tender evaluations in the event of contract variations during project implementation. Section 53(4) of the PPP Act requires that following negotiations with successful bidders: the project report setting out the negotiated terms should be sent by the PPP Unit to the Debt Management Office for confirmation of its initial approval issued at feasibility stage, based on final contract and preferred bidder submission.
8.2. Does the Ministry of Finance (or government more broadly) have a specific system of: Budgeting for PPP projects.	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
Accounting liabilities (explicit and implicit, direct and contingent) arising from PPPs.	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
Reporting liabilities (explicit and implicit, direct and contingent) arising from PPPs.	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Article 14 (2)(P) of the PPP Act in Kenya provides that the PPP unit would monitor contingent liabilities, accounting, and budgetary issues related to public private partnerships with the relevant offices within the state department responsible for finance. Article 35 (2) provides that the unit shall submit the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project. Article

	53(4) provides that the unit shall review the project report submitted to it under this section and submit the report to the Debt Management Office for confirmation of its initial approval at feasibility stage, based on final contract and preferred bidder submission.
8.3. If yes to question 8.2, which of the following alternatives best describes the regulation?: Accounting and reporting according to International Public Sector Accounting Standards (IPSAS).	No
Accounting and reporting according to other international standard (e.g. European System of Accounts).	No
Please specify:	n/a
Other.	No
Please specify:	n/a
9. Besides the procuring authority and the Ministry of Finance or Central Budgetary Authority, does any other authority(s) approve the PPP project before launching the procurement process (e.g. Cabinet, Cabinet Committee, Parliament, Supreme Audit Office, etc.)?	Yes
If yes, please specify the relevant authority	The PPP Committee, the Cabinet, and the Parliament approve PPP projects.
and provide the relevant legal/regulatory provisions (if any):	<p>The main PPP Committee approvals are provided for in the following provisions: Sections 23, 24, 31 for project proposals; 35 for feasibility studies; 37 for initiation of tender processes; 45 for use of competitive dialogue for PPP procurement; 49 for tender evaluation reports; 52 for initiation of tender negotiations; 53 for project and financial risk assessment reports; 58 for tender cancellations; 64 for PPP contract variations; 7 and 68 for use of funds in the Project Facilitation Fund.</p> <p>The main cabinet approvals are in Sections 24 and 25 for publication of PPP projects in the national priority list; 57 for contract execution.</p> <p>The main parliamentary approval is with respect to PPPs for natural resource exploitation at Section 56.</p>
9.1. Besides the procuring authority and the Ministry of Finance or Central Budgetary Authority, does any other authority(s) approve the PPP	Yes

<p>project before signing the PPP contract?</p>	
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>The main PPP Committee approvals are provided for in the following provisions: Sections 37 for initiation of tender processes; 45 for use of competitive dialogue for PPP procurement; 49 for tender evaluation reports; 52 for initiation of tender negotiations; 53 for project and financial risk assessment reports; 58 for tender cancellations; 64 for PPP contract variations; 7 and 68 for use of funds in the Project Facilitation Fund.</p> <p>The main cabinet approvals are in Sections 24 and 25 for publication of PPP projects in the national priority list; 57 for contract execution.</p> <p>The main parliamentary approval is with respect to PPPs for natural resource exploitation at Section 56.</p>
<p>10. Does the procuring authority use transaction advisors during the PPP project cycle?</p>	<p>Yes</p>
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>According to Section 36 (2) of the PPP Act, Where the PPP unit finds that the contracting authority does not have the technical expertise to procure the project, the contracting authority shall appoint a transaction advisor to assist the authority in the procurement process. Under Rule 17 of the PPP Regulations, a contracting authority may appoint a transaction advisor and in accordance with the terms of reference of the appointment, assist the contracting authority to: develop feasibility studies; prepare bid documents; carry out due diligence activities for projects; structure the procurement process; and in managing such other technical or financial matters as the contracting authority may require assistance in relation to a PPP project. Clause 3.5 of the PPP Policy Statement provides that public entities intending to use PPP as a method of delivering infrastructure services shall be required to have the capacity to manage the commercial processes involved and will be required to hire transaction advisors in those cases where capacity is lacking.</p>
<p>11. In a case comparable to the case study assumptions, please select the option that best describes the way your government integrates the prioritization of PPP projects with other public investment project prioritization? (e.g. in the context of a national public investment system, multi-year perspective plans, medium-term budgetary framework): The regulatory framework provides for the inclusion of PPPs in the national public investment</p>	<p>Yes</p>

<p>system/medium term budgetary framework and details a specific procedure to ensure the consistency of PPPs with other public investment priorities.</p>	
<p>If yes, please specify and provide the relevant legal/regulatory provisions (if any):</p>	<p>Under Sections 23 and 24 of the PPP Act, Contracting Authorities are required to submit lists of PPP projects they intend to undertake in line with their development programmes. The lists are assessed and approved, hierarchically, by the PPP Unit, the PPP Committee, and the National Cabinet. Section 14 (2) (h) of the PPP Act provides that in performing its functions, the Public Private Partnerships Unit is required to rate, compile, and maintain an inventory of public private partnerships projects that are highly rated and likely to attract private sector investment. Section 23(1) of the Public Private Partnerships Act, 2013 provides that each contracting authority is required to prepare a list. Section 24(2) of the PPP Act states the Committee shall consider recommendations and submit to the Cabinet for approval, a national priority list, further, Section 25 of the PPP Act requires the PPP Unit to publish in electronic and print media, the national priority list of projects that has been approved. Section 31 of the PPP Act additionally provides such information as well.</p>
<p>The regulatory framework prescribes the need for PPPs to be consistent with all other investment priorities without establishing a specific procedure to achieve that goal.</p>	<p>No</p>
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>n/a</p>
<p>The regulatory framework does not include any provisions but the procuring authority evaluates the consistency of PPPs with other government investment priorities in practice.</p>	<p>No</p>
<p>If yes, please elaborate:</p>	<p>n/a</p>
<p>The procuring authority does not evaluate PPPs against existing government priorities.</p>	<p>No</p>
<p>Please elaborate and provide examples:</p>	<p>n/a</p>
<p>11.1. Based on your experience, is it always the case that this prioritization is done in practice in accordance with the</p>	<p>Yes</p>

provisions of the regulatory framework described above?	
If yes, please specify:	Contributors provided that no project is added into the PPP National Priority List unless: it has first been subjected to a selection and ranking process within a contracting authority; it has had a detailed project proposal prepared and subjected to approval by the PPP Committee; and the approval has received Cabinet approval for inclusion in the List. Projects that do not follow these procedural requirements are not included in the PPP Priority List.
If no, please elaborate:	n/a
12.1 Which of the following assessments are conducted when identifying and preparing a PPP in order to inform the decision to proceed with it? (check all that apply): Socio-economic analysis (cost-benefit analysis of the socio-economic impact of the PPP project)	Yes
Relevant legal/regulatory provision (if any)	Section 33(2) (c) of the PPP Act requires a contracting authority to undertake a feasibility study of the project, which it intends to implement under a public private partnership arrangement, and among the 5 assessment aspects are social, economic and environmental viability, and impact assessments.
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	Contributors provide that practice in Kenya is that a feasibility study, which includes a cost-benefit analysis of the project, is done to better prepare for the procurement stage of any PPP.
12.2. Affordability assessment, including the identification of the required long term public commitments (explicit and implicit, direct and contingent liabilities)	Yes
Relevant legal/regulatory provision (if any)	Section 33 (2) (d) of the PPP Act requires that, as part of the feasibility study, the affordability, value for money, and a public-sector comparator for the project be undertaken.
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	Contributors provided that this is in application and to achieve requirements of a Feasibility Study Report

12.3. Risk identification, allocation and assessment (risk matrix)	Yes
Relevant legal/regulatory provision (if any)	Section 53 of the PPP Regulations requires that a financial risk assessment report be created by the PPP Unit and submitted to the Committee. Section 53 provides, “(5) When the negotiations between a contracting authority and the person who has made a privately-initiated investment proposal have been concluded, the contracting authority shall prepare a project risk assessment report specifying the terms agreed between the contracting authority and that person and submit the report to the Unit for review. (6) The Unit shall review the report prepared under paragraph (5) and submit a copy of the report to the Debt Management Office to review and confirm the accuracy of the contingent liabilities and the risk matrix of the proposal. “Clause 3.7 of the PPP Policy Statement further provides that in order to be viable, PPP projects must carefully allocate all relevant risks to specific parties and must determine if a project is financially and commercially viable for the project’s given risk allocation structure. The principle that Government will follow in allocating the risks of a PPP project will be to optimize, rather than maximize, the transfer of project risks to the private party. Government will seek to allocate risks to the party that is best able to manage controllable risks, best able to insure uncontrollable but insurable risks, or best able to bear the financial consequences of uncontrollable and uninsurable risks.
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	Contributors provide that this is standard for all Feasibility Study reports.
12.4. Comparative assessment to evaluate whether a PPP is the best option when compared to other procurement alternatives (i.e. value for money analysis, public sector comparator)	Yes
Relevant legal/regulatory provision (if any)	Section 33 (2) (d) of the PPP Act provides that the authority will consider the affordability, value for money, and public-sector comparator for the project. Under Section 31(2) in conceptualizing, identifying, and prioritizing projects under the Act, a contracting authority shall consider the strategic and operational benefits of entering into a PPP arrangement compared to the development of the facility or provision of the service by the contracting authority
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a

Is the assessment done in practice?	Yes
Details:	Contributors provide that this is standard for all Feasibility Study reports.
12.5. Financial viability or bankability assessment	Yes
Relevant legal/regulatory provision (if any)	Section 20(d) of the PPP Act provides, "A contracting authority shall, prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following-(d) commercial, financial, and economic issues."
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	Contributors provide that this is standard for all Feasibility Study reports.
12.6. Market sounding and/or assessment (showing evidence of investors' interest in the market for the project)	Yes
Relevant legal/regulatory provision (if any)	Section 20 (d) of the PPP Act provides, "A contracting authority shall, prior to entering into public private partnership arrangements pursuant to section 19, undertake a sector diagnostic study and assessment covering the following-(d) commercial, financial and economic issues..." And according to Section 12 of the PPP Regulations, "When preparing a project proposal, a contracting authority shall include the following information - (a) demand assessment; (b) the estimated cost of the project based on - (i) the prevailing market rates; (ii) an updated cost of similar precedent projects; or (iii) international best practices; (c) details of the project; (d) the expected private sector role in the project;".
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	Contributors provide that this is standard for all Feasibility Study reports.
12.7. Environmental impact assessment	Yes
Relevant legal/regulatory provision (if any)	As part of the Feasibility Study, the PPP Act requires as follows; "33. (1) A contracting authority shall, in consultation with the unit and upon the approval of the project proposal by the Committee, undertake a feasibility study of the project it intends to implement under a public private partnership for the purpose of determining the viability of undertaking the project under this Act.

	(2) In undertaking a feasibility study under subsection (1), a contracting authority shall consider- (a) the technical requirements of the project; (b) the legal requirements to be met by the parties to the project; (c) the social, economic, and environmental impact of the project; and (d) the affordability, value for money, and public -sector comparator for the project as prescribed in the regulations made under this Act.”
Is there a specific methodology for the assessment?	No
If yes, please elaborate	n/a
Is the assessment done in practice?	Yes
Details:	The assessment is required as part of the feasibility study.
12.8. Consultation process with affected communities on potential impact of the PPP project	No
Relevant legal/regulatory provision (if any)	n/a
Is there a specific methodology for the assessment?	n/a
If yes, please elaborate	n/a
Is the assessment done in practice?	n/a
Details:	n/a
13. Does the procuring authority include the assessments (indicated in Question 12 above) in the request for proposals and/or tender documents (for example, as part of an Information Memorandum to the bidders)?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
and specify which of the assessments are included in the request for proposals and/or tender documents:	n/a
13.1. Are the assessments published online?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
specify the website	n/a

please specify which of the assessments are published online:	n/a
14. Does the procuring authority include a draft PPP contract in the request for proposals?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 43 (2) of the PPP Act requires a contracting authority to include in the tender documents, the basic terms and conditions of the project agreement, including non-negotiable conditions.
If no, please elaborate	n/a
14.1. Are the tender documents published online?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 37 (1) of the PPP Act requires that requests for qualification are published in at least two newspapers of national circulation and in electronic media.
and please specify the website:	Contracting authority's website, National Treasury under IFMIS, and PPP Unit website at www.pppunit.go.ke
15. In a case comparable to the case study assumptions, have standardized PPP model contracts and/or transaction documents been developed?	No
If yes, please specify and provide a government-supported website where the mentioned standards are available or provide an electronic copy of them:	n/a
16.1 In a case comparable to the case study assumptions, who is the responsible party for each of the following requirements? Obtaining the required urban permits:	No
Procuring authority (or other Government entity)	No
Private Partner	No
Private partner with facilitation role assigned to the procuring authority (or other Government entity)	No
To be established in the contract	Yes
Relevant legal/regulatory provision (if any)	PPP Act section 62 (1) provides that the parties to a project agreement under this Act shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule. The Third Schedule paragraph 6 states, "the responsibility for obtaining authorizations, permits, and approvals" as one of the components of the PPP contract, which the parties shall agree on.

16.2. Obtaining the required environmental permits: Procuring authority (or other Government entity)	No
Private Partner	No
Private partner with facilitation role assigned to the procuring authority (or other Government entity)	No
To be established in the contract	Yes
Relevant legal/regulatory provision (if any)	PPP Act section 62 (1) provides that the parties to a project agreement under this Act shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule. The Third Schedule paragraph 6 states, “the responsibility for obtaining authorizations, permits, and approvals” as one of the components of the PPP contract, which the parties shall agree on.
16.3. Obtaining the required operational permits: Procuring authority (or other Government entity)	No
Private Partner	No
Private partner with facilitation role assigned to the procuring authority (or other Government entity)	No
To be established in the contract	Yes
Relevant legal/regulatory provision (if any)	PPP Act section 62 (1) provides that the parties to a project agreement under this Act shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule. The Third Schedule paragraph 6 states, “the responsibility for obtaining authorizations, permits, and approvals” as one of the components of the PPP contract, which the parties shall agree on.
16.4. Obtaining the required land: Procuring authority (or other Government entity)	No
Private Partner	No
Private partner with facilitation role assigned to the procuring authority (or other Government entity)	No
To be established in the contract	Yes
Relevant legal/regulatory provision (if any)	No regulatory basis
16.5. Obtaining the required right of way: Procuring authority (or other Government entity)	No

Private Partner	No
Private partner with facilitation role assigned to the procuring authority (or other Government entity)	No
To be established in the contract	Yes
Relevant legal/regulatory provision (if any)	No regulatory basis
PPP Procurement	
18. Which of the following options best describes the required qualifications of the bid evaluation committee members? (Please select only one): The membership of the bid evaluation committee is specified and/or its members are required to meet detailed qualifications.	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	The PPP Act Section 47 (2) provides that the evaluation committee shall consist of: (a) at least one representative of the contracting authority nominated by the relevant State department; (b) a representative of the PPP Node established within the contracting authority; (c) a representative of the relevant regulatory body; (d) a representative of the PPP Unit; (e) a representative of the Attorney General. The PPP Act moreover anticipates that further specific qualification criteria for these committee members shall be determined according to each project requirements, including legal, procurement, technical, and financial standard requirements at minimum.
The bid evaluation committee members require sufficient qualification without specific details.	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
The bid evaluation committee members are not required to have any specific qualifications.	No
Please elaborate and provide examples:	n/a
19. Does the procuring authority issue a public procurement notice of the PPP project?	Yes
If yes, please specify the means of publication and provide the relevant legal/regulatory provisions (if any):	Section 37 (1) of the PPP Act provides that the procuring authority shall invite requests for qualification by notice in at least 2 newspapers of national circulation and in the electronic media. Under Section 36 (1) of the PPP Regulations, once shortlisted, the prequalified bidders are invited to make

	their bids by the accounting officer of the procuring entity through a notice in the official Gazette as well as 2 newspapers of national circulation. Notice should also be given through the procuring entity's website or such other electronic means of communication.
19.1. If yes, is the public procurement notice published online?	Yes
If yes, please specify the website:	The procuring authority's website and the PPP Unit's website www.pppunit.go.ke and the IFMIS platform under the National Treasury.
20. Are foreign companies prohibited from participating in the bidding process?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
21. In a case comparable to the case study assumptions, does the procuring authority grant the potential bidders a minimum period of time to submit their bids?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	PPP Act Section 43 (2) (h) provides that Tender documents under subsection (1) shall include- (h) the deadline and place for submission of the tender documents by a bidder.
and the time in calendar days:	n/a
22.1. In a case comparable to the case study assumptions, which are the procurement procedures available and/or set as default for PPP projects? Open tendering: Available	Yes
Default	No
Relevant legal/regulatory provision (if any)	PPP Act Section 29 provides, "29. (1) Except as otherwise provided for under this Act, all projects shall be procured through a competitive bidding process. "
22.2. Restricted tendering (with pre-qualification stage): Available	No
Default	Yes
Relevant legal/regulatory provision (if any)	PPP Act Section 37 (1) provides, "A contracting authority shall, upon the approval by the Committee, invite requests for qualification by notice in at least two newspapers of national circulation and in the electronic media."
22.3 Multi-stage tendering (with shortlisting of final candidate(s)): Available	Yes
Default	No
Relevant legal/regulatory provision (if any)	No regulatory basis
22.4. Competitive dialogue: Available	Yes

Default	No
Relevant legal/regulatory provision (if any)	Section 45 (1) of the PPP Act provides that a contracting authority may, in consultation with the unit and with the approval of the Committee, hold a competitive dialogue with each bidder to define the technical or financial aspects of the project.
22.5. Direct negotiation with more than one candidate: Available	No
Default	No
Relevant legal/regulatory provision (if any)	n/a
22.6. Direct negotiation with only one candidate: Available	No
Default	No
Relevant legal/regulatory provision (if any)	n/a
22.7 Other. Specify:	No
Available	No
Default	No
Relevant legal/regulatory provision (if any)	n/a
22.8. Do the tender documents detail the procedure of the procurement process providing the same information to all the bidders?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 43 of the PPP Act provides, “(2) Tender documents prepared under subsection (1) shall include the following information- (a) general information related to the project necessary for the preparation and submission of a bid; (b) specifications of the project including the technical and financial conditions that should be met by a bidder; (c) specifications of the final product, level of services, performance indicators and such other requirements as the contracting authority and relevant regulatory bodies shall consider necessary including the safety, security, and environment preservation requirements to be met by a bidder; (d) basic terms and conditions of the project agreement including non-negotiable conditions; (e) the criteria and method to be used in evaluating a bid; (f) the forms and documents that are required to be filled and submitted by a bidder; (g) the value of the bid security required to be submitted by a bidder; (gg) conditions under which bidders may submit request for clarifications; and (h) the deadline and place for submission of the tender documents by a bidder.”

If no, please elaborate:	n/a
22.9. Do the tender documents specify the prequalification/shortlisting criteria (when applicable) in order to make them available to all the bidders?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	<p>According to Section 38 (2) of the PPP Act, “</p> <p>(1) A person who intends to request for qualification for a project under this Act may constitute a consortium for that purpose.</p> <p>(2) A person or consortium qualifies to request for qualification if the person or consortium-</p> <p>(a) meets the criteria specified in the request for qualification issued by the contracting authority;</p> <p>(b) has the technical capability and financial capacity to undertake the project;</p> <p>(c) has the legal capacity to enter into a project agreement with the contracting authority under this Act;</p> <p>(d) is not insolvent, in receivership, bankrupt, or in the process of being wound up; and</p> <p>(e) is not precluded by the contracting authority from entering into an agreement for the purpose of undertaking the project.”</p> <p>Moreover, Section 37(2) of the PPP Act provides that a contracting authority shall, in the request for qualification notice specify the eligibility criteria of a bidder and may require bidders to provide such statements or documents as proof of their eligibility.</p> <p>Section 43(2) of the PPP Act also provides, ““Tender documents prepared under subsection (1) shall include the following information (e) the criteria and method to be used in evaluating a bid.”</p>
22.10. Based on your experience, is it always the case that the specified criteria are respected in practice?	Yes
If yes, please specify and provide the relevant legal/regulatory provisions (if any):	<p>Contributors confirm that specified criteria have been respected in practice. Section 40 of the PPP Act moreover sets the conditions of disqualification of a private party when this criteria are not met:</p> <p>(1) A pre-qualification committee shall consider the requests for qualification submitted to the contracting authority in accordance with the notice issued under section 37 and shortlist the qualified bidders.</p> <p>(2) A pre-qualification committee shall disqualify a bidder if that bidder—</p> <p>(a) submits false, inaccurate, or incomplete information in relation to its qualifications;</p> <p>(b) colludes, connives, or is involved in any corrupt or dishonest practice;</p> <p>(e) fails to meet the eligibility criteria; or</p> <p>(f) contravenes the provisions of this Act or any other written law in order to have an unfair advantage over other bidders in the award of the tender.</p> <p>(3) A private party may object to the decision of the pre-qualification committee not to shortlist a bidder under subsection (1).</p> <p>(4) An objection under subsection (3) shall be determined by the Petition Committee in accordance with section 67.</p>

	Bid stage decisions can also be challenged before the Petition Committee under section 67 – where the tribunal is empowered to determine all disputes that arise from a tendering process, including where such disputes are attributed to the administrative actions of contracting authorities, the Unit, or the PPP Committee.
If no, please elaborate:	n/a
23. Can interested parties/potential bidders submit questions to clarify the public procurement notice and/or the request for proposals?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 41(3) of the PPP Act provides that (3) Any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders. Moreover, Section 59 of the Finance Act, 2015 amended the provisions of section 43(2) by introducing a new paragraph (gg) which expressly states that “tender documents shall specify procedures conditions under which bidders may seek clarifications on the tender and or the tender documents”
23.1. If yes, notwithstanding confidential information pertaining to the bidders, does the procuring authority disclose those questions and clarifications to all potential bidders?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 41(3) of the PPP Act provides that any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders. However, all responses are anonymized to preserve vendor neutrality outcomes in the tender process, according to contributors.
23.2. Based on your experience, is it always the case that this disclosure of information is done in practice?	Yes
If yes, please specify:	Contributors provided that questions are consolidated and responses are provided to all bidders without disclosing the names of the bidders who posed the questions.
If no, please elaborate:	n/a
24. Besides questions and clarifications, can the procuring authority conduct pre-bidding conference?	Yes
If yes, please specify and provide the relevant legal/regulatory provisions (if any):	The PPP Act provides, 41. (1) A contracting authority may, in consultation with the unit, hold a preliminary meeting with the bidders who are shortlisted under section 40. (2) The contracting authority shall, during the preliminary meeting, deliberate on issues related to the project specifications and initial preliminary conditions and respond to any enquiry made by the bidders in relation to the project

	<p>(3) Any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated to all shortlisted bidders. According to Section 37 (1) of the PPP Regulations, after a notice of an invitation to tender is published, a contracting authority convenes a pre-bid conference to clarify key conference issues in relation to a tender. Contributors confirmed that while these provisions apply to questions and clarifications from bidders, they also are a basis for conducting pre-bidding conferences.</p>
<p>24.1. If yes, notwithstanding confidential information pertaining to the bidders, does the procuring authority disclose the content and the results of the pre-bid conference to all bidders?</p>	<p>Yes</p>
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>Pursuant to the PPP Act section 41 (3), any enquiry made by a bidder and response issued by a contracting authority in relation to a bid shall be communicated, in anonymized format, to all shortlisted bidders.</p>
<p>24.2. Based on your experience, is it always the case that this disclosure of information is done in practice?</p>	<p>Yes</p>
<p>If yes, please specify:</p>	<p>Contributors provided that questions are consolidated and responses are provided to all bidders without disclosing the names of the bidders who posed the questions.</p>
<p>If no, please elaborate:</p>	<p>n/a</p>
<p>25. In a case comparable to the case study assumptions, does the procuring authority require the bidders to prepare and present a financial model with their proposals?</p>	<p>No</p>
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>n/a</p>
<p>If no, please elaborate:</p>	<p>Section 44(1) of the PPP Act requires a bidder, who intends to bid for a project to complete and submit a technical bid and financial bid, however no express mention of a financial model exists.</p>
<p>26. Does the procuring authority evaluate the proposals strictly and solely in accordance with the evaluation criteria stated in the tender documents?</p>	<p>Yes</p>
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	<p>Sections 47(3) and 48(3) of the PPP Act provide that the proposal evaluation team is required to open and evaluate the technical and financial bids within the time, in accordance with the procedure and requirements specified in the tender documents. Section 49 (1) of the Public Private Partnerships Act, 2013</p>

	provides that upon evaluating the bids and before declaring the first ranked bidder, the proposal evaluation team is required to prepare an evaluation report, specifying the evaluation criteria, the manner in which the first ranked bidder satisfied the requirements specified in the tender documents in comparison with other bidders.
Evaluation criteria is not set in the tender documents	No
27. In the case where only one proposal is submitted (sole proposals), which of the following options best describes the way the procuring authority deals with them? (Please select only one)?: The procuring authority follows a specific procedure before awarding a PPP contract where only one proposal is submitted.	No
Please specify and provide the relevant legal/regulatory provisions (if any):	n/a
The procuring authority considers sole proposals valid as long as they meet the conditions outlined in the tender documents.	No
Please provide the relevant legal/regulatory provisions (if any):	n/a
The procuring authority does not award a PPP contract if only one proposal is submitted.	No
Please provide the relevant legal/regulatory provisions (if any):	n/a
The regulatory framework does not include any provisions.	Yes
28. Does the procuring authority publish the award notice?	Yes
If yes, please specify the means of publication and provide the relevant legal/regulatory provisions (if any):	According to Section 60 (1) of the PPP Act, "A contracting authority shall, upon the execution of a project agreement by the parties, publish in at least two newspapers of national circulation and in the electronic media, the results of the tender together with the following information- (a) the nature of the project; (b) the scope of the project; (c) the successful bidder;

	(d) the project cost at net present value; (e) the project value and tariff; and (f) the duration of the project.”
28.1. If yes, is the public procurement award notice published online?	Yes
If yes, please specify the website:	http://www.pppunit.go.ke and in contracting authority websites
29. Does the procuring authority provide all the bidders with the result of the PPP procurement process?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	According to Section 56(3) of the PPP Act, “The contracting authority shall communicate the decision of the Cabinet or Parliament as the case may be, in writing, to all bidders who participated in the bidding of the project.”
If no, please elaborate:	n/a
29.1. If yes, does the notification of the result of the PPP procurement process include the grounds for the selection of the winning bid?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
30. Is there a standstill (or pause) period after the contract award and before the signing of the contract in order to allow unsuccessful bidders to challenge the award decision?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 67 (4) of the PPP Act provides, “(4) Where a petition is based on an administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.” Contributors confirmed that this provision is used as a standstill period where no PPP contracts shall be implemented before the 15-day period.
and the time in calendar days:	15
30.1. Is the standstill period set out in the notice of intention to award?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
31. Does the regulatory framework restrict negotiations with the selected bidder between the award and the signature of	Yes

the PPP contract in order to prevent an unfair disadvantage to the other bidders?	
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 52 of the PPP Act restricts negotiations to the extent that: <ul style="list-style-type: none"> o negotiations cannot result in an increase in pricing; o negotiations cannot affect the non-negotiable terms and conditions as specified in the invitation to tender, the financial structure or the conditions in respect of which there were no reservations raised by the bidder in the bid; and o negotiations cannot amend the terms upon which the bid was evaluated.
31.1. Based on your experience, is it always the case that this restriction is respected in practice?	Yes
If yes, please specify:	Contributors have provided that such restrictions are respected in practice and that all concluded negotiations have generally achieved lowering of PPP prices and clarification of the technical, legal, commercial, and financial terms of the project agreement.
If no, please elaborate:	n/a
32. Does the procuring authority publish the PPP contract?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
32.1. If yes, which of the following options best describes this publication (choose only one)?	n/a
Publication of the full PPP contract including all its annexes and appendixes	n/a
Publication of the full PPP contract without including all its annexes and appendixes	n/a
Publication of a summary of the PPP contract without publishing the full PPP contract	n/a
Publication of a summary of the PPP contract along with the full PPP contract including all its annexes and appendixes	n/a
Publication of a summary of the PPP contract along with the full PPP contract without including all its annexes and appendixes	n/a

32.2. If yes, is it published online?	n/a
If yes, please specify the website:	n/a
32.3. If yes, does the procuring authority also publish any subsequent amendment made to the PPP contract?	n/a
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
PPP Contract Management	
41. Has the procuring or contract management authority established a system to manage the implementation of the PPP contract (e.g. attributing responsibilities or establishing specific management tools)?	Yes
If yes, please provide the relevant legal/regulatory provisions (if any):	Section 65 of the PPP Act provides that, (1) A contracting authority that is a party to a project agreement shall, together with sector regulators, where applicable ensure that the project agreement is properly implemented by- (a) monitoring the implementation of the project agreement; (b) measuring the output of the project; (c) liaising with the private party, users of the facility or service, and other relevant stakeholders; (d) overseeing the management of the project agreement; (e) preparing periodic reports on the project agreement implementation; and (f) submitting reports on the project agreement implementation to the PPP Committee in June and December each year of the project.
41.1. If yes, which of the following tools does it include (check all that apply)? Establishment of a PPP contract management team	Yes
Relevant legal/regulatory provisions (if any):	Section 65 (2) provides that the Contracting authority is required to appoint an independent expert to manage in consultation with the authority the implementation of the project agreement.
Participation of the members of the PPP contract management team in the PPP procurement process and/or vice versa	No
Relevant legal/regulatory provisions (if any):	n/a

Elaboration of a PPP implementation manual or an equivalent document	No
Relevant legal/regulatory provisions (if any):	n/a
Establishment of personnel training programs (i.e. initial training and continued training throughout the course of the project)	No
Relevant legal/regulatory provisions (if any):	n/a
Establishment of a risk mitigation mechanism which considers the evolving nature of risks throughout the project lifecycle (guidelines, specific processes, insurance regime, etc.)	No
Relevant legal/regulatory provisions (if any):	n/a
41.2. Which of the following options best describes the required qualifications of the PPP contract management team members? (Please select only one): The membership of the PPP contract management team is specified and/or its members are required to meet detailed qualifications.	No
If yes, please specify and provide the relevant legal/regulatory provisions (if any):	n/a
The PPP contract management team members are required to meet sufficient qualification without specific details.	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
The PPP contract management team members are not required to meet any specific qualifications.	Yes
Please elaborate and provide examples:	PPP contract management teams are set on a project by project basis.
42. Does the procuring or contract management	Yes

authority establish a system for tracking progress and completion of construction works under a PPP contract?	
If yes, please provide the relevant legal/regulatory provisions (if any):	<p>PPP Act Section 65 on Project management provides,</p> <p>(1) A contracting authority that is a party to a project agreement shall, together with sector regulators, where applicable ensure that the project agreement is properly implemented by-</p> <p>(a) monitoring the implementation of the project agreement;</p> <p>(b) measuring the output of the project;</p> <p>(c) liaising with the private party, users of the facility or service and other relevant stakeholders;</p> <p>(d) overseeing the management of the project agreement;</p> <p>(e) preparing periodic reports on the project agreement implementation; and</p> <p>(f) submitting reports on the project agreement implementation to the Committee in June and December in each year of the project.</p>
42.1. If yes, is the PPP contract construction performance information made available to the public?	<p>No</p>
If yes, please provide the relevant legal/regulatory provisions (if any):	<p>n/a</p>
42.2. If yes, is the PPP contract construction performance information made publicly available online?	<p>n/a</p>
If yes, please specify the website:	<p>n/a</p>
43. Does the procuring or contract management authority establish a monitoring and evaluation system of the PPP contract implementation after construction?	<p>Yes</p>
If yes, please provide the relevant legal/regulatory provisions (if any):	<p>Section 65 (1) of the PPP Act provides that,</p> <p>(1) A contracting authority that is a party to a project agreement shall, together with sector regulators, where applicable ensure that the project agreement is properly implemented by-</p> <p>(a) monitoring the implementation of the project agreement;</p> <p>(b) measuring the output of the project;</p> <p>(c) liaising with the private party, users of the facility or service and other relevant stakeholders;</p> <p>(d) overseeing the management of the project agreement;</p> <p>(e) preparing periodic reports on the project agreement implementation; and</p> <p>(f) submitting reports on the project agreement implementation to the PPP Committee in June and December each year of the project.</p>

43.1. If yes, which of the following tools does it include (check all that apply)?: Performance is assessed against evaluation criteria set in the tender documents and the PPP contract	No
Relevant legal/regulatory provisions (if any)	n/a
The procuring or contract management authority can abate (reduce) payments for non-performance of operating obligations under the PPP contract	No
Relevant legal/regulatory provisions (if any)	n/a
The private partner must provide the procuring or contract management authority with periodic operational and financial data	Yes
Relevant legal/regulatory provisions (if any)	According to Section 69 of the PPP Act, “(1) A project company or private party shall keep proper books of accounts and records in relation to the project and be open for scrutiny by the contracting authority. (2) A project company or private party shall submit the duly audited financial accounts and any other information as may reasonably be required by the contracting authority or the unit within six months after the end of each financial year.”
The procuring or contract management authority must periodically gather information on the performance of the PPP contract	Yes
Relevant legal/regulatory provisions (if any)	Sections 17 (2) and 65(1) of the PPP Act provide that, (1) A contracting authority that is a party to a project agreement shall, together with sector regulators, where applicable, ensure that the project agreement is properly implemented by- (e) preparing periodic reports on the project agreement implementation.
The PPP contract performance information must be available to the public	No
Relevant legal/regulatory provisions (if any)	n/a
43.2. Is PPP contract performance information made publicly available online?	No

If yes, please specify the website:	n/a
44. Are foreign companies prohibited from repatriating the income resulting from the operation of a PPP project?	No
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
45. Does the regulatory framework (including standard contractual clauses) expressly regulate changes in the ownership structure (i.e. stakeholder composition) of the private partner and/or assignment of the PPP contract?	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	<p>According to Section 59 of the PPP Act:</p> <p>“(3) The directors of a project company established under subsection (1) shall not wind up the company, alter the legal structure or reduce the share capital of the company unless the directors have applied for, and obtained the written approval of the contracting authority, which approval shall not be unreasonably withheld.</p> <p>(4) A majority shareholder of a project company shall not transfer any shares held in a project company before the issuance by the contracting authority, of an acceptance certificate confirming its acceptance of the quality of the project undertaken in accordance with the project agreement executed by the parties under section 57.</p> <p>(5) Notwithstanding the provisions of the Companies Act, where transfer of shares results in the transfer of the control of a project company to a third party, the transfer shall not be valid unless the shareholder has applied for, and obtained the written approval of the contracting authority.</p> <p>(6) A project company shall not pledge its shares except for the purpose of financing the project.”</p>
45.1. If yes, which of the following circumstances are specifically regulated? (check all that apply): Any change in the private partner during an initial period (e.g. construction and first five years of operation).	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
Changes of ownership/contract assignment, at any time	No

<p>during the contract, must preserve the same technical qualifications as the original operator.</p>	
<p>If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):</p>	n/a
<p>In other cases, flexibility to change the ownership structure and/or assign the contract.</p>	No
<p>If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):</p>	n/a
<p>46. Does the regulatory framework (including standard contractual clauses) expressly regulate the modification or renegotiation of the PPP contract (once the contract is signed)?</p>	Yes
<p>If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):</p>	<p>Section 64 of the PPP Act provides,</p> <p>(1) A party that intends to make any amendment or variation to a project agreement in relation to the terms and conditions specified therein, the outputs of a project or any waivers specified in the agreement shall apply for, and obtain the approval of the Committee.</p> <p>(2) The Committee shall not approve an amendment, variation or waiver to a project agreement under subsection (1) unless it is satisfied that the agreement, if so amended or varied, shall ensure-</p> <p>(a) the project continues to provide value for money;</p> <p>(b) the project continues to be affordable as verified by the Debt Management Office, where such amendment, variation or waiver has a financial implication;</p> <p>(c) the continued transfer of appropriate risks to the private party;</p> <p>(d) the continued provision of efficient and effective service to the public; and</p> <p>(e) the continued protection and preservation of the environment.</p>
<p>46.1. If yes, is an approval from a government authority, other than the procuring authority, required?</p>	Yes
<p>If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):</p>	<p>Section 64 of the PPP Act provides,</p> <p>(1) A party that intends to make any amendment or variation to a project agreement in relation to the terms and conditions specified therein, the outputs of a project or any waivers specified in the agreement shall apply for, and obtain the approval of the Committee.</p> <p>In addition, contributors also provided that the approval of the Attorney</p>

	General would be required prior to execution of any addendum to the PPP contract or any deed of variation.
46.2. If yes to question 46, which of the following circumstances are specifically regulated? (check all that apply): A change in the scope and/or object of the contract.	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
A change in the risk allocation of the contract.	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	Section 64 of the PPP Act provides, (2) The Committee shall not approve an amendment, variation or waiver to a project agreement under subsection (1) unless it is satisfied that the agreement, if so amended or varied, shall ensure- (c) the continued transfer of appropriate risks to the private party..."
A change in the financial and/or economic balance of the contract.	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	According to Section 64 (2) of the PPP Act: (2) The Committee shall not approve an amendment, variation or waiver to a project agreement under subsection (1) unless it is satisfied that the agreement, if so amended or varied, shall ensure — (a) the project continues to provide value for money; (b) the project continues to be affordable as verified by the Debt Management Office, where such amendment, variation or waiver has a financial implication; (c) the continued transfer of appropriate risks to the private party."
A change in the duration of the contract.	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
A change in the agreed price or tariff.	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
46.3. Can the procuring authority unilaterally modify a PPP contract?	No
If yes, please provide the relevant legal/regulatory/standard	n/a

contractual provisions (if any):	
47. Does the regulatory framework (including standard contractual clauses) expressly regulate the following circumstances that may occur during the life of the PPP contract? (check all that apply): Force Majeure	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	Section 62 of the PPP Act provides, “ (1) The parties to a project agreement under this Act shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule.” Paragraph 14 of the Third Schedule provides, “The basis of risk allocation in respect of a change in the law, unforeseeable accidents, force majeure, or discovery of antiquities, and as the case may be, the resultant compensation.”
Material Adverse government action .	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
Change in the Law.	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	Section 62 of the PPP Act provides, “ (1) The parties to a project agreement under this Act shall specify the minimum contractual obligations required to be met by the parties as set out in the Third Schedule.” Paragraph 14 of the Third Schedule provides, “The basis of risk allocation in respect of a change in the law, unforeseeable accidents, force majeure, or discovery of antiquities, and as the case may be, the resultant compensation.”
Refinancing.	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
Subcontracting and replacement of the subcontractors.	No
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
48. Does the regulatory framework (including standard contractual clauses)	Yes

allow for administrative and/or contractual complaint review mechanisms to address disputes arising from the implementation of PPP contracts?	
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	Section 62 of the PPP Act provides for the minimum contractual obligations that should be included in any project agreement. Paragraph 18 of The Third schedule to the PPP Act specifies that one such obligation is that a project agreement provides that the contract must include a mechanism for dispute resolution including by way of arbitration or any other amicable dispute resolution mechanism. Section 63 (3) of the Act provides that upon the approval of the PPP Committee, it may be agreed to resolve disputes arising under the project agreement though arbitration, or any other non-judicial means of dispute resolution agreed upon in the project agreement as specified in paragraph 18 of the Third Schedule.
48.1. If yes, please specify which of the following options are available (check all that apply): Local administrative review body	No
If yes, please specify:	n/a
Local courts	Yes
Domestic arbitration	Yes
International arbitration	Yes
Investor-State Dispute Settlement (ISDS)	Yes
Mediation	Yes
Please provide the relevant legal/ regulatory/standard contractual provisions (if any)	Section 62 of the PPP Act provides for the minimum contractual obligations that should be included in any project agreement. Paragraph 18 of The Third schedule to the PPP Act specifies that one such obligation is that a project agreement provides that the contract must include a mechanism for dispute resolution including by way of arbitration or any other amicable dispute resolution mechanism. Section 63(3) of the Act provides that upon the approval of the PPP Committee, it may be agreed to resolve disputes arising under the project agreement though arbitration, or any other non-judicial means of dispute resolution agreed upon in the project agreement as specified in paragraph 18 of the Third Schedule.
48.2. If applicable, are arbitration awards enforceable by the local courts?: Domestic Arbitration	Yes
If yes, please provide the relevant legal/ regulatory provisions/standard contractual provisions (if any):	Section 36 (1) of the Arbitration Act (No.4 of 1999) (the Arbitration Act) states that local arbitration awards shall be recognized by the High Court. In addition, the enforcement of the awards is possible under the provisions of the Third Schedule paragraph 18 of the PPP act in Kenya.
International arbitration	Yes

If yes, please provide the relevant legal/ regulatory provisions/standard contractual provisions (if any):	Section 36 (2) of the Arbitration Act, 1995 - "An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention, which Kenya is signatory and relating to arbitral awards." In addition to the provisions of the Third Schedule paragraph 18 in the PPP Act shall be applicable. The New York Convention and other international agreements that Kenya is party of would be applicable, which shall also include the ICSID Convention.
Investor-State arbitration	Yes
If yes, please provide the relevant legal/ regulatory provisions/standard contractual provisions (if any):	Section 36 (2) of the Arbitration Act, 1995 - "An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention, which Kenya is signatory and relating to arbitral awards." In addition to the provisions of the Third Schedule paragraph 18 in the PPP Act shall be applicable. The New York Convention and other international agreements that Kenya is party of would be applicable, which shall also include the ICSID Convention.
49. Does the regulatory framework (including standard contractual clauses) allow for the restructuring of a PPP private partner (SPV) in financial difficulty prior to insolvency?	No
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
50. Does the regulatory framework (including standard contractual clauses) allow for the lenders to take control of the PPP project (lender step-in rights) if either the private partner defaults or if the PPP contract is under threat of termination for failure to meet service obligations?	Yes
If yes, please provide the relevant legal/regulatory/standard contractual provisions (if any):	Paragraph 2 of the Third Schedule to the PPP Act provides that the minimum requirements of the PPP contract shall include, "The rights of a contracting authority, the project company and where applicable, the lender, in relation to the project including step in rights of lenders."
50.1. If yes, which of the following options best describes the lender step-in right? (Please select only one): The regulatory framework expressly regulates the lender step-in rights.	No

If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
The regulatory framework prescribes that a direct agreement should be signed with the lenders.	No
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
The regulatory framework prescribes that the lender step-in rights should be regulated in the contract.	Yes
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	Paragraph 2 of the Third Schedule to the PPP Act provides that the minimum requirements of the PPP contract shall include, "The rights of a contracting authority, the project company and where applicable, the lender, in relation to the project including step in rights of lenders."
Other.	No
Please Specify:	n/a
51. Does the regulatory framework (including standard contractual clauses) expressly establish the grounds for termination of a PPP contract?	Yes
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	Paragraph 16 of the Third Schedule of the PPP Act: Early termination events under which a party may terminate the contract prior to the expiry of the project agreement and the rights of the parties in relation to the termination.
51.1. If yes, does the regulatory framework (including standard contractual clauses) establish the consequences for the termination of the PPP contract?	No
If yes, please specify and provide the relevant legal/regulatory/standard contractual provisions (if any):	n/a
Unsolicited Proposals	
34. Are unsolicited proposals in Kenya: (choose only one):	No

Explicitly prohibited by the legal framework? (If prohibited, skip to section F)	
Explicitly allowed by the legal framework?	Yes
Not regulated by the legal framework, but do happen in practice?	No
Not regulated by the legal framework, and do not happen in practice? (if not done in practice, skip to section F)	No
If the legal framework explicitly prohibits or allows unsolicited proposals, please provide the relevant legal/regulatory provisions	<p>Section 61(1) of the Act provides that a contracting authority may consider a privately-initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where:</p> <p>(a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical: Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority;</p> <p>(b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial;</p> <p>(c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or</p> <p>(d) there exists any of the circumstance as the Cabinet Secretary may prescribe. Over and above this, the newly enacted PPP Regulations provide an additional avenue for projects to be undertaken under privately initiated investment proposals as follows:</p> <p>i) if such projects are already included in the contracting authority's development programme;</p> <p>ii) if the PPP Unit reviews the privately initiated investment proposal and makes recommendations on the same, to the PPP Committee; and</p> <p>iii) the Cabinet Secretary, National Treasury approving the privately-initiated investment proposal after taking into consideration the recommendations of the PPP Committee.</p>
35. Does the procuring authority conduct an assessment to evaluate unsolicited proposals? (if not, skip to question 37)	Yes
If yes, please specify and provide the relevant	<p>Section 61 (3) of the Act requires every unsolicited PPP proposal to (i) provide value for money; (ii) be affordable; and (iii) transfer risks.</p> <p>Rule 52 (1) of the PPP Regulations expounds on these requirements and</p>

legal/regulatory provisions (if any)	<p>provides, “A contracting authority shall develop criteria for the negotiation of a privately-initiated investment proposal and submit them to the Unit for review and recommendation where: (a) the privately initiated investment proposal is affordable; (b) the privately initiated investment proposal provides value for money; and (c) the privately initiated investment proposal provides for the effective transfer of risk from the contracting authority.” Section 61 (2) (a) provides, “A contracting authority shall, before commencing negotiations with a private party under this section- prescribe a criteria against which the outcome of negotiations shall be evaluated.”</p>
35.1. If yes, is there any vetting procedure and/or pre-feasibility analysis before fully assessing the unsolicited proposal?	<p>Yes</p>
If yes, please provide the relevant legal/regulatory provisions (if any):	<p>Rule 53 (1) and (2) of the PPP Regulations: “(1) The Unit shall review a privately-initiated investment proposal made to a contracting authority and shall recommend to the Committee whether or not to approve the proposal and the negotiation criteria. (2) The contracting authority shall only initiate negotiations on a privately-initiated investment proposal after obtaining the approval of the Committee.” In addition, the procuring authority must satisfy itself that the project meets the requirements of Section 61 of the Act and Section 52 (1) of the PPP Regulations mentioned in the previous answer. Section 61 (1) of the Act provides that a contracting authority may consider a privately-initiated investment proposal for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where: (a) there is an urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical: Provided that the circumstances giving rise to the risk of disruption were not foreseeable by the contracting authority or the result of an unreasonable failure to act by the contracting authority; (b) the costs relating to the intellectual property in relation to the proposed design of the project is substantial; (c) there exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service; or (d) there exists any of the circumstance as the Cabinet Secretary may prescribe. Over and above this, the newly enacted PPP Regulations provide an additional avenue for projects to be undertaken under privately-initiated investment proposals as follows:</p>

	<p>i) if such projects are already included in the contracting authority's development programme;</p> <p>ii) if the PPP Unit reviews the privately initiated investment proposal and makes recommendations on the same, to the PPP Committee; and</p> <p>iii) the Cabinet Secretary, National Treasury approving the privately initiated investment proposal after taking into consideration the recommendations of the PPP Committee.</p>
<p>36. Which of the following options best describe how the procuring authority ensures that unsolicited proposals are consistent with existing government priorities? (Please select only one): The procuring authority follows a specific procedure to ensure the consistency of PPPs with other government investment priorities.</p>	Yes
<p>If yes, please specify and provide the relevant legal/regulatory provisions (if any):</p>	<p>Previously mentioned Section 23 (2) of the PPP Act applies to all PPP projects, whether procured competitively or privately initiated. All PPP projects must flow from a planned public investment programme. This is reinforced under Rule 51 (2) of the PPP Regulations that is specific to PPPs and must ultimately abide by the conditions set out in Section 61 (1) and (3) of the PPP Act.</p>
<p>The regulatory framework requires unsolicited proposals to be among the existing government priorities without establishing specific procedures to achieve that goal.</p>	No
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	n/a
<p>The procuring authority does not evaluate unsolicited proposals against existing government priorities.</p>	No
<p>Please elaborate and provide examples:</p>	n/a
<p>37. Does the procuring authority initiate a competitive PPP procurement procedure when proceeding with the unsolicited proposal?</p>	No
<p>If yes, please provide the relevant legal/regulatory provisions (if any):</p>	n/a
<p>38. Does the procuring authority grant a minimum</p>	No

period of time to additional prospective bidders (besides the proponent) to prepare their proposals?	
If yes, please provide the relevant legal/regulatory provisions (if any):	n/a
and the time in calendar days:	n/a
39.1 Does the procuring authority use any of the following incentive mechanisms to reward/compensate the presentation of unsolicited proposals? (check all that apply): Access to the best and final offer (BAFO) process and/or automatic shortlisting.	No
39.2 Developer's fee (reimbursing the original proponent for the project development cost).	No
39.3 Bid Bonus.	No
39.4 Swiss challenge (If unsuccessful, the original proponent has the option to match the winning bid and win the contract).	No
39.5 Other.	No
Please specify:	n/a
Please provide the relevant legal/regulatory provisions (if any):	n/a