



COMMENTS ON THE PUBLIC PRIVATE PARTNERSHIPS BILL, 2021

Clause	Proposed Amendment/Input	Justification /Comments
5	Delete the clause	The PPP law is silent on significant issues of law including competition laws and the Public Audit Act. For example, what happens if the PPP entity violates competition laws? To have the proposed Act as the main law superseding other statutes creates uncertainty with regards to projects facing litigation. This clause should be deleted but Parliament could consider the adjustment on laws on a case by case basis as PPPs are approved, going forward.
8(1)(g)	Delete the clause	<p>The role of monitoring all government obligations as defined under Article 214(2) of the Constitution is placed on Parliament and the Cabinet Secretary for Finance as outlined under Article 211 of the Constitution. Managing Contingent liabilities is part of fiscal policy that directly affects the Kenyan Economy. Therefore, Approval of Contingent Liabilities should be left to Parliament and National Treasury. Section 8(g) is inconsistent with the Constitution and best practice.</p> <p>Parliament could constitute a specific subcommittee that looks into public guarantees and approves them at least 1 month before Parliament debate the Budget Policy Statement.</p>
19(2)b	Rewrite the clause	The Directorate should liaise with Kenyan universities and Thinktanks to develop resource material on public-private partnerships. These institutions would provide useful input for knowledge development on the subject.
19(2)f	Delete the Clause	The provision seeks to take away the procurement role of contracting authorities. The Directorate and Committees job should be limited to review of project proposals.
19(2)i	Delete the clause	The role of monitoring contingent liabilities and accounting for budgetary issues has been left to Parliament to provide checks and balances to all Executive functions. Retaining the clause would create uncertainty.

19(3)	Add provision	As a public office, the Directorate shall account to Parliament for public resources allocated to it. The Directorate shall be audited like any other entity that receives funds from the public purse.
22	Rewrite the clause	From best practice, the role of the PPP Committee is limited to review of the process leading up to a PPP contract while the contracting Authority retains control on originating processes and the procurement role. The Directorate acts as the secretariat to the PPP committee while Parliament retains the overall approval on what becomes Public Guarantees.
22(1)h	Rewrite provision	Require the Contracting Authority to submit annual or periodic reports to the Committee of Parliament dealing with PPPs. This is important because PPP have the potential to significantly affect the resources available and require Parliament to take note of issues that affect the implementation of the PPP early enough.
28	Add provision	Whenever the Cabinet Secretary responsible for Finance issues any form of government support measures, the risks that a PPP entity could suffer should be explicitly clear to decision-makers (the Parliament, PPP Committee and the Contracting Authority). The extent and proportion of what risk is shared by the public and the private partner should be clear. The support measure in any form of guarantees should be commensurate to the risk rather than a blanket offer by the government.
38	Add provision	Direct procurement shall not be used as a means to avoid competition.
62	Rewrite the clause to require all PPP agreements to be ratified by Parliament Add provision	The PPP agreements are part of the Public Budgets and forms part of the government obligations. Article 95(4)c provides that the National Assembly shall exercise oversight over national revenue and its expenditure. Parliament shall engage the Office of the Auditor-General or a special counsel to review the management decisions of the PPP Committee every year
67(9)	Add to the Provision	The Cabinet Secretary in consultation with the Directorate and the Public shall make regulations for better implementation of this section.
76	Add provision	Require the Project Company, Directorate and the PPP Committee to publish and publicize project performance and monitoring within that year.