



---

**Electronic Theses and Dissertations**

---

2021

A Review of Kenya's Public Private Partnerships legal framework for implementing infrastructure projects by county governments.

---

Kaburu, Mildred Gakii  
*Strathmore Law School*  
*Strathmore University*

**Recommended Citation**

Kaburu, M. G. (2021). *A Review of Kenya's Public Private Partnerships legal framework for implementing infrastructure projects by county governments* [Thesis, Strathmore University].

<http://hdl.handle.net/11071/12911>

Follow this and additional works at: <http://hdl.handle.net/11071/12911>

**A REVIEW OF KENYA'S PUBLIC PRIVATE PARTNERSHIPS LEGAL  
FRAMEWORK FOR IMPLEMENTING INFRASTRUCTURE PROJECTS BY  
COUNTY GOVERNMENTS**



**MASTER OF LAWS (LL.M)**

**2020**

**A REVIEW OF KENYA'S PUBLIC PRIVATE PARTNERSHIPS LEGAL  
FRAMEWORK FOR IMPLEMENTING INFRASTRUCTURE PROJECTS BY  
COUNTY GOVERNMENTS**

**MILDRED GAKII KABURU**

**STUDENT ADMISSION NUMBER: 060288**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE  
AWARD OF THE DEGREE IN MASTER OF LAWS (LL.M)**

**STRATHMORE LAW SCHOOL,**

**STRATHMORE UNIVERSITY,**

**NAIROBI, KENYA**

**DECEMBER 2020**

This thesis is available for Library use on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

## Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

© No part of this thesis may be reproduced without the permission of the author and Strathmore University

**Mildred Gakii Kaburu** [Name of Candidate]

..... [Signature]

..... [Date]

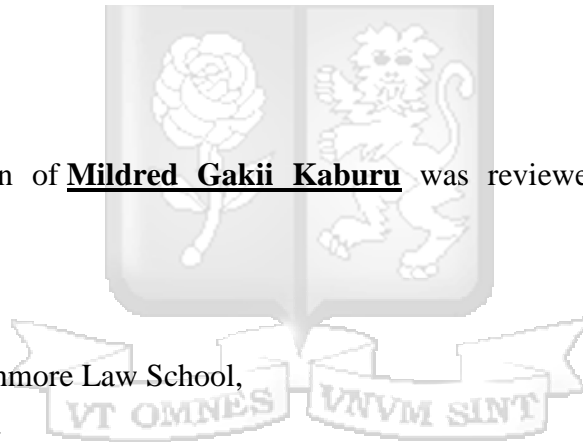
## Approval

The thesis/dissertation of **Mildred Gakii Kaburu** was reviewed and approved by the following:

Prof. Jacob Sitati

Senior Lecturer, Strathmore Law School,

Strathmore University



Dr. Peter Kwenjera,

Dean, Strathmore Law School,

Strathmore University

Dr. Bernard Shibwabo,

Director, Office of Graduate Studies,

Strathmore University

## Abstract

A Public Private Partnership (PPP) allows a public authority to benefit from the participation of the private sector in managing and financing public service expansion by outsourcing risk and by harnessing the innovative capacity and capital of the private sector. Consequently, the public agency can focus on policymaking, planning, and regulation. Thus, the PPP model can hasten delivery to curb Africa's current dreary state of infrastructure. Therefore, this study examines the legal, institutional and procedural framework for carrying out PPPs at the county level in Kenya. The aim is to find out whether the current legislative framework is one of the key causes for the low uptake of PPPs at county level despite the apparent benefits of PPPs as a means for sourcing funds for infrastructure development. This study compares the legal framework for carrying out PPPs by South Africa and Nigeria which are the two African countries that have achieved great success in their local PPP projects and are the market leaders in infrastructure development in Africa. The study's key finding is that the Kenyan PPP laws should be customized to suit County Governments because they are constitutionally mandated to provide critical services through infrastructure development. The study recommends the implementation of some of the lessons learnt from the two countries such as to customize the legal, institutional and procedural framework and for PPP arrangements by county governments in Kenya and to have the national government have a supportive role rather than a supervisory role in county government PPP projects.

## Table of Contents

<b>Declaration</b> .....	<b>ii</b>
<b>Approval</b> .....	<b>ii</b>
<b>Abstract</b> .....	<b>iii</b>
<b>List of Legal Instruments</b> .....	<b>vii</b>
<b>List of Cases</b> .....	<b>ix</b>
<b>Abbreviations and Acronyms</b> .....	<b>x</b>
<b>Acknowledgement</b> .....	<b>xi</b>
<b>Dedication</b> .....	<b>xii</b>
<b>Chapter 1</b> .....	<b>1</b>
<b>Introduction to the Study</b> .....	<b>1</b>
1.1 Background of the Study.....	1
1.2 Statement of the Problem .....	9
1.3 The Objectives of the Study .....	10
1.4 Research Questions .....	10
1.5 Research Hypothesis .....	11
1.6 Theoretical Framework .....	11
1.6.1 Local Autonomy Theory .....	11
1.6.2 Principal-Agent Theory (PAT).....	14
1.7 Literature Review.....	17
1.8 Justification of the Study.....	25
1.9 Research Methodology.....	25
1.9.1 Primary and Secondary Sources of Information.....	25
1.9.2 Comparative Studies.....	26
1.10 Scope and Limitation of the Study.....	27
1.11 Chapter Breakdown.....	27
<b>Chapter 2</b> .....	<b>30</b>
<b>The Legal, Institutional and Procedural Framework for conducting Public-Private Partnerships in County Governments in Kenya.</b> .....	<b>30</b>
2.1 Introduction .....	30
2.2 Devolution .....	30

2.3	County Government Structure in Kenya .....	33
2.4	Public-Private Partnership Laws in Kenya.....	37
2.4.1	Policy Statement on Public-Private Partnerships, November 2011 .....	37
2.4.2	The Constitution of Kenya, 2010 .....	38
2.4.3	The Public-Private Partnerships Act, 2013.....	40
2.4.4	The Public-Private Partnerships Regulations .....	41
2.4.4.1	The Public-Private Partnerships Regulations, 2014.....	41
2.4.4.2	The Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017 ....	41
2.4.5	The Public-Private Partnerships (Amendment) Bill, 2017 .....	42
2.5	Institutional Framework .....	43
2.5.1	The Public-Private Partnership Committee .....	43
2.5.2	The Public-Private Partnership Unit.....	44
2.5.3	The Public-Private Partnership Nodes.....	45
2.5.4	The Petition Committee.....	46
2.6	Procedural Framework .....	47
2.7	Public Finance Management Act .....	52
2.8	Conclusion.....	54
<b>Chapter 3</b>	.....	<b>56</b>
<b>Review of the Legal, Institutional and Procedural Framework for Conducting Local Public-Private Partnerships in South Africa and Nigeria.....</b>		<b>56</b>
3.1	Introduction .....	56
3.2	South Africa .....	56
3.2.1	Legal Framework.....	58
3.2.2	Institutional Framework .....	70
3.2.3	Procedural Framework .....	71
3.3	Nigeria.....	73
3.3.1	Legal Framework .....	73
3.3.2	Institutional Framework.....	75
3.3.3	Procedural Framework.....	76
3.5	Conclusion.....	77
<b>Chapter 4</b>	.....	<b>78</b>

<b>Best Practices from South Africa and Nigeria for Conducting Local Public-Private Partnerships.....</b>	<b>78</b>
<b>4.1 Introduction .....</b>	<b>78</b>
<b>4.2 Best Practices from South Africa.....</b>	<b>78</b>
<b>4.3 Best Practices from Nigeria.....</b>	<b>80</b>
<b>4.4 Conclusion.....</b>	<b>81</b>
<b>Chapter 5 .....</b>	<b>82</b>
<b>Summary of Findings, Recommendations and Conclusion .....</b>	<b>82</b>
5.1 Introduction .....	82
5.2 Summary of Findings .....	82
5.2.1 Legal and Regulatory Framework .....	82
5.2.2 Institutional Framework .....	84
5.2.3 Procedural Framework .....	85
5.3 Conclusion.....	85
5.4 Recommendations .....	86
5.4.1 Legal and Regulatory Reforms.....	86
5.4.2 Institutional Reforms .....	87
5.4.3 Procedural Reforms.....	87
<b>6 BIBLIOGRAPHY .....</b>	<b>89</b>
6.1 Journals.....	89
6.3 Dissertations .....	94
6.4 Internet Sources.....	95
<b>7. APPENDICES.....</b>	<b>96</b>
7.1 Similarity Index Report.....	96
7.2 Ethical Clearance Certificate.....	97

## **List of Legal Instruments**

### **Kenya**

1. County Governments Act (Act No.17 of 2012)
2. Constitution of Kenya, (2010).
3. Intergovernmental Relations Act, (No. 2 of 2012)
4. Public Finance Management Act, (No 18 of 2012)
5. Public-Private Partnerships Act (No. 15 of 2013)
6. Public-Private Partnerships (Regulations), (2014)
7. Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017
8. Public-Private Partnerships (Amendment) Bill, (Bill No.52 of 2017)
9. Public Procurement and Asset Disposal Act, (No. 33 of 2015)
10. Government of Kenya PPP Policy Statement, (2011)
11. Kenya Vision 2030 (2008-2030)

### **South Africa**

1. Constitution of the Republic of South Africa, (1996)
2. Local Government: Municipal Finance Management Act 2003, Municipal Public-Private Partnership Regulations, 2005 (South Africa)
3. Municipal Systems Act, 2003 (South Africa)
4. National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines. (South Africa)
5. Public Finance Management Act, 1999 (South Africa)
6. Treasury Regulation 16, (South Africa)

## **Nigeria**

1. Constitution of the Federal Republic of Nigeria (1999)
2. Infrastructure Concession Regulatory Commission Act, 2005 (Nigeria)
3. Public Enterprise (Privatisation & Commercialisation) Act, 1999 (Nigeria)
4. Lagos State Roads (Private Sector Participation) Authority Law, 2007 (Nigeria)
5. Lagos State Public-Private Partnership Law, 2011 (Nigeria)
6. Rivers State Public-Private Participation in Infrastructure Development Law, 2009 (Nigeria)
7. Kogi State's Public-Private Partnership Law, 2014 (Nigeria)
8. Public Procurement Act, (2007). (Nigeria)

## **International Instruments**

1. UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects UN, (2001).
2. The European Charter of Local Self-Government, (1985)
3. The United Nations Economic Commission for Europe, '*Guidebook on Promoting Good Governance in Public-Private Partnerships*', The United Nations, (2008).

## List of Cases

*Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM*

*Terminals* [2015] eKLR

*Kenya National Highways Authority v PPP Petition Committee & 2 others* [2018] eKLR

*Mota-Engil Engenharia E Construcao Africa SA & 4 others v Public Private Partnership*

*Petition Committee & another; Meridiam Infrastructure Africa Fund (MIAF) & 2 others*

*(Interested Parties)* [2019] eKLR



## Abbreviations and Acronyms

<b>BPE</b>	Bureau of Public Enterprises
<b>EMDE</b>	Emerging Markets and Developing Economies
<b>EOI</b>	Expression of Interest
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>ICRC</b>	Infrastructure Concession Regulatory Commission
<b>GTAC</b>	Government Technical Advisory Centre
<b>GOK</b>	Government of Kenya
<b>MFMA</b>	Municipal Finance Management Act
<b>MSA</b>	Municipal Systems Act
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PFMA</b>	Public Finance Management Act
<b>PPIAF</b>	Public-Private Infrastructure Advisory Facility
<b>PPP</b>	Public-Private Partnerships
<b>RFP</b>	Request for Proposals
<b>RFQ</b>	Request for Qualification
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>USD</b>	United States Dollars

## Acknowledgement

I would like to specially acknowledge my supervisor, Prof. Sitati who painstakingly read my drafts, provided comments and offered advice along the way and has guided me tirelessly through the research project. I have been happy to incorporate all their suggestions and advice. His guidance is invaluable.



## Dedication

I dedicate this work to the Almighty God, my husband, my family and friends for their encouragement, moral and financial support and understanding they accorded me during the period I was undertaking my studies.



# Chapter 1

## Introduction to the Study

### 1.1 Background of the Study

A Public-Private Partnership (PPP) is a medium to long term arrangement between the public and private sectors whereby some of the service obligations of the public sector are provided by the private sector, with a clear agreement on shared objectives for delivery of public infrastructure and or public services.<sup>1</sup> It is an arrangement where government states its need for capital-intensive, long-lived infrastructure and the desired facility is built using a complex combination of government and mostly private financing and then operated by the private entity under a long-term franchise, contract or lease.<sup>2</sup> In PPPs, the risks, skills, responsibilities and resources are apportioned between the public and private sectors. <sup>3</sup> In turn, governments focus on policy, regulation and planning since the day to day operations and expertise are delegated to the private sector. <sup>4</sup>

PPP models are increasingly envisaged as attractive propositions for involving the private sector in both national and international development cooperation. The underlying logic for establishing a public-private partnership is that both public and private sectors have unique characteristics that provide them with advantages in specific aspects of service or project

---

<sup>1</sup> <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships> on 4 November 2020

<sup>2</sup> Roman A, A Guide to Public-Private Partnerships (PPPs): What Public Procurement Specialists Need to Know, *The NIGP Business Council*, (2015), 2

<sup>3</sup> <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships> on 4 November 2020

<sup>4</sup> <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships> on 4 November 2020

delivery.<sup>5</sup> In a time of constrained public budgets, leveraging private-sector financial resources and expertise to deliver a range of infrastructure projects has growing appeal globally.<sup>6</sup> PPP reforms aim to push back the boundaries of the state and cut public spending.<sup>7</sup> It is for this reason why PPPs have gained popularity due to its capability to harness the innovative capacity and capital of the private sector.<sup>8</sup> PPPs are often depicted as creative, flexible collaborations in which the partners are bound by shared objectives and mutual trust.<sup>9</sup> PPPs are mostly used to provide and maintain infrastructure, including roads, bridges, water and wastewater treatment plants, schools, hospitals and prisons. The critical normative justification for PPPs is that the private sector has stronger incentives to deliver services more efficiently and at a lower cost than with traditional government procurement.<sup>10</sup>



---

<sup>5</sup>Grimsey D and Lewis M, *Public Private Partnerships: The Worldwide Revolution in Infrastructure*, Edward Elgar Publishing, 2007, 12

<sup>6</sup> Istrate E and Puentes R, *Moving Forward on Public Private Partnerships: U.S and International Experience with PPP Units*, (2011).

<sup>7</sup> Torres L, Pina V, Acerete B, *Public-Private Partnership in Spanish Local Governments*, 4 *European Business Organization Law Review*, 3 (2003) 433

<sup>8</sup> Russell A.D, Tawiah P, DeZoysa S, 'Project innovation—a function of procurement mode?' *Canadian Journal of Civil Engineering*, 33(12), 2011, 1519.

<sup>9</sup> Chang I, 'Use of public private partnerships to meet future army needs', *RAND Arroyo Center*, 1999.

<sup>10</sup> Boardman A, Seimiatycki M and Vining A, 'The theory and evidence concerning public-private partnerships in Canada and elsewhere', 9, *The School of Public Policy SPP research papers*, University of Calgary, (2016), 1.

The most successful partnership arrangements draw on the strengths of both the public and private sector to establish complementary relationships.<sup>11</sup> Though the roles may vary from project to project the overall responsibility of the government entities does not change.<sup>12</sup> In all cases, the public entity remains responsible and accountable for delivering services and projects in a manner that protects and furthers the public interest.<sup>13</sup>

The demand for private sector's innovative design and management solutions for public facilities drove PPPs globally. <sup>14</sup> However, the move in developing countries was due to the high demand for infrastructure development and pressure on national budgets deficits.<sup>15</sup> As neoliberal limits on government borrowing spread, so too did PPPs.<sup>16</sup> In Europe for instance, the European Union Rules limited government budget deficit to 3% of GDP.<sup>17</sup> Similarly, in developing countries, Kenya being one of them, the international financial institutions such as the World Bank and IMF encouraged the adoption of PPPs in the 1990s, especially in the water

---

<sup>11</sup> Mula R, Rai N, Kulkarni V and Singh A, *Public-Private Partnership and impact of ICRISAT's pearl millet hybrid parents research*, Journal of SAT Agricultural Research 5 (1), 2007, 5.

<sup>12</sup> Mula *et al*, *Public-Private Partnership and Impact of ICRISAT's*, 5.

<sup>13</sup> Mula *et al*, *Public-Private Partnership and Impact of ICRISAT's*, 5.

<sup>14</sup> Mustafa A, *Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience*, Iraq Institute for Economic Reforms (IIER), 2009, 1

<sup>15</sup> Mustafa A, *Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience*, 1.

<sup>16</sup> Hall D, *Why Public-Private Partnerships don't work: The many advantages of the public alternative*, Public Services International (PSI) Research Unit, University of Greenwich, UK, 2015, 8

<sup>17</sup> Official Journal of the European Union, *Council Regulation (EC) on speeding up and clarifying the implementation of the excessive deficit procedure*, No 1467/97, 3

and energy sectors.<sup>18</sup> Such arrangements, however, posed a dilemma to the international financial institutions between encouraging strict fiscal disciplines on the one hand which would imply stricter rules for PPPs and a desire to promote privatization in general which makes it easy for PPPs.<sup>19</sup>

One of the most critical constraints in implementing a successful PPP in developing countries like Kenya is the lack of a suitable PPP framework.<sup>20</sup> Such a framework would help in bridging the investment gap for the delivery of various public goods.<sup>21</sup> Private investment in infrastructure is nurtured by existence of a robust and favourable legal framework which should be adequately flexible and receptive to keep up with the developments in infrastructure.<sup>22</sup> The legislative framework for PPPs provides the platform by which the governments regulate and ensure the provision of public services to the public and offers protection of rights for public service providers and the customers.<sup>23</sup> Having a PPP related legislative and regulatory framework cannot be overemphasized.<sup>24</sup> The concept of best practice with regards to the PPP framework, in particular, needs to be looked at with caution since there is no one size fits all solution.<sup>25</sup> As such, what works in one country may not work in another let alone be transferred to or replicated in another sector or region in the same country.

---

<sup>18</sup> Hall D, *Why Public-Private Partnerships Don't Work*, 8.

<sup>19</sup> Hall D, *Why Public-Private Partnerships Don't Work*, 9

<sup>20</sup> Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012.

<sup>21</sup> Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012.

<sup>22</sup> UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects UN, 2001, 23.

<sup>23</sup> Soyaju O, 'Legal Framework for Public-Private Partnership in Nigeria,' 46 *De Jure* 3, (2013), 818

<sup>24</sup> Yong K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 37.

<sup>25</sup> Yong K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 37.

Consequently, the exact scope, remit and institutional arrangement need to be assessed in light of a particular country's needs and local context, which often lead to hybrid regulatory models being implemented.

The PPP framework in Kenya has been catapulted by the need to invest in the infrastructural framework and the attendant desire to achieve the Vision 2030 goals by the Kenyan government.<sup>26</sup> Kenya's Vision 2030 (2008 – 2030) aims to transform Kenya into an industrialised middle-income country by 2030, which requires substantial investments in infrastructure services. Under-investment in infrastructure and related maintenance increases the cost of doing business, undermines competitiveness and adversely affects trade.<sup>27</sup> For Kenya to promote its economic growth, it is critical that it adopts the model of incorporating PPPs in its development blueprint for both National and County governments.<sup>28</sup>

After a rigorous and extensive process, the Constitution of Kenya, 2010 was passed and became Kenya's supreme law on 27<sup>th</sup> August 2010. One of the fundamental changes brought about by the 'New Constitution' was the devolution of governance. This led to the decentralisation of some of the critical powers and responsibilities such as the delivery of certain important public services from the national government to the 47 county governments. Some of the essential objectives of devolution are; ease of access of services, self-governance,

---

<sup>26</sup> Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya' LLM Thesis, University of Nairobi, 2018, 7

<sup>27</sup> Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya', 8

<sup>28</sup> Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya', 8

promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them.<sup>29</sup>

In consideration of the objectives of devolution, the Constitution is evident on the functions and powers that will be carried out by each level of government.<sup>30</sup> The counties' mandate includes but is not limited to the provision of; county health services, public entertainment and public amenities such as libraries and museums; county transport such as the construction of county roads, street lighting, public road transport; housing; construction of markets; county public works and services such as storm-water management systems and water and sanitation services.<sup>31</sup> A practical and established strategy for procuring for such services and infrastructure is through Public-Private Partnerships (PPPs) rather than the traditional procurement process. However, despite the above advantages, county governments are still not keen on using PPPs to finance their projects and service delivery seven years later after their formation.

The legal environment where projects often operate influences to a large extent, the willingness of the private sector and public entity to collaborate in infrastructure project development and public service delivery.<sup>32</sup> The success of public, private collaboration revolves around availing an adequate and enabling legal and regulatory framework that critically analyses services and

---

<sup>29</sup> Article 174 , *Constitution of Kenya*, (2010).

<sup>30</sup> Fourth Schedule, *Constitution of Kenya*, (2010).

<sup>31</sup> Fourth Schedule, *Constitution of Kenya*, (2010).

<sup>32</sup> Diba. H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012, 23.

partners.<sup>33</sup> In Kenya, the legal framework for PPPs is mainly the Public-Private Partnership Act (No. 15 of 2013) and its regulations. However, this Act does not provide a mechanism through which counties should conduct PPPs. Instead, it treats them like other contracting authorities without acknowledging that county governments have autonomy and a Constitutional mandate to deliver certain services and build specific infrastructure without any further reference to the national government. It does so by requiring all contracting authorities including county governments, to seek the approval of national government agencies at all stages of the PPP project.

The enactment of the PPP Act in Kenya was a welcome move. It is however not an end as of itself, as it ignored the devolved units in Kenya, which are critical in the implementation of infrastructure projects and attainment of Vision 2030. A ‘Contracting Authority’ under the PPP Act is defined as a state department, agency, state corporation or county government which intends to delegate any of its functions to a private entity.<sup>34</sup> A contracting authority, including a county government, must submit its PPP project list to the PPP Unit<sup>35</sup> and the PPP Committee.<sup>36</sup> A contracting authority must also submit its project proposal to the Committee for approval and once approved it must implement the PPP unit’s input in the project.<sup>37</sup> Further, a contracting authority’s project appraisal team shall consist of a representative of the PPP

---

<sup>33</sup> Zhang X, ‘Critical success factors for public-private partnerships in infrastructure development’, *Journal of Construction Engineering and Management*, 2005, 3-14.

<sup>34</sup> Section 2, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>35</sup> Section 23, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>36</sup> Section 24, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>37</sup> Section 31, *Public Private Partnerships Act* (No. 15 of 2013)

Unit<sup>38</sup> and the feasibility study conducted to determine the viability of undertaking the project must be approved by the PPP Committee.<sup>39</sup>

Also, technical bids<sup>40</sup> and financial bids<sup>41</sup> must be approved by the proposal evaluation team, which consists of representatives of the PPP Unit and the Attorney General. Further and with the approval of the PPP Committee the contracting authority and the successful bidder may commence the negotiations, and the negotiating committee must consist of a nominee from the PPP Unit and other nominees from State departments recommended by the PPP Unit.<sup>42</sup> Finally, the PPP Project must be approved by the Committee and the Cabinet or Parliament before the contracting authority can proceed to execute the PPP Contract.<sup>43</sup>

All the provisions of the Act highlighted above, illustrate that a county government cannot carry out a PPP project without the approval of national government agencies despite PPPs being an effective financing option for the delivery of the services and infrastructure bestowed upon them by the Constitution. Thus, it is prudent to examine the legal framework, institutional and policy mechanisms, to determine whether the existing environment is appropriate for the implementation of the PPPs by the county government in Kenya.

---

<sup>38</sup> Section 32, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>39</sup> Section 35, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>40</sup> Section 47, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>41</sup> Section 48, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>42</sup> Section 52, *Public Private Partnerships Act* (No. 15 of 2013)

<sup>43</sup> Section 57, *Public Private Partnerships Act* (No. 15 of 2013)

## 1.2 Statement of the Problem

There are multiple sources that county governments in Kenya can obtain alternative sources of funding for building and maintaining public infrastructure and service delivery. They include conditional grants, loans, and donor funding. Loans as sources of county government revenue in Kenya may come from external sources or private lenders. However, conventional methods of funding have proven unreliable, mostly due to the costly procedures that have to be followed, making such funds attract huge interest rates. These challenges lead to the demand for a suitable partnership between the private and public sector through Public-Private Partnerships. However, despite the indisputable benefits of PPPs, there has not been a single PPP project at the county level that has been completed since the counties commenced their operations in 2013. Coincidentally, Kenya's main legal framework for PPPs, the Public-Private Partnership Act was also enacted in 2013, but the county governments are yet to reap the benefits of this legislation. According to the National Treasury report of January 2020, only 1 out of 47 counties have listed projects with the PPP unit for approval though none of the county governments in Kenya has completed or has an ongoing project.<sup>44</sup>

This study, therefore, seeks to interrogate whether the Public-Private Partnerships Act and its Regulations (from now on “**the Act**”) is responsible for the low and slow uptake PPP projects at the county government level. More specifically, the study's focus will be on whether the provisions of the Act that require county governments at various stages of the project to seek

---

<sup>44</sup> Kenya PPP Pipeline Status Report, January 2020  
<http://demo.pppunit.go.ke/wpcontent/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf> on 5 March 2020

the approval of the national government for PPPs to take off has led the county governments to prefer other less effective forms of project financing.

### **1.3 The Objectives of the Study**

The objectives of this study are:

- a. To interrogate whether the current legislative framework for conducting PPPs is the cause of the slow uptake of PPPs at County level in Kenya;
- b. To compare how South Africa and Nigeria conduct their local PPP projects to identify best practices and draw lessons from them as the market leaders in infrastructure development in Africa;
- c. To make viable recommendations for reforms which should be taken into account to ensure that the PPPs' legal and institutional framework is sound for county governments.

### **1.4 Research Questions**

This paper seeks to answer the following questions:

- a. How is Kenya's current legal framework and regulatory structure stifling to opportunities presented for PPP's at the County level?
- b. Which countries in Africa have a similar economic, political and social challenges as Kenya and have successfully implemented PPPs at local level of government?
- c. What in Kenya's PPP legal framework should be reviewed to encourage devolved governments to have a more significant role in the procurement and management process of PPPs at the local level?

## 1.5 Research Hypothesis

Kenya's current legal, institutional and procedural framework, which does not allow county governments to independently implement Public-Private Partnership projects, has resulted in low uptake of local infrastructure projects using the Public-Private Partnership model of financing.

## 1.6 Theoretical Framework

In this study, the theoretical framework is based on the **Local Autonomy Theory and Principal-Agent Theory (PAT)**.

### 1.6.1 Local Autonomy Theory

The proponent of this theory is Gordon Clark.<sup>45</sup> This theory deliberately deals with the relations between different tiers of a State.<sup>46</sup> This theory states that local autonomy is desired by all but is compromised by many laws administered by higher tiers of the state.<sup>47</sup> The proposed theory, therefore, treats governments as entities, not merely as the derivative symbols of decentralised democratic politics.<sup>48</sup> It is premised upon two principles of power derived from Jeremy Bentham: initiative and immunity.<sup>49</sup> The first principle refers to the power of localities to function free from the oversight authority of higher tiers of the state and the power of local governments to regulate and legislate in their interests.<sup>50</sup> The latter principle refers to the

---

<sup>45</sup> Clark G, A theory of local autonomy, 24 *Annals of the Association of American Geographers*, (1984), 195.

<sup>46</sup> Clark G, A theory of local autonomy, 196.

<sup>47</sup> Clark G, A theory of local autonomy, 195.

<sup>48</sup> Clark G, A theory of local autonomy, 195.

<sup>49</sup> Clark G, A theory of local autonomy, 195.

<sup>50</sup> Clark G, A theory of local autonomy, 205.

immunity of local governments from the authority of higher tiers of the state and the power of localities to legislate and regulate the behaviour of residents.<sup>51</sup>

The purpose of this study is to find out whether county governments have the freedom under the law to provide basic infrastructure to their constituents through PPPs without interference from the national government. Thus, this theory is relevant because local autonomy is the freedom of local authorities in the management of local problems.<sup>52</sup> The European Charter of Local Self-Government defines local autonomy as the right and the productive capacity of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their responsibility and in the interests of the local population.<sup>53</sup> Three elements form the autonomy and give it consistency which is; organisational, functional and administrative autonomy.<sup>54</sup> *Organisational autonomy* refers to the ability of local authorities to organise themselves according to local needs; *functional autonomy* refers to the ability of local authorities to operate based on self-managing and self-governing and *administrative autonomy* refers to the ability of local authorities to self-manage by using local patrimony for the proper performance of their powers.<sup>55</sup>

---

<sup>51</sup> Clark G, A theory of local autonomy, 205.

<sup>52</sup> Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 15.

<sup>53</sup> Article 3, *The European Charter of Local Self-Government*, 1985

<sup>54</sup> Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 20

<sup>55</sup> Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 20

Globalisation and information revolution have brought about a paradigm shift in the international competitiveness of nations.<sup>56</sup> The economic prosperity of a nation is now closely linked to the knowledge, skills and information base of its citizens rather than the country's resource endowments.<sup>57</sup> It is recognised now that local governments are at the core of the future prosperity of a nation because of their better positioning to forge a competitive advantage to spur economic growth fostering a new knowledge-based economy.<sup>58</sup>

For local government to be effective, then two key conditions must be met.<sup>59</sup> First, local authorities must possess sufficient power, independence and financial resources to govern distinctively, meeting the particular needs of their areas and the expectations of their citizenry.<sup>60</sup> Secondly, the quality of local democracy must be such as to enable the participation of individuals, grant the responsiveness of local institutions and remove the need, actual or perceived, for a high level of central interference in the business of local government.<sup>61</sup>

Given their democratic credentials and geographical and cultural proximity to those on behalf of whom they act, local authorities do occupy a pivotal position in the democratic life of the country, pursuing distinctive agendas appropriate to the needs and mores of their respective areas.<sup>62</sup> Local government could enable citizens to participate in governance more readily and

---

<sup>56</sup> Anwar, Rehana and Sayeed, *Empowering States and Provinces or Unshackling Local Governments*, 339

<sup>57</sup> Anwar, Rehana and Sayeed, *Empowering States and Provinces*, 339

<sup>58</sup> Anwar, Rehana and Sayeed, *Empowering States and Provinces*, 339

<sup>59</sup> Bailey and Elliot, 'Taking local government seriously: democracy, autonomy and the constitution', 3

<sup>60</sup> Bailey and Elliot, 'Taking local government seriously', 3

<sup>61</sup> Bailey and Elliot, 'Taking local government seriously,' 3

<sup>62</sup> Bailey and Elliot, 'Taking local government seriously,' 3

to a greater extent than would be possible if all governance occurred at a national level. Local government is valuable because of its capacity for responsiveness: it has the potential to make decisions and deliver services in ways which are sensitive to local customs, economic and social conditions, and so on.<sup>63</sup> Economic growth is best advanced by allowing decisions to be taken in a way which properly reflects local circumstances which means that the focus should be on achieving real devolution of power to local and regional authorities as far as possible.<sup>64</sup>

### 1.6.2 Principal-Agent Theory (PAT)

Another theoretical approach used in this study is the PAT approach which in simple terms is typified in the behaviour of a boss (the principal) and an employee (the agent), where the boss cannot accurately monitor the productivity of his/her employee.<sup>65</sup> The Principal-Agent Theory or Agency Theory derives its disciplinary origins from economics.<sup>66</sup> The key assumptions underlying a PAT framework and which are similar to the basics of a PPP contract (where county government is the principal and the private investor as the agent) include: information asymmetry between the parties whereby the agent has more information about its own actions as compared to the principal; the agent pursues its interests which may run contrary to those of the principal.<sup>67</sup>

---

<sup>63</sup> Bailey and Elliot, 'Taking local government seriously,' 3

<sup>64</sup> Bailey and Elliot, 'Taking local government seriously,' 3

<sup>65</sup> Palma A, Leruth L and Prunier G, '*Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships*', International Monetary Fund (IMF), (2009), 12.

<sup>66</sup>Kivisto J, *Agency Theory as a Framework for the Government-University Relationship*, University of Tampere, 2007, 8.

<sup>67</sup> Palma A *et al*, '*Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships*', 12.

An agency problem arises under conditions of asymmetry of information and conflict of interest between the principal and the agent.<sup>68</sup> Under this theory, the best results between the principal and agent can be achieved if there is a fully specified enforceable contract with stable terms over time, measurable output indicators that can be monitored and credible punishment against a party in case cheating is proved.<sup>69</sup> The PAT theory is relevant in the discussion of PPPs given the specific nature of risks existing in most PPP projects which in most cases are uninsurable.<sup>70</sup> The PAT approach addresses this by modelling the relation between the informed party (the Agent) and the less informed one (the Principal).<sup>71</sup> As a result of the information asymmetry, the question is how to efficiently allocate the risks between partners in the reference contract.<sup>72</sup> The target followed in the determination of risk allocation criteria is the total cost minimization which must maximize the Principal's utility.<sup>73</sup>

The analytical process followed by the PAT approach consists in maximizing the principal's utility subject to the agent's participation and incentive constraints.<sup>74</sup> The respect of these two constraints must permit both partners to improve their situation, compared to a situation in

---

<sup>68</sup>Solino A, *Application of the Agency Theory for the Analysis of Performance Based Mechanisms in Road Management*, 13th World Conference on Transport Research, 2010, 2

<sup>69</sup> Palma A *et al*, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', 14

<sup>70</sup> Oudot J, *Risk-Allocation: Theoretical and Empirical Evidences. Application to Public-Private Partnerships in the Defense Sector*, Centre ATOM, University of Paris, 2005, 533.

<sup>71</sup> Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences', 535

<sup>72</sup> Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences', 537

<sup>73</sup> Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences' 539.

<sup>74</sup> Laffont J and Martimont D, *The Theory of Incentives: The Principal-Agent Model*, Princeton University Press, 2002, 84.

which only one constraint would have been taken into account. This is underlined by the idea that “incentive and participation constraints define the set of incentive feasible allocation.” Both risk allocation criteria registered by the PAT come from these two constraints.<sup>75</sup> In the PAT framework, the Agent’s effort is not observable.<sup>76</sup> At the same time, the Agent’s behaviour is at the root of the performance. To assure a certain level of performance, the principal should give the agent incentives to perform.<sup>77</sup> The incentive constraints should be tackled. The authors belonging to the PAT concentrate on imposing of potential cost overruns on partners as an incentive device.

There are several general conclusions on PAT: Firstly, the risk should be allocated to the agent to the extent he can manage the risk. Secondly, risk should be allocated to the risk-averse partner to minimize the overall risk-bearing cost.<sup>78</sup> It is worth noting that PPP contracts often have high transactional costs that may be caused or increased by Principal-Agent problems.<sup>79</sup> The transaction costs in a PPP include costs required to initiate, negotiate and manage the PPP relationship over the life of the contract.

One of the leading derivatives from local autonomy theory is that local authorities must possess sufficient power, independence and financial resources to govern distinctively. From the PAT

---

<sup>75</sup> Laffont J and Martimont D, *The Theory of Incentives*, 84.

<sup>76</sup> Laffont J and Martimont D, *The Theory of Incentives*, 88

<sup>77</sup> Laffont J and Martimont D, *The Theory of Incentives*, 91

<sup>78</sup> Boardman A, Siemiatycki M, Vining A ‘*The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere*’, The School of Public Policy, University of Calgary’, 9(12), 2016, 14.

<sup>79</sup> Boardman A, *et al*, ‘*The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere*’, 14.

approach the main inference is that PPP contracts often have high transactional costs that may be caused or increased by Principal-Agent problems. For success to be achieved using the PPP framework, it is prudent to develop internal structures that will allow members of both the private and public sectors to make independent decisions. However, each decision should be within cost-reduction parameters that ought to be set out initially. In light of the above, this study adopts both local autonomy theory and the PAT approach owing to the unique nature of the PPP models and the compelling need to as far as possible adequately address the concern of the equal partners of the partnership arrangement.

### **1.7 Literature Review**

In PPPs, the government agency chooses a private consortium which is in charge of both designing the quality attributes of the infrastructure, building those assets and finally managing them as efficiently as possible.<sup>80</sup> The prerequisites for the successful long-term public, private partnerships are market-driven competition, shared risk and transparency to achieve their intended purposes and protect the public from excessive risk.<sup>81</sup> Most countries have used PPPs because they improve operational efficiency, enable the innovation of technological and managerial skills, and increase the involvement of private entities in public services.<sup>82</sup> PPP projects are seen often as a solution concerning major projects insofar as their ability to defer

---

<sup>80</sup> Martimort and Pouyet, “Build It or Not”, 2

<sup>81</sup> Martimort and Pouyet, “Build It or Not”, 2

<sup>82</sup> Chowdhury, Chen and Tiong, *Analyzing the structure of public-private partnership projects using network theory*, 247.

capital expenditures; lower whole life cost through integrated and bundled contracts; and introducing private sector expertise and innovation into public projects.<sup>83</sup>

PPPs potentially bring the efficiency of business to public service delivery and avoid the politically contentious aspects of full privatisation.<sup>84</sup> PPPs allow governments to retain ownership while contracting the private sector to perform a specific function such as building, maintaining and operating infrastructures like roads and ports, or providing essential services like water and electricity.<sup>85</sup> Both sides stand to benefit from the contractual agreement. The government earns revenue by leasing state-owned assets or pays the private sector for improved infrastructure and better service delivery.<sup>86</sup> Often the private sector can do the job more efficiently, which can lower prices and improve rollout.<sup>87</sup> The private operator gets reimbursed either by the government or consumers for doing its work, at a profit.<sup>88</sup>

Given the previous benefits, there is a global trend for financing public projects via Public-Private Partnerships (PPPs).<sup>89</sup> Approximately USD 95 trillion in public and private investments will be needed in energy, transport, water, telecommunications infrastructure at

---

<sup>83</sup> Uddin and Zack, 'Public private partnership projects-what, why & how is risk allocated?' 3.

<sup>84</sup> Farlam P, 'Assessing Public-Private Partnerships in Africa,' 2, The South African Institute of International Affairs, Nepad Policy Focus Series, (2005).’ 32

<sup>85</sup> Farlam, 'Assessing Public-Private Partnerships in Africa', 33

<sup>86</sup> Farlam, 'Assessing Public-Private Partnerships in Africa', i.

<sup>87</sup> Farlam, 'Assessing Public-Private Partnerships in Africa', i.

<sup>88</sup> Farlam, 'Assessing Public-Private Partnerships in Africa', i.

<sup>89</sup> Tang, Shen, and Cheng, 'A review of studies on public-private partnership projects in the construction industry' 683.

the global level between 2016 and 2030 to support growth and sustainable development, which is equivalent to approximately USD 6.3 trillion per year over the next fifteen years.<sup>90</sup> Therefore, due to the scale of the needs and the tight budgets for governments, mobilizing private sources for financing will be critical, and PPPs could help narrow the infrastructure gap.<sup>91</sup>

Since their debut in the United Kingdom in the 1990s, public-private partnerships (PPPs) have been adopted in many countries around the world, including in Kenya. However, there has always been a degree of cooperation between the public sector and the private sector.<sup>92</sup> In retrospect, private contracting for the provision of public services dates as back as the times in the Bible where Matthew was a private tax collector.<sup>93</sup> In the 21<sup>st</sup> Century, the adoption of PPPs by governments has increased in both developed and developing countries especially following the global financial crises of 2007-2008 despite the commencement of the modern way of carrying out PPP projects in 1990 in the United Kingdom.<sup>94</sup> The use of Public-Private Partnerships for infrastructure development is now a significant part of the global solution to infrastructure development.<sup>95</sup>

---

<sup>90</sup>OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', *OECD Multi-Level Governance Studies*, OECD Publishing, 2018, 11

<sup>91</sup> OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 11

<sup>92</sup> Hodge, 'Public private partnerships and legitimacy', 318

<sup>93</sup> Hodge and Greve, 'Public – Private Partnerships: An International Performance Review', 546

<sup>94</sup> Kyei and Chan, 'Review of studies on the Critical Success Factors for Public–Private Partnership (PPP) projects' 1335.

<sup>95</sup> Jooste and Scott, *Organizations Enabling Public Private Partnerships*, 4

In developing countries, the growth of private sector participation has been outstanding since, in 1990, only 58 projects in eight countries had gotten to financial close, but this number had increased to 288 projects in 64 countries by 2007.<sup>96</sup> PPPs may have the potential to solve sub-Saharan Africa's dense infrastructure and service backlogs.<sup>97</sup> Facing the dearth of infrastructure funding, an increasing number of countries, notably emerging markets and developing economies (EMDE), are turning to Public-Private Partnerships (PPPs) to tap private capital.<sup>98</sup> In Africa, PPPs are a small market, and most of the projects are in South Africa, Nigeria and Kenya<sup>99</sup> which account for 48% of the 335 total PPP infrastructure projects in the Sub-Saharan region in the past 25 years.<sup>100</sup> Therefore, PPPs can provide alternative models of financing in this region where feasible projects are identified.<sup>101</sup>

An effective and sustainable legal and institutional structure is essential for the identification, development and implementation of successful PPPs, but this is still evolving in Kenya.<sup>102</sup> Successful arrangement and completion of projects can be largely attributed to the PPP legal framework in place.<sup>103</sup> There is need for a clear and firm legal environment for PPP projects, to attract financing, competition for projects and reduce risks which consequently will reduce

---

<sup>96</sup> Yong K, *Public- Private Partnerships policy and practice*, 22

<sup>97</sup> Farlam, 'Assessing Public-Private Partnerships in Africa,' i

<sup>98</sup> Izuwah and Rana, *Infrastructure & Africa's Development – the PPP imperative*' 1

<sup>99</sup> <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020

<sup>100</sup> <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020

<sup>101</sup> <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020

<sup>102</sup> Odame and Kangai, 'Agribusiness public-private partnerships, 8

<sup>103</sup> Arimoro, 'Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus' 5

project costs and this cannot be emphasized enough.<sup>104</sup> The PPP framework must be clear, predictable and stable as well as commercially oriented.<sup>105</sup>

Traditional forms of state intervention are not enough to deal with complex social and infrastructural demands that governments are faced within the 21<sup>st</sup> Century.<sup>106</sup> These demands are well-identified at the local level. This local knowledge plays an important role in tailoring capital investments to local characteristics.<sup>107</sup> This is why novel institutional arrangements that devolve responsibility from the national centres to local entities of government and engage the private sector are required.<sup>108</sup> Therefore, subnational governments may be the best placed to partner with the private sector for infrastructure improvements.<sup>109</sup> With capital mobility and deregulation, local governments as providers of infrastructure-related services, are more appropriate channels for attracting domestic and foreign investment.<sup>110</sup>

The legal framework plays a critical role in the success of a PPP because it creates proper guides and controls for PPP contracts. .<sup>111</sup> In Kenya, the development of a comprehensive legal framework for PPPs was initially driven by the government's commitment to achieving the

---

<sup>104</sup> Delmon, *Creating a Framework for Public Private Partnership (PPP) Programmes*, 5.

<sup>105</sup> The United Nations Economic Commission for Europe, 29.

<sup>106</sup> Lagat, 'Review of the Policy, Legal and Institutional Framework of Public, 33

<sup>107</sup> OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 22.

<sup>108</sup> OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 22.

<sup>109</sup> OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges' 23

<sup>110</sup> Anwar S *et al*, 'Empowering States and Provinces or Unshackling Local Governments: Does It Matter for Peace, Order, Good Government, and Growth?', 339

<sup>111</sup><https://www.businessdailyafrica.com/analysis/columnists/Kenya-on-right-path-to-undertaking-projects/4259356-4797154-s2sap0/index.html> on 10 January 2020

objectives of Vision 2030, Kenya's development blueprint which aims to transform Kenya into an industrialized middle-income country by the year 2030.<sup>112</sup> It is particularly propelled by amongst others, the increased demand for quality and affordable public services by the citizens. However, the huge funding gap in the country to complete infrastructural projects coupled with the attendant desire to reduce sovereign borrowing has led to inadequate infrastructural facilities in the country.<sup>113</sup> To achieve this, Vision 2030 set out a 10% per annum GDP growth target, and to realise these high growth rates the Government emphasized on the importance of enabling private sector participation in infrastructure in Vision 2030's First Medium Term Plan (2008 – 2012) and the Second Medium Term Plan (2013 – 2017).<sup>114</sup>

The first Medium Term Plan (2008-2012) under the Kenya Vision 2030 emphasized the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs.<sup>115</sup> Consequently, the Government put in place the Public Procurement and Disposal (Public-Private Partnerships) Regulations, 2009 which outlined what constituted a PPP and also created both the PPP Steering Committee and PPP Secretariat both of which were both established in 2010.<sup>116</sup> The Regulations provided for the institutional and regulatory basis for all kinds of public procurement but did not expressly provide for the

---

<sup>112</sup> Kenya Vision 2030: *A Globally Competitive and Prosperous Kenya*, viii

<sup>113</sup> Kenya Vision 2030: *A Globally Competitive and Prosperous Kenya*, viii

<sup>114</sup> Cambridge Economic Policy Associates Ltd, *Mobilizing Finance for Infrastructure: A Study for the UK Department for International Development (DFID), Kenya Country Case Study*, 2015, 2

<sup>115</sup> Cambridge Economic Policy Associates Ltd, *Mobilizing Finance for Infrastructure*, 2

<sup>116</sup> Cambridge Economic Policy Associates Ltd, *Mobilizing Finance for Infrastructure*, 2.

legal basis for PPPs.<sup>117</sup> Illustrating the Government's commitment to PPPs, a PPP policy statement was released in 2011 which set the stage for the enactment of the Public-Private Partnerships Act in 2013 and its subsequent Regulations.

However, PPP arrangements are still a relatively novel concept in the Kenyan system. Nonetheless, the government of Kenya has shown a growing interest in PPPs as a vehicle for the development of infrastructure.<sup>118</sup> For the period, 2012-2020, the total infrastructure investment needs across the 12 sectors amounted to USD 62,176 million, with the government of Kenya providing USD 25,000 million thus leaving a funding gap of USD 37,000 million.<sup>119</sup> With a projected reduction in the funding gap for infrastructure estimated at USD 40 Billion over the next 8 years, the government of Kenya is keener on PPPs as the demand for quality and affordable from its citizen's increases.<sup>120</sup> Kenya also ranks highest relative to the PPP investment (in excess of \$8.5 billion) in contrast to the neighbouring countries such as Rwanda, Tanzania, Uganda and Zambia.<sup>121</sup> The total population of Kenyan citizens has increased to

---

<sup>117</sup> Cambridge Economic Policy Associates Ltd, *Mobilizing Finance for Infrastructure*, 3

<sup>118</sup> Chileshe N, Njau C, Kibichii B, Macharia L, & Kavishe N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' *International Journal of Construction Management*, (2020), 1.

<sup>119</sup> Chileshe et al, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1

<sup>120</sup> Chileshe et al, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1

<sup>121</sup> Tanzania Economic Update: The Road Less Traveled, Unleashing Public Private Partnerships in Tanzania, *The World Bank Group, Africa Region Macroeconomics and Fiscal Management Global Practice*, May 2016 <http://www.worldbank.org/tania/aneconomicupdate> on 4 November 2020

49.7 million with a Gross Domestic Product (GDP) of 5.8% and an inflation rate of 6.3% since 2016 thus leading to a labour force of only 18.66 million.<sup>122</sup> In addition, the population of Kenya has been projected to increase to 59 million by the year 2030 and 75 million by 2050 and with the infrastructure development sector also being put in the frontline of the Vision 2030 projection board.<sup>123</sup> Vision 2030 emphasizes the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs. PPPs and county governments are the key drivers for achieving infrastructural programmes under Vision 2030. It is therefore imperative that the legal and regulatory framework is conducive for county government to implement infrastructure projects through PPPs. Given that the PPP Act is a fairly new piece of legislation having been enacted in the year 2013, there is need for research to investigate its adequacy to ignite debate for its improvement by comparing it to the more established policies, legislative and institutional frameworks in other African jurisdictions such as South Africa and Nigeria who have more successful PPPs at the local level and which have more mature PPP structures at the local level.

However, there is a dearth of literature in Kenya, especially following the enactment of the PPP Act in 2013 and the establishment of county governments. This can be contrasted with literature in other developed jurisdictions where PPPs have evolved and where there have been significant scholarly works on PPPs, about devolved units. Again, literature is scarce when it comes to addressing the slow uptake of PPP frameworks in county governments owing to the

---

<sup>122</sup> Chileshe et al, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1

<sup>123</sup> Chileshe et al, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 2

threat of autonomy by the central government. The idea that some decisions will have to be approved by the central government during PPP projects is a prospect that not many private entities would want to find appealing. Hence, this study seeks to assess whether the slow uptake of PPP frameworks is due to the central government involvement in such projects. By reviewing Kenya's public-private partnerships legal framework for implementing infrastructure projects by county governments, this paper will recommend improvements and give proposals on legal reform and consequently bridging the knowledge gap in literature regarding legislation on PPPs at local level.

### **1.8 Justification of the Study**

This study is important because it will shed light on the existing gaps in the PPP legislative framework regarding implementation of PPPs at county level. This study will therefore be necessary to policy makers in the PPP sector as it will help them better understand the legal challenges the county governments experience when conducting PPPs. This study will also be relevant to county government officials who may use it to lobby for reforms in the legislative framework of PPP to better suit counties so that they can leverage the benefits of financing projects using PPPs. This study will also be a point of reference for future researchers and academia on PPPs especially those that are to be conducted at local level.

### **1.9 Research Methodology**

#### **1.9.1 Primary and Secondary Sources of Information**

There exists extensive literature in PPPs, especially in legal, procurement, economics and infrastructure journals. Many of the scholars discuss PPPs as a better source of funding public infrastructure projects than traditional procurement sources. However, little literature exists on a thorough analysis of the legal regime governing PPPs for states and local governments for

African countries with a devolved system of governance. There is even less literature on the legal, institutional and procedural frameworks for carrying out PPPs by county governments in Kenya. Therefore, for each chapter, the author will review various literature from both primary and secondary sources on local autonomy, decentralisation, PPP laws and regulations conducted in devolved systems of governance throughout this research to gain more insight into this topic and to support the research hypothesis. Some of the literature reviewed will include books, articles, journals, conference papers, dissertations, Constitutions, relevant government statutes and case laws, international treaties and agreements, conventions and protocols.

### **1.9.2 Comparative Studies**

This research shall compare and contrast studies of countries to identify the principles they use to regulate PPPs at local levels of governance. The ultimate goal being establishing patterns of international best practices in the conduct of local projects through PPPs in decentralised governments. Finally, the paper shall review laws that these countries have in place that ensure that local PPPs are well managed. The identified countries are; South Africa and Nigeria in Africa since their local governments have been successful in implementing PPP projects at the local level. South Africa is regarded as a country that has developed a distinct PPP regime that takes into account the country's local settings and therefore its framework remains a good model for other developing and emerging economies.<sup>124</sup>In Nigeria, most state and local

---

<sup>124</sup> Yescombe R, *Public-Private Partnerships: Principles of Policy and Finance*, Butterworth-Heinemann, (2007)

governments have established PPP legislation and PPP units in their areas of jurisdiction and therefore will have key learnings for how to carry out PPPs at local level in Kenya.<sup>125</sup>

### **1.10 Scope and Limitation of the Study**

This study has limited its scope to the legal, institutional and procedural framework governing PPPs carried out by County Governments in Kenya. It has therefore only analysed the laws and regulations on PPPs, county governments and procurement of public projects in Kenya. This study has limited itself only to legislative factors that may be directly linked to the low uptake of PPPs at the county level in Kenya and has not researched on other factors that may also be attributed to the low uptake such as corruption and lack of capacity, expertise or knowledge within county officials.

### **1.11 Chapter Breakdown**

The objectives of this study will be met by five distinct chapters.

The first chapter will be an introduction to the study. The aim of the chapter will be to give a general background of PPPs, how they work and the importance of a proper legislative framework to govern them. The chapter will also state the problem the study seeks to research on, the study's objectives and questions the study will seek to answer. Literature from various primary and secondary sources shall be reviewed on PPPs and how they are conducted locally in various jurisdictions including Kenya. The chapter will also state the preferred methodology for conducting the research and justify why the study is important and relevant in the current PPP landscape.

---

<sup>125</sup> Ayoola O, Examining Public Private Partnership in Nigeria: Potentials and Challenges (A case study of some local government areas in Osun State)' Bsc Thesis, Obafemi Awolowo University, May 2015, xiii

The second chapter will be a review of the legal, institutional and procedural framework for conducting Public-Private Partnerships in County Governments in Kenya. This chapter will review the key tenets of devolution in Kenya and the operative constitutional and legal principles on the relationship between the national governments and the county governments on public services delivery. This chapter will also review the legal framework relating to county governments and the legal, institutional and procedural framework for conducting PPPs at the county level in Kenya.

The third chapter will review the legal, institutional and procedural framework for carrying out PPPs in South Africa and Nigeria all of which have had more success in conducting local PPP projects than Kenya. The aim is to find out what role their respective legislative frameworks for conducting local PPPs has played in this success and compare this to the Kenyan legislative framework for conducting similar PPPs.

The fourth chapter will analyse the best practices from South Africa and Nigeria for conducting local Public-Private Partnerships. It will draw out the key lessons from the legislative frameworks for conducting local PPPs in South Africa and Nigeria vis-à-vis the legislative framework for conducting local PPPs in Kenya and brings out the best practices that Kenya can borrow from these two African jurisdictions.

The fifth chapter and final chapter will outline the findings of this study based on the preceding chapters. It will propose recommendations in the PPP legal, institutional and procedural framework to address the gaps that exist within the Kenyan county governments' legal framework in comparison to the legislative frameworks of South Africa, Nigeria and other international best practices.



## Chapter 2

### **The Legal, Institutional and Procedural Framework for conducting Public-Private Partnerships in County Governments in Kenya.**

#### **2.1 Introduction**

This chapter will review the fundamental tenets of devolution in Kenya and the operative constitutional and legal principles on the relationship between the national governments and the county governments on public services delivery. This chapter will also review the legal framework relating to county governments and the legal, institutional and procedural framework for conducting PPPs at the county level in Kenya. This will form a basis for the comparative study in Chapter 3 which will interrogate whether the Kenyan PPP legal regime is in line with best practices aimed at enhancing and promoting the use of PPPs as a method of public financing by local governments.

#### **2.2 Devolution**

After Kenya gained independence, the governance of the country was centralized, which harmed the delivery of public services and local governance.<sup>126</sup> However, decentralization and local governance in Kenya got a positive boost, in 2010, when the new Constitution was promulgated. One laudable critical elements contained in the 2010 Constitution is the creation of institutions to strengthen and sustain governance both nationally and locally, where locally

---

<sup>126</sup> Hope R, 'Devolved government and local governance in Kenya: Implementing decentralization underpinned by the 2010 Constitution', 13 *African and Asian Studies: Development Practice International*, Toronto, Ontario, Canada, (2014), 339.

the devolved governments were created.<sup>127</sup> Devolution represents the transfer of power and resources to lower (sub-national) levels of government that are both relatively independent of the national government and are democratically elected.<sup>128</sup>

According to the 2010 Constitution, the objectives of devolution of government in Kenya are *inter alia*: to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; ease of access of services, self-governance, promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them, ensure equitable sharing of national and local resources and to improve checks and balances and the separation of powers to promote the democratic and accountable exercise of power.<sup>129</sup>

The governments at the national and county levels are distinct and interdependent and are required to conduct their mutual relations based on consultation and cooperation.<sup>130</sup> This is further emphasized in the Intergovernmental Relations Act which establishes a framework for consultation and cooperation between the national and county governments, and amongst county governments and establishes mechanisms for the resolution of intergovernmental disputes.<sup>131</sup> Some of the core principles of intergovernmental relations are the respect for the functional and institutional integrity of the two levels of government and respect for the constitutional status of the levels of government and the institutions of government establishes

---

<sup>127</sup> Hope R, 'Devolved government and local governance in Kenya', 339

<sup>128</sup> Hope R, 'Devolved government and local governance in Kenya', 339

<sup>129</sup> Article 174, *Constitution of Kenya (2010)*

<sup>130</sup> Article 6, Article 212, *Constitution of Kenya (2010)*

<sup>131</sup> *Intergovernmental Relations Act, (No. 2 of 2012)*

at either level of government.<sup>132</sup> Thus, both levels government should respect each other's constitutional mandate and should allow each other to carry out their constitutional mandate without undue interference.

The 2010 Constitution also provides for the equitable sharing of national revenue among the national government and county governments.<sup>133</sup> The determination of the equitable shares is governed by a set of criteria that include: the national interest; the need to ensure that county governments can perform the functions allocated to them; the fiscal capacity and efficiency of county governments; developmental and other needs of counties; economic disparities within and among counties and the need to remedy them; the desirability of stable and predictable allocations of revenue; and the need for economic optimization of each county and to provide incentives for each county to optimize its capacity to raise revenue.<sup>134</sup> Moreover, the 2010 constitution also provides for the equitable share of the national revenue that is allocated to county governments to be at least 15 percent of all revenue collected by the national government.<sup>135</sup> There is also a further 0.5 percent of the total revenue collected by the national government each year which should be set aside in an equalization fund to be used to provide essential services and to minimize the disparity in the quality of services with the rest of the country, so far possible.<sup>136</sup>

---

<sup>132</sup> Section 4, *Intergovernmental Relations Act, (No. 2 of 2012)*

<sup>133</sup> Article 202, *Constitution of Kenya (2010)*

<sup>134</sup> Article 203 (1), *Constitution of Kenya (2010)*

<sup>135</sup> Article 203 (2), *Constitution of Kenya (2010)*

<sup>136</sup> Article 204 (2), *Constitution of Kenya (2010)*

In addition, the 2010 constitution required that a revenue fund be established for each county government into which shall be deposited all monies raised for or received on behalf of a county government, except money reasonably excluded by an Act of Parliament.<sup>137</sup> Along with the fiscal transfers from the national government, a county government may also mobilize revenue by levying taxes such as property rates, entertainment taxes, and any other tax or licensing fees that it is authorized to impose by an Act of Parliament<sup>138</sup>; and by borrowing.<sup>139</sup> However, the national government must guarantee a county government loan must have the approval of the county government's assembly.<sup>140</sup>

### **2.3 County Government Structure in Kenya**

During the colonial era, local governments in Kenya were considered to be relatively autonomous and had significant sources of revenue.<sup>141</sup> However, after the country attained independence in 1963, local authorities were weakened and simultaneously developed a bad reputation for incompetence.<sup>142</sup> After independence was achieved, the assumption of power by Kenyan political leaders triggered the consolidation of local governance that saw successful attempts to re-centralize which, in turn, undermined both the link and the relationship between local authorities and their constituents.<sup>143</sup> The re-centralization took form through measures

---

<sup>137</sup> Article 206, *Constitution of Kenya (2010)*

<sup>138</sup> Article 209 (3), *Constitution of Kenya (2010)*

<sup>139</sup> Article 212, *Constitution of Kenya (2010)*

<sup>140</sup> Article 212, *Constitution of Kenya (2010)*

<sup>141</sup> Hope R, 'Devolved government and local governance in Kenya', 340

<sup>142</sup> Oloo A, 'Devolution and Democratic Governance : Options in Kenya' in Kibua Tand Mwabu G (eds), *Decentralization and Devolution in Kenya: New Approaches*, University of Nairobi Press, 2008, 105

<sup>143</sup> Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105

that led to the emergence of an administrative structure consisting of local authorities and national government administrative units which made up what was termed provincial administration.<sup>144</sup>The local authorities were required to provide only a small number of services and any other programs they considered essential for improving services to their residents.<sup>145</sup> The significant services they had responsibility for were primary education, health care, road maintenance, and agricultural extension.<sup>146</sup> However, in pursuit of its re-centralization policy, the national government decided to keep the pre-independence structure of local government. Still, it transferred most of the critical functions and powers back to the national government, thereby severely restricting the autonomy of the local governments.<sup>147</sup> This dual system remained the basic framework for local governance and public service delivery in Kenya until the 2010 Constitution was passed overwhelmingly by Kenyans on 4<sup>th</sup> August 2010.<sup>148</sup>

The 2010 Constitution provides for a two-tier government structure which has the national government and the 47 counties. Further, under Article 1 of the Constitution, the sovereignty of the people is to be exercised at each level of government. The national government comprises of the Executive, the Legislature and the Judiciary. The Executive comprises of the President, deputy president and a cabinet of at least 14 but no more than 22 cabinet

---

<sup>144</sup> Hope R, 'Devolved government and local governance in Kenya', 340

<sup>145</sup> Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105

<sup>146</sup> Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105

<sup>147</sup> Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105

<sup>148</sup> Hope R, 'Devolved government and local governance in Kenya', 340

secretaries.<sup>149</sup> The Legislature comprises of the National Assembly, and the Senate<sup>150</sup> whilst the Judiciary consists of the all the courts and related infrastructure and all Tribunals.<sup>151</sup>

On the other hand, Chapter 11 of the Constitution spells out in meticulous detail the objects and principles of devolved governments, the functions and powers of these 47 county governments, the boundaries of the counties, the relationships between and among county governments and the national government, the rationale and manner of suspension of the county governments and other general issues including county assembly powers and gender balance and diversity.<sup>152</sup>

Each of the 47 county governments has an Executive which comprises of the governor, deputy governor and a county executive committee and a Legislative arm which is the county assembly.<sup>153</sup> For each county, the governor and the deputy governor are the Chief Executive and Deputy Chief Executive of the county respectively.<sup>154</sup> The governor is elected directly by the voters registered in the county for a term of five years and can hold office for only two terms.<sup>155</sup> The deputy governor is elected as a running mate by the governor, therefore, there is no separate election for the deputy governor required.<sup>156</sup> Each county also has a county

---

<sup>149</sup> Chapter 9, *Constitution of Kenya (2010)*

<sup>150</sup> Chapter 8, *Constitution of Kenya (2010)*

<sup>151</sup> Chapter 10, *Constitution of Kenya (2010)*

<sup>152</sup> Hope R, 'Devolved government and local governance in Kenya', 340

<sup>153</sup> Article 176, *Constitution of Kenya (2010)*

<sup>154</sup> Article 179(4), *Constitution of Kenya (2010)*

<sup>155</sup> Article 180, *Constitution of Kenya (2010)*

<sup>156</sup> Article 180 (6), *Constitution of Kenya (2010)*

assembly, elected for a five-year term, consisting of members elected by the voters in each ward; and the Speaker, who is an ex officio member.<sup>157</sup> Each county assembly has a speaker elected by the county assembly who presides over the sitting of the county assembly.<sup>158</sup>

The county assembly is the legislative arm of the county and has the power to: make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government as required by the Constitution<sup>159</sup>; exercise oversight over the county executive and any other county executive organs;<sup>160</sup>; and receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions.<sup>161</sup>

The executive authority of a county is vested in, and exercised by, a county executive committee.<sup>162</sup> The county executive committee consists of the county governor and his deputy; and non-assembly members appointed by the county government, with the approval of the assembly.<sup>163</sup> The number of members appointed shall not exceed a third of the number of members of the county assembly, if the assembly has less than 30 members; or 10, if the assembly has 30 or more members.<sup>164</sup> Members of a county executive committee are

---

<sup>157</sup> Article 177, *Constitution of Kenya (2010)*

<sup>158</sup> Article 178 (2), *Constitution of Kenya (2010)*

<sup>159</sup> Article 185 (2), *Constitution of Kenya (2010)*

<sup>160</sup> Article 185 (3), *Constitution of Kenya (2010)*

<sup>161</sup> Article 185 (4), *Constitution of Kenya (2010)*

<sup>162</sup> Article 179 (1), *Constitution of Kenya (2010)*

<sup>163</sup> Article 179 (2), *Constitution of Kenya (2010)*

<sup>164</sup> Article 179 (3), *Constitution of Kenya (2010)*

accountable to the county governor for the performance of the functions and exercise of their powers.<sup>165</sup> The functions of a county executive committee are to: prepare proposed legislation; implement county and national legislation; manage and coordinate the functions of the county administration and its departments; preparation of county reports,<sup>166</sup> and perform any other functions conferred on it by the Constitution or national legislation.<sup>167</sup> All these Constitutional provisions are further operationalized through the County Governments Act, 2012.

## **2.4 Public-Private Partnership Laws in Kenya**

### **2.4.1 Policy Statement on Public-Private Partnerships, November 2011**

This policy was the precursor for all other existing PPP laws in Kenya. From 1996 to 2011 when the Policy Statement on Public-Private Partnerships, 2011 (the “PPP Policy”) was enacted, Kenya’s government had illustrated its commitment to PPPs as a model for financing infrastructure in the country which led to investments by private stakeholders .<sup>168</sup> These infrastructure investments, however, happened without any legal framework for PPPs.<sup>169</sup> As a result, most of these transactions, took longer to be prepared and approved and feasibility studies were not adequately conducted.<sup>170</sup> There was also uncertainty about the legal process by which contracts should be tendered, procured and awarded.<sup>171</sup>

---

<sup>165</sup> Article 179 (6), *Constitution of Kenya (2010)*

<sup>166</sup> Article 183 (3), *Constitution of Kenya (2010)*

<sup>167</sup> Article 183 (1), *Constitution of Kenya (2010)*

<sup>168</sup> Government of Kenya PPP Policy Statement, 2011, ii

<sup>169</sup> Government of Kenya PPP Policy Statement, 2011, ii

<sup>170</sup> Government of Kenya PPP Policy Statement, 2011, ii

<sup>171</sup> Government of Kenya PPP Policy Statement, 2011, ii

Therefore, the policy was formulated because the Kenyan government realized that the in order to attain Kenya’s development agenda and to meet the infrastructure shortfall, private sector involvement would be required.<sup>172</sup> Therefore, a strong political will, robust legal and institutional framework would be required in order to successfully implement PPP projects.

Consequently, the policy provided a basis for the enactment of a PPP law which would create clear and certain project development process and establish public institutions such as sector state departments, statutory bodies, public enterprises, county governments and local authorities that would implement and champion PPPs as a viable method of infrastructure development.<sup>173</sup>

#### **2.4.2 The Constitution of Kenya, 2010**

The Constitution of Kenya, 2010 (the “**Constitution**”) is the highest law of the land and any law that is inconsistent with the Constitution is void to the extent of the inconsistency.<sup>174</sup> Therefore, this study will interrogate whether the PPP legal, institutional and procedural framework governing the conduct of PPPs at the county level is inconsistent with the provisions of Constitution that provide for the devolution of government.

To begin with, PPPs are a method of financing public projects. They, therefore, should adhere to Chapter 12 of the Constitution, 2010, which provides the principles guiding all aspects of

---

<sup>172</sup> Government of Kenya PPP Policy Statement, 2011, ii

<sup>173</sup> Government of Kenya PPP Policy Statement, 2011, 8

<sup>174</sup> Article 4, *Constitution of Kenya* (2010)

public finance in both levels of government which are fairness, equity, transparency competitive and cost effective.<sup>175</sup>

In addition to the principles of public finance, any form of public borrowing shall be guided by the following principles: Need to ensure the stability of domestic financial markets; Promotion of inter-generational equity in the sharing of burdens and benefits of public borrowing; determination of thresholds of borrowing rights for both levels of government; use of objective criteria for evaluating national government entities or county government eligibility for national government debt guarantee; and prudence and equity in setting limits for debt stock levels for each county government.<sup>176</sup>

Because of the foregoing, the national government was devolved to give powers to ease of access of services, self-governance, promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them.<sup>177</sup>

In exercising its mandate under the Constitution, a county government may enter into partnerships with any public or private organization per the provisions of any law relating to public or private partnerships for any work, service or function it is responsible for.<sup>178</sup> For that reason, county governments provide abundant PPP opportunities since some of the services that are devolved include the provision of water and sanitation, education, county roads and street lighting, county health, county housing, public entertainment, public amenities and

---

<sup>175</sup> Article 201, *Constitution of Kenya, (2010)*

<sup>176</sup> Republic of Kenya, *Public Debt and Borrowing Policy, June 2020, 5*

<sup>177</sup> Article 174 (d), *Constitution of Kenya (2010)*

<sup>178</sup> Section 6 (3), *County Governments Act (Act No.17 of 2012)*

construction of markets.<sup>179</sup> Article 189 (a) of the Constitution expressly states that government at either level shall have due regard to the functional and institutional integrity of the other when exercising its powers and respect the Constitutional status and institutions of government the other level.<sup>180</sup> This study seeks to interrogate whether the PPP Act is in line with the spirit of Article 189 of the Constitution.

### **2.4.3 The Public-Private Partnerships Act, 2013**

The Public-Private Partnerships Act, 2013 (the “**PPP Act**”) was assented to on 14<sup>th</sup> January 2013 and came into force on 8<sup>th</sup> February 2013 which is close to 2 years after the PPP Policy was rolled out. It is the principal legislation that governs the implementation of PPP projects in Kenya.<sup>181</sup> When there is a conflict between the provisions of the PPP Act and any other law, the provisions of the PPP Act shall take precedence.<sup>182</sup> This is echoed in the Public Procurement and Asset Disposal Act, 2015, which states that procurement and asset disposal carried out in the PPP Act shall not be subjected to its provisions.<sup>183</sup>

The PPP Act allows the private sector to participate in the financing, construction, development, operation, or maintenance of infrastructure or development projects of various state authorities through and establishes institutions that regulate, monitor and supervise the

---

<sup>179</sup> Fourth Schedule, Part 2, *Constitution of Kenya* (2010)

<sup>180</sup> Article 189 (a), *Constitution of Kenya*, (2010).

<sup>181</sup> Section 3, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>182</sup> Section 63 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>183</sup> Section 4 (2)(e), *Public Procurement and Asset Disposal Act*, (No. 33 of 2015)

implementation of project agreements on infrastructure or development projects.<sup>184</sup> It provides for both the institutional and the procedural framework for conducting a PPP project in Kenya.

## **2.4.4 The Public-Private Partnerships Regulations**

### **2.4.4.1 The Public-Private Partnerships Regulations, 2014**

The Public-Private Partnerships Regulations, 2014 (the “**Regulations**”) were enacted in 2014 according to Section 71 of the PPP Act to , to provide for the procedure for appointment of the PPP Committee, and the PPP Unit and their respective roles, to establish a minimum value of investment costs, the maximum value of performance security during the construction and operation phase of a project and to provide guidelines to be observed during the entire project cycle and financial and disclosure forms to be used by the contracting authority.<sup>185</sup>

The Regulations apply to every contract for the design, financing, construction, operation, equipping or maintenance of a PPP project as long as the project is not a national project with a contract value of fewer than eighty-five million shillings or a county government project with a contract value of fewer than five million shillings.<sup>186</sup>

### **2.4.4.2 The Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017 (the “Fund”)**

The Fund is established by the Public-Private Partnership Act to support contracting authorities in the preparation phase,, project appraisal and tendering phase of a project, to support the activities of the PPP Unit, to extend finance to capital intensive projects, to meet unforeseeable

---

<sup>184</sup> Preamble, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>185</sup> Section 71, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>186</sup> Regulation 2, *Public Private Partnerships (Regulations)*, (2014)

liabilities arising from a project and to settle the transaction advisors' retainer fees.<sup>187</sup> The Fund's main sources of money are levies imposed on projects, donations, grants, appropriations-in-aid, success fees paid to the PPP unit, and monies from the Treasury.<sup>188</sup>

The PPP Committee is in charge of the management of the Fund and ensures that only eligible projects are authorized for funding.<sup>189</sup> The Director of the PPP Unit is the Officer administering the Fund and is supported by the Secretariat, which consists of members of staff from the PPP Unit.<sup>190</sup> Information on the amount and the source of money received into the Fund and the total number of projects supported by the Fund should be published annually on the PPP Unit's website by the Officer administering the Fund.<sup>191</sup>

#### **2.4.5 The Public-Private Partnerships (Amendment) Bill, 2017**

The Public-Private Partnerships (Amendment) Bill, 2017 was passed by the National Assembly on 31<sup>st</sup> July 2018 and by the Senate on 20<sup>th</sup> February 2019 with recommended amendments.<sup>192</sup> However, it is yet to be assented to by the President.<sup>193</sup> It proposes to amend the PPP Act by adding a new section, 54 A and 54 B which if passed will amend the procedural framework for county PPPs to allow county governments to approve local PPPs unless the PPP

---

<sup>187</sup> Section 68, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>188</sup> Section 68 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>189</sup> Regulation, *Public Private Partnerships (Project Facilitation Fund) Regulations*, 2017

<sup>190</sup> Regulation 20 & 23, *Public Private Partnerships (Project Facilitation Fund) Regulations*, 2017

<sup>191</sup> Regulation, *Public Private Partnerships (Project Facilitation Fund) Regulations*, 2017

<sup>192</sup> Report on the Consideration of Senate Amendments to the Public Private Partnerships (Amendment) Bill, 2017, April 2019.

<sup>193</sup> <http://kenyalaw.org/kl/index.php?id=6819> on 27 February 2020

project requires a form of national government support or exceeds the budget threshold that has been prescribed by the Cabinet Secretary in charge of Finance.<sup>194</sup> However, all other provisions of the PPP Act shall still apply to county governments.

## **2.5 Institutional Framework**

### **2.5.1 The Public-Private Partnership Committee**

The first institution created by the PPP Act is the Public-Private Partnership Committee (the “PPP Committee”). The PPP Committee’s members include; the Principal Secretaries in the State departments responsible for matters relating to finance, national planning, land, county governments, transport, infrastructure, energy; the Attorney General; the Director of the PPP unit; and four professionals who are not public officers with more than 10 years professional experience in their respective fields.<sup>195</sup>

The PPP Committee’s core mandate is to supervise and oversee all the other institutions tasked with the implementation of PPP projects in the country.<sup>196</sup> They do so by formulating policy guidelines, standards, and procedures for awarding contracts and they ensure that there is an efficient implementation of any project agreement and that each project is consistent with the provisions of the PPP Act and the national priorities specified in Government policies.<sup>197</sup> The PPP Committee also approves project proposals, feasibility studies and project lists, authorizes

---

<sup>194</sup> Section 16, The Public-Private Partnerships (Amendment) Bill, (Bill No.52 of 2017)

<sup>195</sup> Section 4, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>196</sup> Section 8, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>197</sup> Section 7, *Public Private Partnerships Act* (Act No.15 of 2013)

allocations from the Project Facilitation Fund and is also in charge of regularly reviewing the legal, institutional and regulatory framework of PPPs.<sup>198</sup>

Parliament is required to ratify a PPP project agreement only in instances where the project is a concession for the exploitation of natural resources under Article 71 of the Constitution.<sup>199</sup>

### **2.5.2 The Public-Private Partnership Unit**

The Public-Private Partnership Unit (the “**PPP Unit**”) is the secretariat of the PPP Committee and is composed of employees of the State department responsible for matters relating to finance.<sup>200</sup> It provides legal, technical and financial advisory services to the PPP Committee and the PPP Node.<sup>201</sup>

It is also the resource hub on matters relating to PPPs by maintaining a record of all PPP project documentation, collating, analyzing, disseminating information by rating, compiling and maintaining an inventory of PPP projects that are likely to attract private sector investment.<sup>202</sup>

It is also tasked to provide capacity building and assisting contracting authorities to design, identify, select, prioritize, appraise, evaluate, negotiate projects, conducting research on how to improve performance of PPP and create awareness and build capacity amongst stakeholders.<sup>203</sup>

They are also mandated to advise the Committee on the support that should be accorded to

---

<sup>198</sup> Section 7, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>199</sup> Section 55, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>200</sup> Section 11 & 12, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>201</sup> Section 14 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>202</sup> Section 14 (2) (a,d,g,j), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>203</sup> Section 14 (2) (b,c,f,m), *Public Private Partnerships Act* (Act No.15 of 2013)

each project, to develop systems that would aid in ensuring transparency and equity in the implementation and monitoring of projects.<sup>204</sup> The PPP unit reports to the PPP Committee. It is the enforcement authority, ensuring that all the directives of the PPP Committee are implemented in the PPP sector and individual projects.

### **2.5.3 The Public-Private Partnership Nodes**

A Public-Private Partnership Node (the “**Node**”), is the project implementation team formed by a contracting authority conducting a PPP. It comprises of the accounting, financial, technical, procurement and the legal personnel of the contracting authority.<sup>205</sup> Each member of the Node, other than the Accounting Officer, must be a departmental head in the contracting authority.<sup>206</sup>

As the steering team on behalf of the contracting authority they ensure the projects are legally sound and commercially viable. They also undertake the tendering process and oversee the project’s implementation.<sup>207</sup> It also maintains a record of all PPP documentation and agreements and must submit to the unit regular and annual reports of the PPP projects conducted by the contracting authority.<sup>208</sup> The node must implement the recommendations and guidelines issued by the PPP Unit.<sup>209</sup>

---

<sup>204</sup> Section 14 (2) (e,p,k,o), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>205</sup> Section 16, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>206</sup> Regulation 8 (2) *Public Private Partnerships (Regulations)*, 2014

<sup>207</sup> Section 17, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>208</sup> Section 17, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>209</sup> Section 17 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

#### 2.5.4 The Petition Committee

The PPP Act together with the PPP Regulations also provides for a dispute resolution mechanism by creating a separate committee known as the Petition Committee to hear and determine any disputes that may arise during the project cycle before the project agreement is executed..<sup>210</sup> This was emphasized in the *Kenya National Highways Authority v PPP Petition Committee & 2 others* [2018] eKLR where the court held that this provision is all-encompassing and grants the Petition Committee the power to determine all complaints which means that the Committee is not limited in the kind of the complaints that it can consider and determine. In the case of *Mota-Engil Engenharia E Construcao Africa SA & 4 others v Public Private Partnership Petition Committee & another; Meridiam Infrastructure Africa Fund (MIAF) & 2 others (Interested Parties)* [2019] eKLR, the court held that the Petition Committee has jurisdiction to determine all matters under the PPP Act. When dealing with a petition or a complaint, the petition committee may allocate costs of hearing the petition.<sup>211</sup>

The Petition Committee consists of a chairperson who should be qualified to be a High Court judge, as well as four other subject matter experts and the Director of the PPP Unit.<sup>212</sup> Further, the Cabinet Secretary in charge of finance will also appoint a secretariat to support the Petition Committee. The petition committee term expires after three years after which the members are eligible for re-appointment for one more term..<sup>213</sup> Petitions brought before the Petition Committee that are based on an administrative decision of the PPP Committee, the PPP Unit

---

<sup>210</sup> Section 67 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>211</sup> Regulation 60 (1) (e), *Public Private Partnerships (Regulations)*, 2014

<sup>212</sup> Section 67 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>213</sup> Section 67 (3), *Public Private Partnerships Act* (Act No.15 of 2013)

and the contracting authority must be determined within fifteen days from the date of the decision, and this decision is final and binding on both parties.<sup>214</sup> This was upheld in *Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM Terminals* [2015] eKLR where the court held that the refusal by the Petition Committee to order disclosure in that case was a final decision. All other petitions must be determined within seven days after the hearing.<sup>215</sup> The Petition Committee may suspend the tendering process while the petition is being heard and determined.<sup>216</sup>

## 2.6 Procedural Framework

The PPP Act elaborately lays down the procedures to be followed by a contracting authority when carrying out a PPP project. A contracting authority is a government agency which delegates its functions to a private party.<sup>217</sup> Contracting authorities are required to submit to the PPP Unit a list of the PPP projects they intend to undertake on a priority basis.<sup>218</sup> The contracting authority may update the project list every year, but the final project list must be submitted to the PPP Unit at least three months before the end of the financial year.<sup>219</sup> The project list is then assessed by the PPP unit and approved by the PPP Committee.<sup>220</sup>

---

<sup>214</sup> Section 67, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>215</sup> Regulation 60 (3), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>216</sup> Regulation 60 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>217</sup> Section 2, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>218</sup> Section 23, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>219</sup> Regulation 11, *Public Private Partnerships (Regulations)*, 2014

<sup>220</sup> Section 24, *Public Private Partnerships Act* (Act No.15 of 2013)

The Node, in consultation with the PPP unit, is responsible for conceptualizing and identifying potential projects and must consider the benefits of entering into a PPP compared to carrying out the project independently.<sup>221</sup> Before entering into a PPP, a contracting authority must undertake a sectorial diagnostic study that is submitted to the PPP committee for review and approval.<sup>222</sup>

Once the PPP Committee has approved the proposal, the contracting authority shall undertake a feasibility study of the project which should consider the following aspects: (1) technical requirements, (2) legal requirements and (3) socio-economic and environmental impact of the project.<sup>223</sup> The contracting authority shall then prepare and submit a report with the findings of the feasibility study within two months after concluding the study to the PPP Unit and the PPP Committee for review and evaluation.<sup>224</sup> After the PPP Committee has approved the report after consideration of the PPP Unit's recommendation, the project is finally approved by Cabinet.<sup>225</sup>

After receipt of the approval and in consultation with the PPP Unit, the contracting authority will request for bidders through advertisement in at least two local print dailies print media..<sup>226</sup>After issuance of the public notice, the contracting authority shall constitute a pre-

---

<sup>221</sup> Section 31, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>222</sup> Section 20, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>223</sup> Section 33 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>224</sup> Section 34, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>225</sup> Section 35 (4), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>226</sup> Section 37, *Public Private Partnerships Act* (Act No.15 of 2013)

qualification committee whose role will be to pre-qualify the bidders.<sup>227</sup> The pre-qualification committee must have a representative of the PPP Unit and the Node and other technical, financial and legal experts who will shortlist the qualified bidders.<sup>228</sup> After that, still, in consultation with the PPP Unit, the contracting authority may hold a preliminary meeting with the qualified bidders to discuss the conditions and requirements in the notice and the bidders can make enquiries about the proposed project.<sup>229</sup> The contracting authority may alter the project qualifications based on the deliberations above, but the alterations should not affect pre-qualification criteria and shall be made before the invitation to bid is issued.<sup>230</sup>

After the pre-qualification process laid out above has been completed, the contracting authority in consultation with the PPP Unit shall prepare an invitation to bid and tender documents for the project.<sup>231</sup> The tender documents should include the general information if the project, technical and financial conditions to be met by the bidders, specifications of the final product or service, key performance indicators, basic terms and conditions of the project agreement, the criteria for evaluation of the bids, forms and documents required to be submitted by the bidders, the value of the bid security to be submitted, conditions for bidders to seek clarifications and the deadline and place for submission of the tender documents by the bidders.<sup>232</sup>

---

<sup>227</sup> Section 39 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>228</sup> Section 39 (2), & Section 40 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>229</sup> Section 41, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>230</sup> Section 42, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>231</sup> Section 43 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>232</sup> Section 43 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

Once the bids have been submitted, the contracting authority must constitute a proposal evaluation team to sift through the applications.<sup>233</sup> The proposal evaluation should have not only representatives of the contracting authority but also a representative of the PPP Unit, the Attorney General and the Node.<sup>234</sup> The technical bids should be evaluated before the financial bids.<sup>235</sup> In evaluating the financial bids, the proposal evaluation team must take into account the economic advantage that would accrue to the contracting authority, and the comparative balance for the financial and technical elements of the bid set out in the tender documents.<sup>236</sup> Upon evaluating the bids and before declaring the first ranked bidder, the proposal evaluation team shall prepare an evaluation report specifying the evaluation criteria and give reasons why the first ranked bidder satisfied the requirements specified in the tender documents in comparison to the other bidders.<sup>237</sup>

After that, the contracting authority, with the approval of the PPP Committee, enter into negotiations on the technical and financial terms of the project agreement with the successful bidder and request the second-ranked bidder to extend the validity of its bid pending the completion of negotiations with the successful bidder.<sup>238</sup> The negotiating committee shall consist of a representative from the PPP Unit, the Node, related State departments and members

---

<sup>233</sup> Section 47, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>234</sup> Section 47(2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>235</sup> Section 44 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>236</sup> Section 48, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>237</sup> Section 49, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>238</sup> Section 52, *Public Private Partnerships Act* (Act No.15 of 2013)

of the transaction advisors that have been appointed by the contracting authority.<sup>239</sup> However, the negotiations and the resolutions of the parties should not result into an increase in pricing and shall not affect the non-negotiable terms and conditions in the invitation to tender, the financial structure and conditions that the bidder raised no reservations in the bid.<sup>240</sup>

After the negotiations, the negotiating committee prepares and submits to the contracting authority a project report specifying the negotiated terms together with its recommendations.<sup>241</sup>

After that, the contracting authority will submit the negotiation report to the PPP Unit.<sup>242</sup> The PPP Unit, if satisfied with the project and risk assessment report, shall submit the report to the Debt Management Office for confirmation of its initial approval at feasibility stage based on the final contract and preferred bidder submission.<sup>243</sup>

The PPP Unit shall then submit the project report to the PPP Committee with its recommendations for consideration.<sup>244</sup> The committee will then submit the project report with its recommendations to the Cabinet for approval.<sup>245</sup> Within thirty days of receipt of the Cabinet's approval, the PPP Committee will inform the contracting authority of the Cabinet's decision and the authority will have the green light to finalize the project agreement for execution by the parties to the project and communicate the decision of the Cabinet, in writing,

---

<sup>239</sup> Section 52 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>240</sup> Section 52 (4), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>241</sup> Section 53 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>242</sup> Section 53 (2), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>243</sup> Section 53 (4), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>244</sup> Section 54 (1), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>245</sup> Section 54 (4), *Public Private Partnerships Act* (Act No.15 of 2013)

to all the bidders who participated in the bidding of the project.<sup>246</sup> After that, the successful bidder shall form a Special Purpose Vehicle (SPV) incorporated as a company, and the contracting authority may own shares in the company as a minority shareholder.<sup>247</sup> Also, the project company must submit performance security, in the form of an unconditional and irrevocable letter of guarantee in favour of the contracting authority issued by a bank licensed to operate in Kenya.<sup>248</sup> The performance security must be submitted before the project agreement is signed between the project company and the contracting authority.<sup>249</sup>

Finally, the contracting authority will execute the contract awarded to the bidder as a Public-Private Partnership project and publish in two local dailies of national circulation and online the results of the tender together with the nature, scope, successful bidder, project costs at net present value, the project value and tariff and the duration of the project.<sup>250</sup> Once the project agreement has been executed, the PPP Unit must preserve an electronic copy and a paper copy of the agreement for at least six years after the execution.<sup>251</sup>

## **2.7 Public Finance Management Act**

The objective of the Public Finance Management Act (from now on “**PFM Act**”) is to provide for the effective management of public finances by both National and County Governments, the overall oversight of Parliament and County Assemblies and the different responsibilities of

---

<sup>246</sup> Section 56, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>247</sup> Section 59, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>248</sup> Regulation 50 (2), *Public Private Partnerships (Regulations)*, 2014

<sup>249</sup> Regulation 50 (1), *Public Private Partnerships (Regulations)*, 2014

<sup>250</sup> Section 57 & 60, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>251</sup> Regulation 6, *Public Private Partnerships (Regulations)*, 2014

government and other entities.<sup>252</sup> Under the County Governments Act, 2012, the funds and financial management of county governments should be as provided under the law relating to public finance.<sup>253</sup> In addition, the procedure of budgeting, borrowing powers and grants management shall be as provided in the law relating to public finance.<sup>254</sup>

Therefore, the PFM Act is relevant, especially concerning the approval by the Debt Management Office of any PPP project as well as the issuance of government support such as guarantees, undertaking or binding letters of comfort.<sup>255</sup>

Additionally, under the PFM Act, the Cabinet Secretary for the National Treasury is required to submit to Parliament on or before 15<sup>th</sup> February every year the national government's debt strategy over the medium term in respect to actual and potential liabilities arising from loans and guarantees.<sup>256</sup> It is for that reason that the PPP Unit does seek the confirmation of the Debt Management Office in respect of a PPP project report to ensure the project's affordability<sup>257</sup> as well as assessment and approval of financial risk and contingent liabilities.<sup>258</sup> According to the PFM Act, the Cabinet Secretary for the National Treasury in April 2015 published the Public Finance Management (Roads Annuity Fund) Regulations for purposes of implementing the roads annuity programme through procurement of long term contracts for the design,

---

<sup>252</sup> Preamble, *Public Finance Management Act*, (No. 18 of 2015)

<sup>253</sup> Section 131(1), *County Governments Act* (No. 17 of 2012)

<sup>254</sup> <sup>254</sup> Section 131(2), *County Governments Act* (No. 17 of 2012)

<sup>255</sup> Section 27, *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>256</sup> Section 33, *Public Finance Management Act*, (No. 18 of 2015)

<sup>257</sup> Section 64(2)(b), *Public Private Partnerships Act* (Act No.15 of 2013)

<sup>258</sup> Section 35(2), *Public Private Partnerships Act* (Act No.15 of 2013)

finance, construction and maintenance of up to 10,000-kilometre priority roads under a PPP arrangement.<sup>259</sup>

## 2.8 Conclusion

The legal framework of PPPs in Kenya is first and foremost based on the Constitution, 2010, which enshrines good governance, integrity, transparency and accountability in governance institutions and county government.<sup>260</sup> The critical statute that specifically spells out the legal framework for PPPs in Kenya is the Public-Private Partnerships Act, together with the Regulations thereunder. It is the framework legislation which fundamentally and primarily regulates the PPP arrangements in Kenya. The analysis of these legislation has been pegged on procedural requirements undertaken during the execution of the project with specific regard paid to the institutional and regulatory/administrative mechanisms established by the PPP Act. This has also informed the legal framework of the PPP arrangements in Kenya. The Public Finance Management Act has also been examined as they also contain provisions which directly affects the PPP arrangements in one way or the other. The PPP arrangements are also hinged on contract law which further assures the private sector that the contractual arrangements will be honoured.<sup>261</sup>

From the analysis, it is evident that the PPP laws do not independently provide for legal, institutional or procedural framework tailored explicitly for carrying out PPPs by the County Governments. Instead, the county governments are regarded in the same footing as any other

---

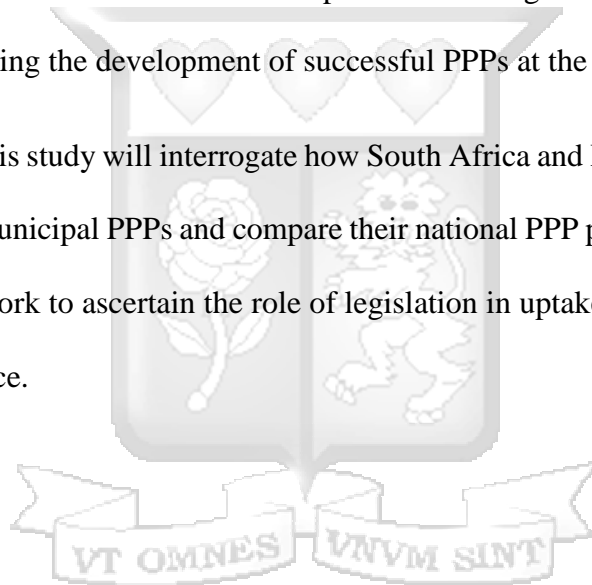
<sup>259</sup> Regulation 2(2), Legal Notice No. 36 of 2015, Kenya Gazette Supplement No. 35 of 2015

<sup>260</sup> Article 10, Constitution of Kenya, 2010.

<sup>261</sup> Mwaniki Gachoka, "Enter Public Private Partnerships," *Kenya Procurement Journal*, 70

national government agency. However, they have the constitutional mandate to provide core services to the public just as the national government. This creates an additional bureaucratic bottleneck and consequently discouraging the use of PPPs as a method of financing public projects at the county level. Also, the Public-Private Partnerships (Amendment) Bill, (Bill No.52 of 2017), which should ideally improve the PPP landscape for county governments provides that county approvals be limited to projects below a certain budgetary threshold. This means that the control of PPP projects at the county level will still be at the mercy of the national government if the amendment bill is passed. This begs the question of whether the PPP framework is aiding the development of successful PPPs at the County level.

The next chapter in this study will interrogate how South Africa and Nigeria conduct their sub-national, State, and municipal PPPs and compare their national PPP policy framework with the Kenyan legal framework to ascertain the role of legislation in uptake successful PPPs at local the level of governance.



## Chapter 3

### **Review of the Legal, Institutional and Procedural Framework for Conducting Local Public-Private Partnerships in South Africa and Nigeria.**

#### **3.1 Introduction**

This chapter reviews the legal, institutional and procedural framework for carrying out PPPs in South Africa and Nigeria, all of which have had more success in conducting local PPP projects than Kenya. The aim is to find out what role their respective legislative frameworks for conducting local PPPs has played in this success and compare this to the Kenyan legislative framework for conducting similar PPPs.

#### **3.2 South Africa**

South Africa is a constitutional democracy with a three-tier system of government consisting of National, Provincial and Local (Municipal) levels and an independent judiciary. These levels of government all have legislative and executive authority in their spheres and are defined in the Constitution as distinctive, interdependent and interrelated.<sup>262</sup> The country is divided into nine provinces which have their executive and legislative branches. The local government consists of municipalities governed by municipal councils.

The country's strong PPP track record informs the choice to study the South African PPP regulatory system in the adoption of the PPP model of public service delivery. PPPs in South Africa has delivered significant projects across several sectors. Examples of PPP projects that have since been concluded include: the Gautrain light rail concession concluded in 2006 for the US \$3,483.00 Million (railway); Mozambique - South Africa Gas Pipeline concluded in

---

<sup>262</sup> Farlam, 'Assessing Public-Private Partnerships in Africa 1.

2003 for US \$1,200.00 Million (natural gas); Xina Solar One CSP concluded in 2015 for the US \$900.00 Million (electricity); and, N3 Toll Road concluded in 1999 for US \$794.70 Million (roads). In total, as at November 2019, 96 PPP projects with a total investment of US \$20,680.00 Million had been completed since 1990.<sup>263</sup> A total of 78 other projects with a total investment of US \$20,680.00 Million are still under construction or operation both at the national and local level.<sup>264</sup>

This presents a solid track record in PPP implementation and is undoubtedly a strong complement to the governing regulatory framework. This track record is even more impressive because South Africa's PPP regulatory framework does not have a long history. Regulation of PPPs in South Africa can be traced back to April 1997 when the then cabinet approved the appointment of an interdepartmental task team to develop policy, legislation and institutional reforms to enable the use of PPPs.<sup>265</sup> Several pioneering PPPs were carried out by the South African Roads Agency, Department of Public Works and Correctional Services, South African National Parks, and two municipalities. The lessons learned from these preliminary projects helped in the development of a Strategic Framework for PPPs in 1999.<sup>266</sup>

Consequently, a Public Finance Management Act (PFMA) was enacted in 1999.<sup>267</sup> The broad objective of the Act was to create a good governance structure for the procurement of goods

---

<sup>263</sup> <https://PPPknowledgelab.org/countries/south-africa> on 28 September, 2020

<sup>264</sup> <https://PPPknowledgelab.org/countries/south-africa> on 28 September, 2020

<sup>265</sup> Burger P, 2006. *The Dedicated PPP Unit of the South African National Treasury*. Policy, Finance & Management for Public-Private Partnerships, 2008, 6.

<sup>266</sup> Burger P, 2006. *The Dedicated PPP Unit of the South African National Treasury*. 6.

<sup>267</sup> *Public Finance Management Act*, (Act No. 1 of 1999) (South Africa).

and services by the public sector. Section 76 of the Act provided for the formulation of regulations or instructions applicable to all institutions to which the Act applied concerning among other things, the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.<sup>268</sup> According to this provision, the Treasury Regulation 16 was enacted in the year 2000 as the central legislation governing PPPs for national and provincial governments.

In 2004, the National Treasury issued the National Treasury PPP Practice Note Number 02 of 2004 'South African Regulations for PPPs' (PPP Manual) to facilitate the application of the PFMA and Regulation 16. Municipalities are however not subject to the PFMA or Treasury Regulation 16. PPPs for municipal government is governed by the Municipal Systems Act, 2000 (MSA), and the Municipal Finance Management Act, 2003 (MFMA). The central legislation governing municipal PPPs is in chapter 11 Part 2 of the MFMA. There is also the Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations), which address the PPP provisions in both the MSA and the MFMA, and other matters in the MFMA related to the procurement of multi-year PPP agreements.<sup>269</sup> A PPP Unit set up in the year 2000 following the approval of the Strategic Framework for PPPs in 1999 constitutes the institutional framework governing PPPs in South Africa. Its vital role is the procurement and management of PPPs in South Africa.

### **3.2.1 Legal Framework**

---

<sup>268</sup> Section 76 (4) (c) & (g) *Public Finance Management Act*, (South Africa).

<sup>269</sup> *Municipal Service Delivery and PPP Guidelines*, (South Africa), 21.

### **3.2.1.1 Legal Framework for National and Provincial Levels of Government**

As already pointed out, regulation of PPPs at the national and provincial levels of government as provided for under the PFMA and Treasury Regulation 16 to the PFMA. The following section gives a brief overview of the same.

#### **a. The Public Finance Management Act (PFMA)**

This Act forms the underlying legislation of PPP regulation in South Africa. Its focus on financial management is on outputs and responsibilities aimed at improving the public sector's financial management. The heads of departments in public institutions are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates.<sup>270</sup> These officials, therefore, need to evaluate value-for-money choices continually.

Consequently, if a PPP is opted for as a mechanism for the delivery of public service, it will require investigation as to whether it provides value for money. PPPs, in their very nature, entails targeted public spending, leveraging private sector finance and efficiencies, and allocating risks to the party best able to manage them. As a mechanism of delivery, therefore, a PPP is firmly in line with the intent of the PFMA.<sup>271</sup> It is because of this that the provisions of the Act as may affect PPPs were operationalized with the Treasury enacting the Treasury Regulation 16 according to section 76 of the Act.

#### **b. Treasury Regulation 16 to the Public Finance Management Act, 1999**

---

<sup>270</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs.

<https://www.gtac.gov.za/Publications/630-Module%2001.pdf> on 28 September, 2020

<sup>271</sup> <https://www.gtac.gov.za/Publications/630-Module%2001.pdf> on 28 September, 2020

Enacted according to section 76 of the Act, Regulation 16 provides precise and detailed instructions for PPPs. The Regulation defines PPPs and set out the phases and tests they will have to go through. For application, the National Treasury's PPP Manual and Standardized PPP Provisions (PPP Manual) is issued according to the PFMA and Treasury Regulation 16. They are issued for national and provincial departments, constitutional institutions, and public entities affected by the PFMA and the Treasury Regulation 16.

PPP Manual is issued as a PPP Practice Note, in terms of section 76(4) (g) of the PFMA. These PPP practice notes, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations. The regulations apply to all national and provincial government departments; all constitutional institutions listed in schedule 1 to the PFMA; and, all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity.<sup>272</sup> The regulations do not, however, apply to entities listed in schedule 2 to the PFMA nor Municipalities.

A PPP is defined as a contract between a public sector institution and a private party, in which the private party assumes the substantial financial, technical and operational risk in the design, financing, building and operation of a project.<sup>273</sup> Regulation caters for various types of PPPs. It allows such projects to be developed with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets.<sup>274</sup>

---

<sup>272</sup> Regulation 1.2.1. *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>273</sup> Regulation 16.1 (Definitions) *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>274</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 5

As regards PPP financing, the Regulation does not prescribe any structure with the assumption being that the mode of financing will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal. Nevertheless, all PPPs governed by the Regulation are governed by a three-pronged test: whether the institution can afford the deal; whether the PPP is a value for money solution and whether substantial technical, operational and financial risk shall be transferred to the private party.<sup>275</sup> PPP agreements can only be entered into by the accounting officer or the accounting authority of the institution. The Regulation provides six distinctive stages of PPP project cycle. These stages are project inception, feasibility study, procurement, management, delivery and exit. The Regulation requires that the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage. Further, the Regulations require that those specific treasury approvals are given at various phases of the project cycle.

At the project inception stage, the accounting officer or the accounting authority must in writing register the PPP with the relevant treasury and inform the relevant treasury of the expertise within that institution to proceed with a PPP. The accounting officer or authority may appoint a project officer from within or outside the institution and a transaction advisor if the relevant treasury so requests.<sup>276</sup> A feasibility study must be conducted by the accounting officer or authority to determine whether the proposed PPP is in the best interests of an institution. The parameters to be met by the study are specified under regulation 16.4.1. (a) – (f). The

---

<sup>275</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 6

<sup>276</sup> Regulation 16.3.1. *Treasury Regulation 16 to the PFMA*, (South Africa)

relevant treasury's approval, according to the feasibility study, is mandatory before the project can move to the procurement phase.

The next stage is procurement. The regulation sets out clear procurement steps that must be followed by institutions and prescribes distinct treasury approvals that must be obtained in this phase. The procurement procedure must be per a system that is fair, equitable, transparent, competitive and cost-effective. All bidders at each stage of a procurement process must have an equal chance of competing for the contract, and no action taken by the government may prejudice their competitiveness.<sup>277</sup> The relevant treasury's approval will be required before the issuance of the procurement documentation, including the draft PPP Agreement and before appointing the preferred bidder after evaluation of bids. To obtain this latter approval, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid.<sup>278</sup>

Upon the conclusion of the procurement stage, the relevant treasury's approval must be obtained before the accounting officer or authority concludes a PPP agreement.<sup>279</sup> This approval is meant to assess: (i) whether the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as had been approved at the procurement stage; (ii) that the management plan presented by the

---

<sup>277</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 9.

<sup>278</sup> Regulation 16.5.4. *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>279</sup> Regulation 16.6.1. *Treasury Regulation 16 to the PFMA*, (South Africa)

institution explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and (iii) that satisfactory due diligence including legal, due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party concerning matters of their respective competence and capacity to enter into the PPP agreement.<sup>280</sup>

As regards the management phase, the accounting officer or accounting authority of the institution is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved by the relevant treasury for measuring the outputs of the PPP agreement; monitoring the implementation of the PPP agreement and performances under the PPP agreement; liaising with the private party; resolving disputes and differences with the private party; generally overseeing the day-to-day management of the PPP agreement; and, reporting on the PPP agreement in the institution's annual report.<sup>281</sup>

The Regulation provides for the amendment of the PPP Agreements.<sup>282</sup> The relevant treasury's approval is required for any material amendment. This approval will only be granted if the said amendments will ensure that the PPP Agreement will continue to provide for: value for money; affordability; and substantial technical, operational and financial risk transfer to the private

---

<sup>280</sup> Regulation 16.6.1 (a), (b) and (c) *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>281</sup> Regulation 16.7.1. *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>282</sup> Regulation 16.8. *Treasury Regulation 16 to the PFMA*, (South Africa)

party. The treasury has, however a raft of conditions that must be met by the institution before being exempted.<sup>283</sup>

A PPP agreement entered into by an institution is binding to the State only if they were entered into by the accounting officer or accounting authority of that institution and if the relevant authority granted all treasury approvals required under the Regulation.<sup>284</sup> The Regulation also provides for exemption from compliance with any or all of its provisions. This exemption may be granted upon appropriate terms and conditions by the relevant treasury upon written from an institution. This exemption may be with a specific PPP or a general one in terms of which the institution is exempt.<sup>285</sup>

#### **3.4.1.2 Legal Framework for Municipal Governments**

PPP regulation for municipal governments is provided for under the MFMA, MSA and the Municipal Service Delivery and PPP Guidelines of 2007.

##### **a. Municipal Finance Management Act, 2003 (MFMA)**

Chapter 11 Part, 2 of the MFMA, forms the basis of PPP regulation for municipalities. It provides that a municipality may enter into a public-private partnership agreement if it shows that the agreement will: provide value for money to the municipality; be affordable for the municipality; and, transfer appropriate technical, operational and financial risk to the private party.<sup>286</sup> It is further provided that if the PPP involves the provision of municipal service,

---

<sup>283</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 12, 13.

<sup>284</sup> Regulation 16.9. *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>285</sup> Regulation 16.10. *Treasury Regulation 16 to the PFMA*, (South Africa)

<sup>286</sup> Section 120 (1), *Municipal Finance Management Act* (South Africa)

Chapter 8 of the MSA must be complied with.<sup>287</sup> A feasibility study must be conducted before a PPP is concluded.<sup>288</sup>

Once the feasibility study is concluded, the accounting officer of the municipality is to submit the report to the municipality's council for a decision as to whether the municipality should continue with the PPP. Sixty days before the meeting of the council, the accounting officer must make public the particulars of the PPP and the feasibility study report for purposes of public participation.<sup>289</sup> Further, the accounting officer must seek the views of the National Treasury; the National Department responsible for Local Government; if the PPP involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and, any other national or provincial organ of State as may be prescribed.<sup>290</sup>

The provisions of the Act relating to supply chain management apply to PPP procurement.<sup>291</sup> Each municipality is required to have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for the municipal supply chain management.<sup>292</sup> The Policy should cover areas concerning the procurement processes that may be used, when a particular procurement process must be used, procedure and mechanism for each process, transparent

---

<sup>287</sup> Section 120 (3). *Municipal Finance Management Act* (South Africa)

<sup>288</sup> Section 120 (4). *Municipal Finance Management Act* (South Africa)

<sup>289</sup> Section 120 (6). *Municipal Finance Management Act* (South Africa)

<sup>290</sup> Section 120 (7). *Municipal Finance Management Act* (South Africa)

<sup>291</sup> Part 1 of Chapter 11 *Municipal Finance Management Act* (South Africa)

<sup>292</sup> Section 111 and 112, *Municipal Finance Management Act* (South Africa)

prequalification process, competitive bidding processes, bid documentation, evaluation of tenders, the participation of stakeholders and public, preventive measures to combat corruption and other malpractices, contract management and dispute settlement.<sup>293</sup>

The Act also allows for unsolicited proposals but in a very controlled way. The municipality is not obliged to consider these bids received outside its normal bidding process. If these bids are to be considered, then they should be handled in strict compliance with a prescribed framework. This framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.<sup>294</sup>

#### **b. Municipal Systems Act, MSA**

The Act provides for different ways through which a municipality may provide a municipal service in its area or a part of its area including an external mechanism or any other institution, entity or person legally competent to operate a business activity.<sup>295</sup> This envisages engaging a private entity in a PPP set up. Suppose the municipality decides on an external mechanism of service delivery. In that case, it is required to give notice to the local community of its intention to explore the provision of the municipal service through this mechanism. The appropriate mechanism is to be assessed based on the direct and indirect costs and benefits associated with the project, the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service, the views

---

<sup>293</sup> Section 112, *Municipal Finance Management Act* (South Africa)

<sup>294</sup> Section 113, *Municipal Finance Management Act* (South Africa)

<sup>295</sup> Section 76 (b) (v), *Municipal Systems Act* (South Africa)

of the local community, the likely impact on development, job creation and employment patterns in the municipality and the views of organized labour.<sup>296</sup>

Once a particular mechanism has been settled upon, a feasibility study must be undertaken along the parameters provided for in the Act.<sup>297</sup> After conducting a feasibility study, the municipality must then conduct a selection process of the service provider which must be fair, equitable, transparent, cost-effective and competitive, and as may be provided for in other applicable national legislation. Further, the process complies with Chapter 11 of the MFMA.<sup>298</sup> Once a prospective bidder has been selected, the municipality is then to negotiate an agreement with the said bidder in strict adherence to the bid documents. The copies of the agreement are to be made available for public inspection.<sup>299</sup>

### **c. Municipal PPP Regulations**

Section 168(1)(d) of the MFMA provides that the Minister of Finance may, with the concurrence of the Minister for Provincial and Local Government, issue regulations and guidelines regulating the financial commitments of municipalities and municipal entities in terms of public-private partnerships (PPPs). Section 86A of the Municipal Systems Act (2000) (MSA), read together with section 120 (1) and (2) of the Municipal Finance Management Act provide that the Minister for Provincial and Local Government may issue guidelines for

---

<sup>296</sup> Section 78 (3), *Municipal Systems Act* (South Africa)

<sup>297</sup> Section 78 (3) (c), *Municipal Systems Act* (South Africa)

<sup>298</sup> Section 83, *Municipal Systems Act* (South Africa)

<sup>299</sup> Section 84, *Municipal Systems Act* (South Africa)

municipalities when assessing options for the provision of a municipal service, the different categories of municipal services and the different categories of service providers.

Accordingly, with effect from 1 April 2005, the Municipal Public-Private Regulations were issued.<sup>300</sup> These Regulations address the PPP provisions in both the MSA and the MFMA and other matters in the MFMA related to the procurement of multi-year PPP agreements. They also define the elements of a municipal PPP and set out the stages and approvals it will have to go through.<sup>301</sup>

The Regulation does not provide for the financing structure for PPPs with the underlying assumption being that these will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal. However, affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding.<sup>302</sup> The Regulation divides the PPP cycle into four phases: project inception, feasibility study, procurement and contract management. The PPP project cycle enables the three regulatory tests of affordability, value for money and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement. Additionally, the views and recommendations of the national treasury and the relevant provincial treasury should be sought at various stages.

---

<sup>300</sup> Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations) 2007.

<sup>301</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 2.

<sup>302</sup> South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 7.

At the project inception stage, the accounting officer of the municipality must notify the national treasury and the relevant provincial treasury in writing of the municipality's intention together with the information on the capacity of the municipality to comply with section 120 (1) of the MFMA. Besides, and if he has been requested to do so by the national or the relevant provincial treasury, appoint a competent person as a transaction advisor to assist in the preparation and procurement of PPP agreement. These provisions are made applicable under section 78 (2) of the MSA in the event of a provision of municipal service through an external mechanism to be appointed in terms of a PPP agreement.<sup>303</sup>

A feasibility study must then be conducted in terms of section 120 (4) of the MFMA, and other matters to be covered by the survey are provided for in the Regulation.<sup>304</sup> A feasibility study under this provision of the MFMA need not be conducted if the project is a municipal service for which a feasibility study has already been conducted under the MSA. At the procurement stage, the accounting officer must ensure compliance with Part 1 of Chapter 11 of the MFMA. In so doing, the accounting officer must solicit the views and recommendations of the national and the relevant provincial treasury on the proposed bid documentation thirty days before bids are publicly invited and on the evaluation of the received bids and of any preferred bidder at least thirty days before any award is made. An award of the PPP agreement must be subject to compliance with section 120 (6) and section 33 of MFMA.<sup>305</sup> Other views and recommendations of the national and the relevant provincial treasuries must be sought on the proposed terms of the draft PPP agreement, the municipality's plan for effective management

---

<sup>303</sup> Regulation 2, *Municipal Public-Private Regulations*, (South Africa)

<sup>304</sup> Regulation 3 (1), *Municipal Public-Private Regulations*, (South Africa)

<sup>305</sup> Regulation 4 (2), *Municipal Public-Private Regulations*, (South Africa)

of the agreement and the preferred bidder's competencies and capacity to comply with its obligations under the agreement.<sup>306</sup> The accounting officer of a municipality is the officer authorized to sign the agreement on behalf of the municipality.<sup>307</sup>

### **3.2.2 Institutional Framework**

The institutional regulatory framework for PPPs in South Africa is the national and relevant provincial treasuries. The national treasury has been given the duty under the PFMA to formulate regulations and issue practice notes and guidelines for the implementation of public service delivery mechanisms, including PPPs.<sup>308</sup> Consequently, the treasury has formulated the Treasury Regulations 16 to the PFMA that constitute the legal framework for PPP regulation at the national and provincial levels. In order to effectively perform its functions, the PPP Unit of South Africa was established in mid-2000 consisting of five professional staff drawn from both the public and private sectors. This was following the endorsement of a Strategic Framework for PPPs by the cabinet in December 1999 and enactment of the PFMA which was largely influenced by the lessons drawn from pioneering PPP projects conducted from 1997 to 2000<sup>309</sup> and the international experience.

The PPP Unit was established under the Government Technical Advisory Centre (GTAC) which is an agency of the National Treasury, established to support public finance management through professional advisory services, programme and project management and transaction

---

<sup>306</sup> Regulation 4 (3), *Municipal Public-Private Regulations*, (South Africa)

<sup>307</sup> Regulation 6 (1), *Municipal Public-Private Regulations*, (South Africa)

<sup>308</sup> Section 168, *Public Finance Management Act*, (South Africa).

<sup>309</sup> South Africa National Roads Agency for the N3 and N4 toll roads, <https://www.gtac.gov.za/> on 28 September,

support.<sup>310</sup> Currently, the PPP Unit consists of seventeen professional staff drawn from at least fourteen sectors who are allocated projects depending upon individual sector expertise and interest.<sup>311</sup>

The primary function of the South African PPP unit is to ensure compliance with the legal requirements of affordability, value for money and sufficient risk transfer for every PPP project. To fulfil the abovementioned function, the PPP Unit has two broad tasks: to provide technical assistance to government departments, provinces and municipalities who want to set up and manage PPPs, and to provide national treasury approvals and recommendations during the phases of PPP implementation cycle.

### 3.2.3 Procedural Framework

The critical steps in a municipal PPP project cycle are the inception stage, feasibility study stage, the procurement stage, the PPP contract management stage.<sup>312</sup> At the **inception stage**, the key steps are the identification of the project, notification of the municipal desk at the national treasury's PPP unit, the provincial treasury, the appointment of the project officer and the project secretariat, assessment of the project budgets, setting up the project team.<sup>313</sup> A project should originate from an integrated development plan which identifies the gaps in municipal services and has a draft plan to eliminate these gaps.<sup>314</sup> Project identification should

---

<sup>310</sup> <https://www.gtac.gov.za/> on 28 September, 2020

<sup>311</sup> <http://www.PPP.gov.za/Pages/About.aspx> on 28 September, 2020

<sup>312</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Project Inception*, vii

<sup>313</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Project Inception*, 1

<sup>314</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Project Inception*, 1

describe the nature and size of the project, the current municipal budget, projected development costs and the initial list of risks.<sup>315</sup> After that, the National Treasury PPP Unit will assign an internal project adviser to the municipal PPP project.<sup>316</sup>

The next stage is the **feasibility study stage** which provides information about costs, indicates whether the costs can be met from within municipal budgets without disruptions to other local projects, identifies, allocates, quantifies and mitigates risks, prompts municipalities to consider how the project will be structured, identifies constraints that cause the project to be halted and ensures that a proper business plan is developed for the project.<sup>317</sup> The critical steps in this stage are public participation, need analysis, technical and service delivery analysis, project due diligence, full value assessment, simplified value assessment, procurement plan and submission of the feasibility report to the council and the national PPP unit and revisiting the feasibility study report to the council incorporating the council's and the PPP unit's recommendations.<sup>318</sup>

The subsequent stage is the **procurement stage**. The municipality must solicit the views and recommendations of the National Treasury and the provincial treasury on the bid documentation at least 30 days before bids are publicly invited.<sup>319</sup> The key processes in this stage in chronological order include issuing a Request for Qualification (RFQ), selecting the

---

<sup>315</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Project Inception*, 1

<sup>316</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Project Inception*, 6

<sup>317</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Feasibility Study*, 1

<sup>318</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 3: Feasibility Study*, 1

<sup>319</sup> Sub-regulation 4 (1) (a), *Local Government: Municipal Finance Management Act 2003, Municipal Public-Private Partnership Regulations*, 1

pre-qualified bidders, issuing the Request for Proposals (RFP), selection of preferred bidder, the announcement of the preferred bidder, PPP contract negotiation and signing and financial closure where the conditions precedent in the contract are satisfied.<sup>320</sup>

The final stage is the **PPP contract management stage**. The three primary functions of the PPP contract management are partnership management which is concerned with the structures of accountability and how the municipality and the private party relate to each other. The next function is the service delivery management which deals with the systems and procedures designed to manage risk and performance. The last function is contract administration function which covers the administrative processes required to ensure that all the procedures contained in the contract and all the documentation relating to the contract are effectively managed.<sup>321</sup>

### 3.3. Nigeria

#### 3.3.1 Legal Framework

Nigeria is relevant to this study because it is one of the African countries with a robust and many successful PPPs in the region. It is also the regional economic hub in West Africa and so is Kenya in East Africa. Also, though it has a federal system of governance, most of the provision of core services are decentralized to the state and local governments, which may have some similarities to the devolved governance structure in Kenya.

---

<sup>320</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 5: PPP procurement*,

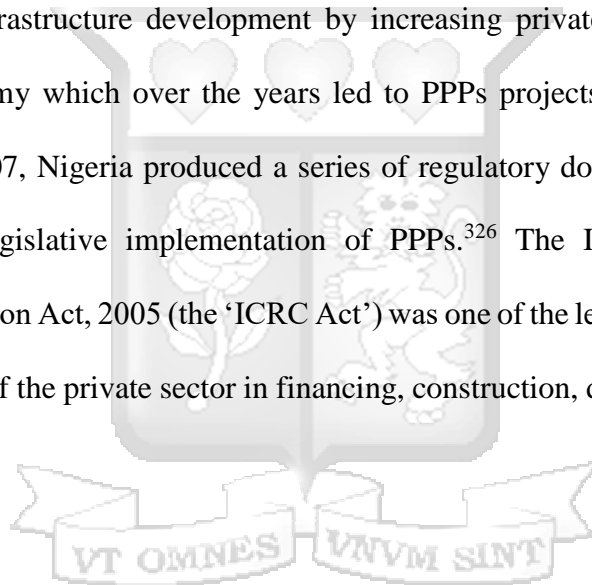
1

<sup>321</sup> National Treasury PPP Unit, *Municipal Service Delivery and PPP Guidelines, Module 5: PPP procurement*,

1

The Federal Republic of Nigeria consists of 1 central federal government, 36 state governments and 768 local governments, and each has a Constitutional mandate to develop infrastructure in its territory.<sup>322</sup> The Constitution divides legislative powers between the federal government and state government and lists the exclusive roles of each government.<sup>323</sup> Based on this distribution of legislative powers by the Constitution, the Federal Government and several States in the federation have enacted specific laws regulating PPPs.<sup>324</sup>

From the late 1990s, the federal government of Nigeria began to shed some of its responsibility for infrastructure development by increasing private participation in critical sectors of the economy which over the years led to PPPs projects being commissioned.<sup>325</sup> Between 1999 to 2007, Nigeria produced a series of regulatory documents and assessments which led to the legislative implementation of PPPs.<sup>326</sup> The Infrastructure Concession Regulatory Commission Act, 2005 (the 'ICRC Act') was one of the legislations that was passed for the participation of the private sector in financing, construction, development, operation or



---

<sup>322</sup> Werneck B, Saadi M, 'Nigeria' in Onuobia F and Okechukwu J, *The Public-Private Partnership Law Review*, Law Business Research Ltd, London, 2018, 178-187

<sup>323</sup> Section 4 (2) Constitution of the Federal Republic of Nigeria (1999)

<sup>324</sup> Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', *European Procurement & Public Private Partnership Law Review*, 7ed (4), (2012), 268.

<sup>325</sup> Werneck B, Saadi M, 'Nigeria' 178

<sup>326</sup> Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 18 *Washington University Global Studies Law Review*, 3, (2019), 701

maintenance of infrastructure or development projects of the federal government through concession or contractual arrangements.<sup>327</sup>

However, the ICRC Act only applies to federal authorities undertaking federal projects.<sup>328</sup> Thus, each Nigerian State has autonomy over its PPP projects, units, laws and regulations within state borders unless the project requires the federal government's funding.<sup>329</sup> In that regard, some of the states such as Lagos, Ekiti, Rivers, Kogi, and Cross River have enacted their respective PPP laws.<sup>330</sup> For example, in 2007, Lagos State enacted the Lagos State Roads (Private Sector Participation) Authority Law and Lagos State Public Private Partnership Law in 2011.<sup>331</sup> Rivers State enacted the Rivers State Public-Private Participation in Infrastructure Development Law in 2009 and Kogi State's Public-Private Partnership Law was passed in 2014, and the Bureau of Public-Private Partnerships was established in 2016.<sup>332</sup>

### **3.3.2 Institutional Framework**

At the federal level, the Infrastructure Concession Regulatory Commission is in charge of PPPs, and its essential functions include but are not limited to taking custody of all concession agreements, monitoring compliance of the agreements and ensuring efficient execution of any

---

<sup>327</sup> Memorandum, *Infrastructure Concession Regulatory Commission Act*, 2005 (Nigeria)

<sup>328</sup> Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 703.

<sup>329</sup> Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 703.

<sup>330</sup> Werneck B, Saadi M, 'Nigeria' 178

<sup>331</sup> Werneck B, Saadi M, 'Nigeria' 178

<sup>332</sup> Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 704.

concession agreement entered into by the federal government.<sup>333</sup> There is also the Bureau of Public Enterprises (BPE) established under the Public Enterprise (Privatisation & Commercialisation) Act, 1999 which is responsible for effecting the privatization or commercialization of government enterprises that use PPP models.<sup>334</sup>

For states with PPP-specific laws, all these laws have established a body with the responsibility for PPPs in the State.<sup>335</sup> For example, in Lagos State, the Office of Public Partnerships is in-charge of granting, negotiating, monitoring, approving the budgets and ensuring compliance in all the concession contracts within the State.<sup>336</sup>

### **3.3.3 Procedural Framework**

At the federal level, the laws that govern PPP procedures are the ICRC Act and the Public Procurement Act, 2007.<sup>337</sup> On the other hand, for the state governments, the bid and award process will differ from the federal process and in each State since the legal framework is different.<sup>338</sup> Nevertheless, on all levels of governance, the procurement process is guided by the same principles of open competitive bidding, promotion of competition, transparency and accountability and the PPP projects at all levels have similar stages in the project cycle.<sup>339</sup> The

---

<sup>333</sup> Werneck B, Saadi M, 'Nigeria' 180

<sup>334</sup> Werneck B, Saadi M, 'Nigeria' 181

<sup>335</sup> Werneck B, Saadi M, 'Nigeria' 181

<sup>336</sup> Werneck B, Saadi M, 'Nigeria' 181

<sup>337</sup> Werneck B, Saadi M, 'Nigeria' 182

<sup>338</sup> Werneck B, Saadi M, 'Nigeria' 182

<sup>339</sup> Werneck B, Saadi M, 'Nigeria' 183.

key steps are the procurement preparation phase, prequalification phase, the negotiation and tendering phase, contract close and financial close.<sup>340</sup>

### **3.5 Conclusion**

In this chapter, a review of the legal, institutional and procedural framework of PPPs in South Africa and Nigeria have been compared with the Kenyan PPP legislative arrangement. Chapter 4 below will analyze the findings, key lessons and best practices from South Africa and Nigeria for PPPs conducted at the local level in Kenya.



---

<sup>340</sup> Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', 276.

## Chapter 4

### **Best Practices from South Africa and Nigeria for Conducting Local Public-Private Partnerships.**

#### **4.1 Introduction**

South Africa and Nigeria cumulatively account for almost half of Sub-Saharan Africa's gross domestic product. This can not only be attributed to their large size and population but also the development of their respective economies through infrastructure development. South Africa has the most significant cumulative experience of public-private partnerships in Africa, with over 50 such partnerships in development or implementation at the national or provincial level, and 300 projects at the municipal level, since 1994. On the other hand, Nigeria has a decentralized system of governance like Kenya does, but it has a more advanced PPP legislative and regulatory framework, especially at the local level. Given the preceding, both of these African countries will have relatable insights on how to implement local PPPs in Kenya.

Therefore, this chapter draws out the key lessons from the legislative frameworks for conducting local PPPs in South Africa and Nigeria vis-à-vis the legislative framework for conducting local PPPs in Kenya and brings out the best practices that Kenya can borrow from these two African jurisdictions.

#### **4.2 Best Practices from South Africa**

The PPP environment in South Africa was reviewed through an analysis of the provisions of Regulation 16 under the South African Public Finance Management Act and various Regulations issued by the National Treasury in South Africa. In so doing the chapter has

discussed the key learning areas which could be borrowed for purposes of law reform and improvement of PPP implementation in Kenya at County government level. South Africa has enacted laws that would apply correctly to municipalities. From the analysis in Chapter 3 of its legislative framework, it is clear that South Africa has an elaborate PPP legal framework specific to the municipalities. These are the MFMA, MSA and the Municipal Service Delivery and PPP Guidelines of 2007. Likewise, Kenya ought to have a PPP legislation that is specific to the counties because their structures of governance are different from those of other public institutions.

Secondly, according to the MSA, the feasibility study approvals and the negotiations are done by the Municipality with minimal interference by the national PPP unit. Therefore, though there is a national PPP unit, its role in project identification and negotiation should not be heavily pronounced as it is now in the Kenyan PPP legal landscape. Also, the national PPP unit for South Africa has a municipal desk. Therefore, the Kenya national PPP unit should have a specialized county PPP office to ensure that counties have the requisite support tailored to their unique circumstances and governance structures. Also, the municipalities get their approvals at each stage of the PPP projects from the National PPP unit. Still, the roles of the local officials such as the mayor, executive and non-executive councillors are clearly defined.

Therefore, the presence of legal framework and regulations guiding local government regarding PPP has accelerated infrastructure development in South Africa both at National government and Local government. In contrast, Kenya has adopted a single Act to govern all PPP aspects both in the national government and county. There is need for Kenya to have legal framework and regulations guiding county government on adoption and implementation of

PPP, like South Africa. This would help in bridging the gap in infrastructure development both at the county level, which will be a step closer in the attainment of Vision 2030.

#### **4.3 Best Practices from Nigeria**

In Nigeria, all states have the autonomy to enact their own PPP laws and form their own local PPP units. Similarly, County governments in Kenya, through their county assemblies have the constitutional mandate to enact any laws that are necessary for, or incidental to the effective performance of their functions and in the exercise of their powers in the Constitution which would include the provision of key public services and building infrastructure.<sup>341</sup> Therefore, counties should be encouraged to enact their own PPP laws, but this can only be done through amendments to the current PPP laws to have provisions that allow the county governments to come up with their own PPP legislation. As it is at the moment, any PPP law enacted by a county would be rendered obsolete in so far as it contradicts the PPP Act due to the hierarchy of laws provided by the Constitution.<sup>342</sup>

Another lesson from the Nigeria PPP legislative regime is that regardless of the autonomy to legislate and to procure for PPPs independently, States that require the federal government support in the form of sovereign guarantee or national government funding are subject to federal government PPP laws. Kenya, may adopt the same concept whereby, counties are allowed to undertake local PPPs without much national government interference if the PPP does not require any sovereign guarantees, national government funding or any other form of national government assistance.

---

<sup>341</sup> Article 185, *Constitution of Kenya*, (2010)

<sup>342</sup> Article 191, *Constitution of Kenya*, (2010)

#### 4.4 Conclusion

Kenya ought to revise its legal, institutional, and procedural framework for PPPs to create a specific legal regime for the county governments since they have the constitutional mandate to provide essential infrastructure for their constituents. County governments should also enact their PPP legislation and create their PPP units to oversee local PPPs. This may increase the uptake of PPP projects at the county level in Kenya.



## Chapter 5

### Summary of Findings, Recommendations and Conclusion

#### 5.1 Introduction

This final chapter outlines the findings of this author's study based on Chapter 3 and Chapter 4. Proposed, are recommendations in the PPP legal, institutional and procedural framework to address the gaps that exist within the Kenyan county governments legal framework in comparison to the legislative frameworks of South Africa, Nigeria and other international best practices.

#### 5.2 Summary of Findings

##### 5.2.1 Legal and Regulatory Framework

Where there are multiple levels of government, there are instances when the higher level of government has a compelling national interest to influence, control and affect the legal framework for the lower level of government.<sup>343</sup> This study's findings illustrate this point in the Kenyan legal and regulatory landscape for PPPs. The Kenya PPP policy, 2011, was enacted right after the new Constitution that created devolution. However, it did not provide for guidelines on how County governments would conduct PPPs. Subsequently, the Public Partnerships Act, 2013 (the 'PPP Act'), the Public-Private Partnerships Regulations, 2014 and the Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017, were enacted by the National government. These laws did not recognize that County PPPs required their custom

---

<sup>343</sup> <https://ppp-certification.com/ppp-certification-guide/154-framework-sub-national-ppps> on 3 March 2020

PPP laws because they were constitutionally mandated to provide critical services through infrastructure development.

South Africa has a much more favourable legal regime for local PPP projects than Kenya. The Public Finance Management Act 1999 (PFMA) and the Treasury Regulation 16 govern all PPPs in the country but the Local Government: Municipal Finance Management Act 2003 (MFMA), the Municipal Systems Act 2003 (MSA) and the Municipal PPP Regulations have specific provisions for PPPs implemented at the municipal level to ensure that there are financial accountability and no wastage of public resources at the local level. The MFMA and the MSA set out a governance framework by clearly laying down the responsibilities of the mayor, executive and non-executive councillors and other local officials and the Municipal PPP regulations define the elements of a municipal PPP and set out the stages and approvals it will have to go through. The national PPP unit is also not very heavily involved in municipal PPPs in comparison to the Kenya PPP unit.

Also, this study found that Nigeria, which has a decentralized structure of governance, has given its states and local governments complete autonomy to legislate on PPPs at the local level. The federal government interferes only if the project cuts across more than one State. In Nigeria, the primary legislation for PPPs is the Infrastructure Concession Regulatory Commission Act, 2005, but it only applies to federal authorities undertaking federal projects. Nigerian states self-govern their PPP projects unless the project requires the federal government's funding or support. In both countries, the PPP model of financing is much more prevalent in financing local projects than it is in Kenya, which can be attributed mainly to the independence the local governments have in regulating their PPPs.

### **5.2.2 Institutional Framework**

In Kenya, all the institutions for PPP implementation and oversight are centralized at the National Treasury. The two principal institutions are the PPP Committee and the PPP Unit. The PPP Committee which is constituted by the principal secretaries in the national ministries supervises and oversees all the other institutions tasked with the implementation of PPP projects at both the national and the county level. The PPP Unit, which is the secretariat and the technical arm of the PPP Committee, provides technical, financial and legal expertise to the PPP Committee. The PPP Unit operates from the National Treasury and is the resource centre for all PPPs in the country. It also assists contracting authorities to design, identify, select, prioritize, appraise, evaluate, and negotiate projects at various stages of a PPP project cycle. There is also a PPP Petition Committee which is tasked with resolution of PPP disputes during the project cycle.

In South Africa, like Kenya, there is one central national PPP unit that is based at the national treasury. It is the centre for PPP knowledge and expertise, provides technical assistance to all public institutions at all levels of the PPP cycle and provides PPP training to all industry players.

Regulation of PPPs in Nigeria mostly depends on the approach followed by each State. In cases where PPP enabling legislation is limited to specific types of projects, for example transportation, it is common that the State's department of transportation is charged with the execution and performance of the applicable PPP project. In other States, the PPP projects would be implemented by more than one state authority.

### 5.2.3 Procedural Framework

This study found that all the countries studied, including Kenya, have similar processes and phases in a local PPP project cycle. These phases include the project development and inception phase, the feasibility study phase, the procurement stage and the contract management stage. The critical difference is the approval process. In Kenya and South Africa, at all stages of a PPP project, a contracting authority including a local government must involve, get approval and recommendations from the national PPP Unit at all stages of the PPP project cycle. However, the South African procedural framework is not an ideal example for Kenya since the local governments in South Africa are not entirely independent from the national government like Kenya since South Africa does not have a decentralized system of governance. In Nigeria, most PPP projects are procured at the state or local level. Some localities and other municipalities, such as city governments or transportation authorities, have traditionally entered into PPPs based on the powers assigned to them under home rule laws or the general powers granted to authorities.

### 5.3 Conclusion

In most instances, infrastructure projects grab the attention of the national government, but infrastructure investment is also critical at the local level. Most local governments customarily have the constitutional mandate to provide essential infrastructure services such as water and electricity, health care, education, urban passenger transport, street lighting, solid waste management, but traditional sources of funds are inadequate and inefficient to meet these needs. Also, the national government, more often than not, will prioritize projects that fit into their agenda or political affiliations. Still, the local governments have a better understanding

of what services are of priority for their constituents. They, therefore, should be given the autonomy to procure their PPPs at the local level within the proposed legal parameters.

Therefore, private engagement in the provision of public services and infrastructure through PPPs may aid in the delivery of such infrastructure and service requirements and encourage private sector investment at the local level. This study concludes that local PPPs, though smaller, can make a massive difference to people's lives and improve their quality of life more rapidly than national PPPs. Kenya should, therefore, consider the proposed reforms to the legal, institutional and procedural framework for PPPs, which will likely increase the number of PPPs at the local level and expand local infrastructure and in turn the local's quality of life significantly.

## **5.4 Recommendations**

### **5.4.1 Legal and Regulatory Reforms**

- a. This study recommends amendment of the Public-Private Partnerships Act and its Regulations to limit the contracting authorities under the Act to national government public authorities. The Act should apply to national PPPs only unless there is a compelling public interest for national involvement or collaboration. The effect of this is that County Governments will enact their own PPP Laws that will not be in contradiction with the national laws. However, projects like those affecting ports of entry, interstate highways or infrastructural interests that benefit the entire country shall have national government participation and coordination.
- b. This study recommends enactment of PPP County Regulations under the Public-Private Partnership Act, which will govern county PPPs that require the national government funding or a national security guarantee.

- c. This study also recommends that County Governments enact their legal framework for conducting PPPs in their jurisdictions. The counties' legal framework should be in harmony with the national PPP Act but will have consideration for local application.

#### **5.4.2 Institutional Reforms**

- a. This study proposes that each county government should create a PPP unit made of technical and financial experts to act as the resource, capacity and knowledge centre for local PPPs and to be in charge of all the PPPs carried out at the county level.
- b. This study also recommends that the PPP laws are reviewed to reduce the national PPPs authority and interference in county PPPs
- c. This study also encourages that County governments combine efforts and carry out infrastructure PPPs that traverse two or more counties such as roads, dams or implement social infrastructure PPPs that could benefit all the counties involved such as hospitals and educational centres.
- d. The study also recommends that the national PPP unit should provide guidance, training, knowledge transfer and capacity building for County PPP units during a PPP project cycle. This will help ease capacity concerns by the private bidders.

#### **5.4.3 Procedural Reforms**

- a. This study proposes that the county PPP unit should give all the approvals required at all the stages of the county PPPs unless that PPP requires national government funding, national security guarantee or the project traverses more than one county.

- b. This study also recommends that the national PPP unit should prepare guidelines, compile international best practices and create model agreements and checklists for local PPPs that will be used by the counties for reference when they need to implement their PPPs.



## 6 BIBLIOGRAPHY

### 6.1 Journals

Anwar S, Rehana S and Sayeed A, Empowering States and Provinces or Unshackling Local Governments: Does It Matter for Peace, Order, Good Government, and Growth? 49 *The Pakistan Development Review*, (2010).

Arimoto A, 'Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus' *University of Maiduguri Law Journal* (2018).

Bailey S and Elliot M, Taking local government seriously: democracy, autonomy and the Constitution, 68 *The Cambridge Law Journal*, (2009)

Bilouseac I and Zaharia P, 'Clarifications on the principle of the autonomy in local public administration, management', 16 *Annales Universitatis Apulensis Series Oeconomica*,1 (2014)

Boardman A, Seimiatycki M and Vining A, 'The theory and evidence concerning public-private partnerships in Canada and elsewhere', 9, *The School of Public Policy SPP research papers*, University of Calgary, (2016).

Chang I, 'Use of public, private partnerships to meet future army needs', *RAND Arroyo Center*, (1999).

Chileshe N, Njau C, Kibichii B, Macharia L, & Kavishe N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' *International Journal of Construction Management*, (2020),

Clark G.L, A theory of local autonomy, 24, *Annals of the Association of American Geographers*, 2, (1984).

Delmon J, Creating a Framework for Public Private Partnership (PPP) Programmes: A Practical Guide for Decision Makers, *PPIAF and the World Bank Group*, (2015).

Farlam P, 'Assessing Public-Private Partnerships in Africa,' 2 *The South African Institute of International Affairs, Nepad Policy Focus Series*, (2005).

Grimsey D and Lewis M, *Public Private Partnerships: The Worldwide Revolution in Infrastructure*, Edward Elgar Publishing, 2007.

Hall D, *Why Public-Private Partnerships don't work: The many advantages of the public alternative*, Public Services International (PSI) Research Unit, University of Greenwich, UK, 2015

Hodge G and Greve C, 'Public – Private Partnerships: An International Performance Review' *Public Administration Review-Journal*, (2007).

Hodge G, 'Public private partnerships and legitimacy', 55 *University of New South Wales Law Journal* 29 (3), (2006).

Hope R, 'Devolved government and local governance in Kenya: Implementing decentralization underpinned by the 2010 Constitution', 13 *African and Asian Studies: Development Practice International, Toronto, Ontario, Canada*, (2014).

Istrate E and Puentes R, Moving Forward on Public Private Public Partnerships: the U.S and International Experience with PPP Units, (2011).

Jooste S and Scott W, Organizations Enabling Public Private Partnerships: An Organization Field Approach, Working Paper 49, *Collaboratory for Research on Global Projects*, 1(2009).

Kyei R and Chan A, 'Review of studies on the Critical Success Factors for Public-Private Partnership (PPP) projects from 1990 to 2013', 33 *International Journal of Project Management*, (2015).

Laffont J and Martimont D, *The Theory of Incentives: The Principal-Agent Model*, Princeton University Press, 2002.

Martimort D and Pouyet J, "Build It or Not": Normative and Positive Theories of Public-Private Partnerships, H11, *Journal of Economic Literature*, (2006).

Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 18 *Washington University Global Studies Law Review*, 3, (2019).

Mula R, Rai N, Kulkarni V and Singh A, *Public-Private Partnership and impact of ICRISAT's pearl millet hybrid parents research*, *Journal of SAT Agricultural Research* 5 (1), 2007

Mustafa A, *Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience*, Iraq Institute for Economic Reforms (IIER), 2009

Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', *European Procurement & Public Private Partnership Law Review*, 7ed (4), (2012).

Nwangwu G, 'Does Nigeria need a regulator for Public-Private Partnerships', 11 *European Procurement & Public Private Partnership Law Review*, 4 (2016).

Odame H and Kangai E, 'Agribusiness public-private partnerships – A country report of Kenya,' *FAO Country Case Studies- Africa*, (2013).

OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', *OECD Multi-Level Governance Studies*, OECD Publishing, (2018)

Oudot J, *Risk-Allocation: Theoretical and Empirical Evidences. Application to Public-Private Partnerships in the Defense Sector*, Centre ATOM, University of Paris, 2005.

Oloo A, 'Devolution and Democratic Governance: Options in Kenya' in Kibua Tand Mwabu G (eds), *Decentralization and Devolution in Kenya: New Approaches*, University of Nairobi Press, 2008.

Palma A, Leruth L and Prunier G, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', International Monetary Fund (IMF), (2009).

Prussing T, 'Public-Private Partnership Financing in South Africa' Masters in Commerce in Financial Management, University of Capetown, May 2015.

Russell A.D, Tawiah P, DeZoysa S, 'Project innovation—a function of procurement mode?', *33 Canadian Journal of Civil Engineering*, 12 (2006).

Siemiatyacki M, Delivering Transportation Infrastructure through Public Private Partnerships, *Journal Note No 224, The World Bank Group*, American Planning Association 76 (1) 2000

Solino A, *Application of the Agency Theory for the Analysis of Performance Based Mechanisms in Road Management*, 13th World Conference on Transport Research, (2010).

Soyeju O, 'Legal Framework for Public-Private Partnership in Nigeria,' *46 De Jure* 3, (2013).

Tang, L., Shen, Q., Cheng, E.W.L, 'A review of studies on public-private partnership projects in the construction industry' *International Journal of Project Management*, (2010).

Tanzania Economic Update: The Road Less Traveled, Unleashing Public Private Partnerships in Tanzania, *The World Bank Group, Africa Region Macroeconomics and Fiscal Management Global Practice*, May 2016

Torres L, Pina V, Acerete B, Public-Private Partnership in Spanish Local Governments, 4 *European Business Organization Law Review*, 3 (2003)

Uddin M and Zack J, 'Public private partnership projects-what, why & how is risk allocated?' *Navigant Construction Forum*, (2016).

Werneck B, Saadi M, 'Nigeria' in Onuobia F and Okechukwu J, The Public-Private Partnership Law Review, Law Business Research Ltd, London, (2018).

Yescombe R, Public-Private Partnerships: Principles of Policy and Finance, *Butterworth-Heinemann*, (2007)

Yong K, *Public-Private Partnerships Policy and Practice: A reference guide*, Commonwealth Secretariat, (2010).

Zhang X, 'Critical success factors for public-private partnerships in infrastructure development', *Journal of Construction Engineering and Management*, (2005).

### 6.3 Dissertations

Ayoola O, Examining Public Private Partnership in Nigeria: Potentials and Challenges (A case study of some local government areas in Osun State)' B.Sc Thesis, Obafemi Awolowo University, May 2015,

Bruchez M, 'Public-Private Partnerships (PPPs) in South Africa: To what extent are PPPs suitable for the long-term development of infrastructure in South Africa?' Master's Thesis, University of Bern, 22 April 2014.

Diba. H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012.

Kivisto J, *Agency Theory as a Framework for the Government-University Relationship*, University of Tampere, 1<sup>st</sup> June 2007.

Lagat E, 'Review of the Policy, Legal and Institutional Framework of Public-Private Partnerships (PPPs) in Kenya,' Master of Laws in International Trade and Investment Law, University of Nairobi, 2018.

Prussing T, 'Public-Private Partnership Financing in South Africa' Masters in Commerce in Financial Management, University of Capetown, May 2015.

## 6.4 Internet Sources

<http://demo.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf>

<https://www.businessdailyafrica.com/analysis/columnists/Kenya-on-right-path-to-undertaking-projects/4259356-4797154-s2sap0/index.html>

<https://www.bloomberg.com/news/articles/2017-09-03/worst-may-be-over-as-africa-s-biggest-economies-emerge-from-rut>

<http://moad-web.s3.amazonaws.com/heracles-production/054/a90/437/054a904372eb7953f0c545270fe9a77e94e5983013f86bfc16561a05ee55/61-System-of-government-75e046216.pdf>

<http://countrystudies.us/south-africa/75.htm>

<https://www.oecd.org/mena/governance/37146964.pdf>

<https://ppp-certification.com/ppp-certification-guide/154-framework-sub-national-ppps>

<https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative>

<http://kenyalaw.org/kl/index.php?id=6819>

[https://www.law.cornell.edu/wex/commerce\\_clause#:~:text=Most%20importantly%2C%20the%20Supreme%20Court,\(1941\)%20and%20Wickard%20v](https://www.law.cornell.edu/wex/commerce_clause#:~:text=Most%20importantly%2C%20the%20Supreme%20Court,(1941)%20and%20Wickard%20v)

<https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54>

<https://www.gtac.gov.za/Publications/630-Module%2001.pdf>

<https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships>

## 7. APPENDICES

### 7.1 Similarity Index Report














## 7.2 Ethical Clearance Certificate


















## Document Information

<b>Analyzed document</b>	A Review of the PPP Legal Framework for Counties in Kenya - Gakii Kaburu LLM Thesis 08.11.2020 - V2.pdf (D117889214)
<b>Submitted</b>	2021-11-08 18:50:00
<b>Submitted by</b>	
<b>Submitter email</b>	mildred.kaburu@strathmore.edu
<b>Similarity</b>	13%
<b>Analysis address</b>	library.strath@analysis.orkund.com

## Sources included in the report

<b>W</b>	URL: <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20the%20energy%20sector%20in%20Kenya.pdf?sequence=3&amp;isAllowed=y">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20the%20energy%20sector%20in%20Kenya.pdf?sequence=3&amp;isAllowed=y</a> Fetched: 2021-11-08 18:59:00	 27
<b>W</b>	URL: <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a> Fetched: 2021-11-08 18:59:00	 10
<b>W</b>	URL: <a href="https://unece.org/DAM/ceci/publications/ppp.pdf">https://unece.org/DAM/ceci/publications/ppp.pdf</a> Fetched: 2021-11-08 18:59:00	 2
<b>W</b>	URL: <a href="https://ppiaf.org/documents/2262/download">https://ppiaf.org/documents/2262/download</a> Fetched: 2021-11-08 18:59:00	 1
<b>W</b>	URL: <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindelopingcountries.pdf</a> Fetched: 2021-11-08 18:59:00	 5
<b>SA</b>	<b>Essay 1305130.pdf</b> Document Essay 1305130.pdf (D27838589)	 7
<b>W</b>	URL: <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a> Fetched: 2021-11-08 18:59:00	 5
<b>W</b>	URL: <a href="https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement">https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement</a> Fetched: 2021-11-08 18:59:00	 2
<b>W</b>	URL: <a href="https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-finance-initiative-pfi-uk-experience.html">https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-finance-initiative-pfi-uk-experience.html</a> Fetched: 2021-11-08 18:59:00	 2
<b>W</b>	URL: <a href="https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_final.pdf">https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_final.pdf</a> Fetched: 2021-11-08 18:59:00	 1
<b>SA</b>	<b>Strathmore University / 124370.docx</b> Document 124370.docx (D111642785) Submitted by: Grace.Chepkemboi@strathmore.edu	 13

Receiver: jkeru.strath@analysis.urkund.com

<b>W</b>	URL: <a href="https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership">https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership</a> Fetched: 2021-11-08 18:59:00	 <b>4</b>
<b>W</b>	URL: <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concession-laws</a> Fetched: 2021-11-08 18:59:00	 <b>9</b>
<b>W</b>	URL: <a href="https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partnerships%20in%20Infrastructure%20of%20Provision%20of%20Public%20Goods%20through%20E-Governance%20in%20India%20564.pdf">https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partnerships%20in%20Infrastructure%20of%20Provision%20of%20Public%20Goods%20through%20E-Governance%20in%20India%20564.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>2</b>
<b>W</b>	URL: <a href="https://smartnet.niua.org/sites/default/files/resources/gnci_v360_ppp_infra_framework_detail.pdf">https://smartnet.niua.org/sites/default/files/resources/gnci_v360_ppp_infra_framework_detail.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>1</b>
<b>W</b>	URL: <a href="https://en.wikipedia.org/wiki/Public%E2%80%93private_partnership_unit">https://en.wikipedia.org/wiki/Public%E2%80%93private_partnership_unit</a> Fetched: 2021-11-08 18:59:00	 <b>1</b>
<b>W</b>	URL: <a href="https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative">https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative</a> Fetched: 2021-11-08 18:59:00	 <b>2</b>
<b>SA</b>	<b>5IJ09SS28340.doc</b> Document 5IJ09SS28340.doc (D112397500)	 <b>2</b>
<b>W</b>	URL: <a href="https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf">https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>2</b>
<b>W</b>	URL: <a href="https://www.oraro.co.ke/tag/procurement-and-construction/">https://www.oraro.co.ke/tag/procurement-and-construction/</a> Fetched: 2021-11-08 18:59:00	 <b>1</b>
<b>W</b>	URL: <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>6</b>
<b>W</b>	URL: <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>35</b>
<b>W</b>	URL: <a href="https://www.gtac.gov.za/Publications/630-Module%2001.pdf">https://www.gtac.gov.za/Publications/630-Module%2001.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>3</b>
<b>W</b>	URL: <a href="https://www.gtac.gov.za/">https://www.gtac.gov.za/</a> Fetched: 2021-11-08 18:59:00	 <b>1</b>
<b>W</b>	URL: <a href="https://www.oecd.org/mena/governance/37146964.pdf">https://www.oecd.org/mena/governance/37146964.pdf</a> Fetched: 2021-11-08 18:59:00	 <b>1</b>
<b>W</b>	URL: <a href="https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54">https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54</a> Fetched: 2021-11-08 18:59:00	 <b>3</b>

## Entire Document

A REVIEW OF KENYA'S PUBLIC PRIVATE PARTNERSHIPS LEGAL FRAMEWORK FOR IMPLEMENTING INFRASTRUCTURE PROJECTS BY COUNTY GOVERNMENTS MILDRED GAKII KABURU MASTER OF LAWS (LL.M) 2020

A REVIEW OF KENYA'S PUBLIC PRIVATE PARTNERSHIPS LEGAL FRAMEWORK FOR IMPLEMENTING INFRASTRUCTURE PROJECTS BY COUNTY GOVERNMENTS MILDRED GAKII KABURU STUDENT ADMISSION NUMBER: 060288

43%

**MATCHING BLOCK 2/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE IN MASTER OF LAWS (LL.M) STRATHMORE LAW SCHOOL, STRATHMORE UNIVERSITY,

NAIROBI, KENYA DECEMBER 2020 This thesis is available for Library use on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

ii

100%

**MATCHING BLOCK 1/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Declaration I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief,

the

100%

**MATCHING BLOCK 7/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

thesis contains no material previously published or written by another person except where due reference is made in the thesis itself. © No part of this thesis may be reproduced without the permission of the author and Strathmore University

Mildred Gakii Kaburu [Name of Candidate] ..... [Signature] .....  
[Date] Approval The thesis/dissertation of Mildred Gakii Kaburu was reviewed and approved by the following: Prof. Jacob Sitati Senior Lecturer,

47%

**MATCHING BLOCK 8/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Strathmore Law School, Strathmore University Dr. Peter Kwenjera, Dean, Strathmore Law School, Strathmore University  
Dr. Bernard Shibwabo, Director, Office of Graduate Studies, Strathmore University

iii Abstract A Public Private Partnership (PPP) allows a public authority to benefit from the participation of the private sector in managing and financing public service expansion by outsourcing risk and by harnessing the innovative capacity and capital of the private sector. Consequently, the public agency can focus on policymaking, planning, and regulation. Thus, the PPP model can hasten delivery to curb Africa's current dreary state of infrastructure. Therefore, this study examines the legal, institutional and procedural framework for carrying out PPPs at the county level in Kenya. The aim is to find out whether the current legislative framework is one of the key causes for the low uptake of PPPs at county level despite the apparent benefits of PPPs as a means for sourcing funds for infrastructure development. This study compares the legal framework for carrying out PPPs by South Africa and Nigeria which are the two African countries that have achieved great success in their local PPP projects and are the market leaders in infrastructure development in Africa. The study's key finding is that the Kenyan PPP laws should be customized to suit County Governments because they are constitutionally mandated to provide critical services through infrastructure development. The study recommends the implementation of some of the lessons learnt from the two countries such as to customize the legal, institutional and procedural framework and for PPP arrangements by county governments in Kenya and to have the national government have a supportive role rather than a supervisory role in county government PPP projects.

iv Table of Contents Declaration .....	ii Approval
.....	ii Abstract
.....	iii List of Legal Instruments
.....	vii List of Cases
.....	ix Abbreviations and Acronyms
.....	x Acknowledgement
.....	xi Dedication
.....	xii Chapter 1
.....	1 Introduction to the Study
.....	1 1.1 Background of the Study
.....	1 1.2 Statement of the Problem
.....	9 1.3 The Objectives of the Study
.....	10 1.4 Research Questions
.....	10 1.5 Research Hypothesis
.....	11 1.6 Theoretical Framework
.....	11 1.6.1 Local Autonomy Theory
.....	11 1.6.2 Principal-Agent Theory (PAT)
.....	14 1.7 Literature Review .....
17 1.8 Justification of the Study .....	25 1.9 Research Methodology
.....	25 1.9.1 Primary and Secondary Sources of Information
.....	25 1.9.2 Comparative Studies .....
.....	26 1.10 Scope and Limitation of the Study .....
.....	27 1.11 Chapter Breakdown
.....	27 Chapter 2
.....	30 The Legal, Institutional and Procedural Framework for conducting Public-Private Partnerships in County Governments in Kenya. ....
.....	30 2.1 Introduction .....
.....	30 2.2 Devolution .....
.....	30
v 2.3 County Government Structure in Kenya .....	33 2.4

83%

**MATCHING BLOCK 3/148**

W

<https://su-plus.strathmore.edu/bitstream/handl...>

Public-Private Partnership Laws in Kenya ..... 37 2.4.1 Policy Statement on Public-Private Partnerships,

November 2011 ..... 37 2.4.2 The Constitution of

Kenya, 2010 ..... 38 2.4.3

76%

**MATCHING BLOCK 4/148**

W

<https://su-plus.strathmore.edu/bitstream/handl...>

The Public-Private Partnerships Act, 2013 ..... 40 2.4.4 The Public-Private Partnerships Regulations ..... 41 2.4.4.1 The Public-Private Partnerships Regulations, 2014 ..... 41 2.4.4.2 The Public-Private Partnerships (

Project Facilitation Fund) Regulations, 2017 .... 41 2.4.5

50%

**MATCHING BLOCK 5/148**

W

<https://su-plus.strathmore.edu/bitstream/handl...>

The Public-Private Partnerships (Amendment) Bill, 2017 ..... 42 2.5 Institutional Framework

..... 43 2.5.1 The Public-Private Partnership Committee

..... 43 2.5.2 The Public-Private Partnership Unit ..... 44

2.5.3 The Public-Private Partnership

Nodes .....	45	2.5.4 The Petition Committee .....	
.....	46	2.6 Procedural Framework .....	
.....	47	2.7 Public Finance Management Act .....	
.....	52	2.8 Conclusion .....	
54 Chapter 3 .....	56	Review of the Legal, Institutional and Procedural Framework for Conducting Local Public-Private Partnerships in South Africa and Nigeria. ....	
.....	56	3.1 Introduction .....	56
Africa .....	56	3.2 South Africa .....	
.....	56	3.2.1 Legal Framework .....	
.....	58	3.2.2 Institutional Framework .....	
.....	70	3.2.3 Procedural Framework .....	
.....	71	3.3. Nigeria .....	
.....	73	3.3.1 Legal Framework .....	
.....	73	3.3.2 Institutional Framework .....	
.....	75	3.3.3 Procedural Framework .....	
.....	76	3.5 Conclusion .....	
.....	77	Chapter 4 .....	
.....	78	.....	
vi Best Practices from South Africa and Nigeria for Conducting Local Public-Private Partnerships. ....	78	4.1 Introduction .....	
.....	78	4.2 Best Practices from South Africa .....	
.....	78	4.3 Best Practices from Nigeria .....	80
4.4 Conclusion .....	81	Chapter 5 .....	
.....	82	Summary of Findings, Recommendations and Conclusion .....	
.....	82	5.1 Introduction .....	82
5.2 Summary of Findings .....	82	5.2.1 Legal and Regulatory Framework .....	
.....	82	5.2.2 Institutional Framework .....	
84 5.2.3 Procedural Framework .....	85	5.3 Conclusion .....	
.....	85	5.4 Recommendations .....	
.....	86	5.4.1 Legal and Regulatory Reforms .....	
.....	86	5.4.2 Institutional Reforms .....	
.....	87	5.4.3 Procedural Reforms .....	
.....	87	6 BIBLIOGRAPHY .....	
.....	89	6.1 Journals .....	
.....	89	6.3 Dissertations .....	
.....	94	6.4 Internet Sources .....	
.....	95	7. APPENDICES .....	
.....	96	7.1 Similarity Index Report .....	
.....	96	7.2 Ethical Clearance Certificate .....	
.....	97	.....	
vii List of Legal Instruments Kenya 1. County Governments Act (Act No.17 of 2012) 2. Constitution of Kenya, (2010). 3. Intergovernmental Relations Act, (No. 2 of 2012) 4. Public Finance Management Act, (No 18 of 2012) 5.			

82%

**MATCHING BLOCK 6/148**

**W**

<https://su-plus.strathmore.edu/bitstream/handl ...>

Public-Private Partnerships Act (No. 15 of 2013) 6. Public-Private Partnerships (Regulations), (2014) 7. Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017 8.

Public-Private Partnerships (

Amendment) Bill, (Bill No.52 of 2017) 9. Public Procurement and Asset Disposal Act, (No. 33 of 2015) 10. Government of Kenya PPP Policy Statement, (2011) 11. Kenya Vision 2030 (2008-2030) South Africa 1. Constitution of the Republic of South Africa, (1996) 2. Local Government: Municipal Finance Management Act 2003, Municipal Public-Private Partnership Regulations, 2005 (South Africa) 3. Municipal Systems Act, 2003 (

100%

**MATCHING BLOCK 9/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

South Africa) 4. National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines. (

South Africa) 5. Public Finance Management Act, 1999 (South Africa) 6. Treasury Regulation 16, (South Africa)

viii Nigeria 1. Constitution of the Federal Republic of Nigeria (1999) 2. Infrastructure Concession Regulatory Commission Act, 2005 (Nigeria) 3. Public Enterprise (Privatisation & Commercialisation) Act, 1999 (Nigeria) 4. Lagos State Roads (Private Sector Participation) Authority Law, 2007 (Nigeria) 5. Lagos State Public-Private Partnership Law, 2011 (Nigeria) 6. Rivers State Public-Private Participation in Infrastructure Development Law, 2009 (Nigeria) 7. Kogi State's Public-Private Partnership Law, 2014 (Nigeria) 8. Public Procurement Act, (2007). (Nigeria) International Instruments 1. UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects UN, (2001). 2. The European Charter of Local Self-Government, (1985) 3. The

91%

**MATCHING BLOCK 10/148**

**W** <https://unece.org/DAM/ceci/publications/ppp.pdf>

United Nations Economic Commission for Europe, 'Guidebook on Promoting Good Governance in Public-Private Partnerships', The United Nations, (2008).

ix List of Cases

88%

**MATCHING BLOCK 16/148**

**W** [https://chambers.com/articles/a-matter-of-comp ...](https://chambers.com/articles/a-matter-of-comp...)

Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM Terminals [2015] eKLR

Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR Mota-Engil Engenharia E Construcao Africa SA & 4 others v Public Private Partnership Petition Committee & another; Meridiam Infrastructure Africa Fund (MIAF) & 2 others (Interested Parties) [2019] eKLR

x Abbreviations and Acronyms BPE Bureau of Public Enterprises EMDE Emerging Markets and Developing Economies EOI Expression of Interest FAO Food and Agriculture Organization of the United Nations ICRC Infrastructure Concession Regulatory Commission GTAC GOK Government Technical Advisory Centre Government of Kenya MFMA Municipal Finance Management Act MSA Municipal Systems Act OECD Organisation for Economic Co-operation and Development

92%

**MATCHING BLOCK 11/148**

**W** <https://ppiaf.org/documents/2262/download>

PFMA Public Finance Management Act PPIAF Public-Private Infrastructure Advisory Facility PPP Public-Private Partnerships RFP Request for Proposals

RFQ Request for Qualification UNCITRAL United Nations Commission on International Trade Law USD United States Dollars

xi Acknowledgement I would like to specially acknowledge my supervisor, Prof. Sitati who painstakingly read my drafts, provided comments and offered advice along the way and has guided me tirelessly through the research project. I have been happy to incorporate all their suggestions and advice. His guidance is invaluable.

xii Dedication I dedicate this work to the Almighty God, my husband, my family and friends for their encouragement, moral and financial support and understanding they accorded me during the period I was undertaking my studies.

1 Chapter 1 Introduction to the Study 1.1 Background of the Study A Public-Private Partnership (PPP) is a medium to long term arrangement between the public and private sectors whereby some of the service obligations of the public sector are provided by the private sector, with a clear agreement on shared objectives for delivery of public infrastructure and or public services. 1 It is an arrangement where government states its need for capital-intensive, long-lived infrastructure and the desired facility is built using a complex combination of government and mostly private financing and then operated by the private entity under a long-term franchise, contract or lease. 2 In PPPs, the risks, skills, responsibilities and resources

are apportioned between the public and private sectors. . 3 In turn, governments focus on policy, regulation and planning since the day to day operations and expertise are delegated to the private sector. . 4 PPP models

95%

**MATCHING BLOCK 12/148**

**W** [https://www.oecd.org/dac/evaluation/IOBstudy37 ...](https://www.oecd.org/dac/evaluation/IOBstudy37...)

are increasingly envisaged as attractive propositions for involving the private sector in

both national and international development cooperation. The underlying logic for establishing a public-private partnership is that both public and private sectors have unique characteristics that provide them with advantages in specific aspects of service or project 1 <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships> on 4 November 2020 2 Roman A, A Guide to Public-Private Partnerships (PPPs): What Public Procurement Specialists Need to Know, 'The NIGP Business Council, (2015), 2 3 <https://ppp.worldbank.org/>

55%

**MATCHING BLOCK 13/148**

**SA** Essay 1305130.pdf (D27838589)

[public-private-partnership/about-public-private-partnerships](https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships) on 4 November 2020 4 <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships>

on 4 November 2020

2 delivery. 5 In a time of constrained public budgets, leveraging private-sector financial resources and expertise to deliver a range of infrastructure projects has growing appeal globally. 6 PPP reforms aim to push back the boundaries of the state and cut public spending. 7 It is for this reason why PPPs have gained popularity due to its capability to harness the innovative capacity and capital of the private sector. 8 PPPs are often depicted as creative, flexible collaborations in which the partners are bound by shared objectives and mutual trust. 9 PPPs are mostly used to provide and maintain infrastructure, including roads, bridges, water and wastewater treatment plants, schools, hospitals and prisons. The critical normative justification for PPPs is that the private sector has stronger incentives to deliver services more efficiently and at a lower cost than with traditional government procurement. 10 5 Grimsey D and Lewis M, Public Private Partnerships: The Worldwide Revolution in Infrastructure, Edward Elgar Publishing, 2007, 12 6 Istrate E and Puentes R, Moving Forward on Public Private Public Partnerships: U.S and International Experience with PPP Units, (2011). 7 Torres L, Pina V, Acerete B, Public-Private Partnership in Spanish Local Governments, 4 European Business Organization Law Review, 3 (2003) 433 8 Russell A.D, Tawiah P, DeZoysa S, 'Project innovation—a function of procurement mode?' Canadian Journal of Civil Engineering, 33(12), 2011, 1519. 9 Chang I, 'Use of public private partnerships to meet future army needs', RAND Arroyo Center, 1999. 10 Boardman A, Seimiatycki M and Vining A, 'The theory and evidence concerning public-private partnerships in Canada and elsewhere', 9, The School of Public Policy SPP research papers, University of Calgary, (2016), 1.

3 The most successful partnership arrangements draw on the strengths of both the public and private sector to establish complementary relationships. 11 Though the roles may vary from project to project the overall responsibility of the government entities does not change. 12 In all cases, the public entity remains responsible and accountable for delivering services and projects in a manner that protects and furthers the public interest. 13 The demand for private sector's innovative design and management solutions for public facilities drove PPPs globally. . 14 However, the move in developing countries was due to the high demand for infrastructure development and pressure on national budgets deficits. 15

80%

**MATCHING BLOCK 14/148**

**W** [https://www.world-psi.org/sites/default/files/ ...](https://www.world-psi.org/sites/default/files/...)

As neoliberal limits on government borrowing spread, so too did PPPs. 16 In Europe

for instance, the European Union Rules limited government budget deficit to 3% of GDP. 17 Similarly, in developing countries, Kenya being one of them, the international financial institutions such as the World Bank and IMF

87%

**MATCHING BLOCK 15/148**

**W** [https://www.world-psi.org/sites/default/files/ ...](https://www.world-psi.org/sites/default/files/...)

encouraged the adoption of PPPs in the 1990s, especially in the water 11

Mula R, Rai N, Kulkarni V and Singh A, Public-Private Partnership and impact of ICRISAT's pearl millet hybrid parents research, Journal of SAT Agricultural Research 5 (1), 2007, 5. 12 Mula et al, Public-Private Partnership and Impact of ICRISAT's, 5. 13 Mula et al, Public-Private Partnership and Impact of ICRISAT's, 5. 14 Mustafa A,

66%

**MATCHING BLOCK 19/148**

**W** [https://docplayer.net/20773528-Concept-and-bac ...](https://docplayer.net/20773528-Concept-and-bac...)

Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, Iraq Institute for Economic Reforms (IIER), 2009, 1 15 Mustafa A, Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, 1. 16

Hall D,

100%

**MATCHING BLOCK 17/148**

**W** [https://www.world-psi.org/sites/default/files/ ...](https://www.world-psi.org/sites/default/files/...)

Why Public-Private Partnerships don't work: The many advantages of the public alternative,

Public Services International (PSI) Research Unit, University of Greenwich, UK, 2015, 8 17 Official Journal of the European Union, Council Regulation (EC) on speeding up and clarifying the implementation of the excessive deficit procedure, No 1467/97, 3

4 and energy sectors. 18 Such arrangements, however, posed a dilemma to the international financial institutions between encouraging strict fiscal disciplines on the one hand

87%

**MATCHING BLOCK 18/148**

**W** [https://www.world-psi.org/sites/default/files/ ...](https://www.world-psi.org/sites/default/files/...)

which would imply stricter rules for PPPs and a desire to promote privatization in general which

makes it easy for PPPs. 19 One of the most critical constraints in implementing a successful PPP in developing countries like Kenya is the lack of a suitable PPP framework. 20 Such a framework would help in bridging the investment gap for the delivery of various public goods. 21 Private investment in infrastructure is nurtured by existence of a robust and favourable legal framework which should be adequately flexible and receptive to keep up with the developments in infrastructure. 22 The legislative framework for PPPs provides the platform by which the

100%

**MATCHING BLOCK 20/148**

**W** [https://uncitral.un.org/sites/uncitral.un.org/ ...](https://uncitral.un.org/sites/uncitral.un.org/...)

governments regulate and ensure the provision of public services to

the public and offers protection of rights for public service providers and the customers. 23 Having a PPP related legislative and regulatory framework cannot be overemphasized. 24 The concept of best practice with regards to the PPP framework, in particular, needs to be looked at with caution since there is no one size fits all solution. 25 As such, what works in one country may not work in another let alone be transferred to or replicated in another sector or region in the same country. 18 Hall D, Why Public-Private Partnerships Don't Work, 8. 19 Hall D, Why Public-Private Partnerships Don't Work, 9 20

96%

**MATCHING BLOCK 22/148**

**SA** 124370.docx (D111642785)

Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012. 21

96%

**MATCHING BLOCK 21/148**

**SA** 124370.docx (D111642785)

Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012. 22

UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects UN, 2001, 23. 23 Soyaju O, 'Legal Framework for Public-Private Partnership in Nigeria,' 46 De Jure 3, (2013), 818 24

88%

**MATCHING BLOCK 24/148**

**W** [https://pppknowledgelab.org/guide/sections/3-w ...](https://pppknowledgelab.org/guide/sections/3-w...)

Yong K, Public-Private Partnerships Policy and practice: A Reference Guide, Commonwealth Secretariat, 37. 25

88%

**MATCHING BLOCK 25/148**

**W** [https://pppknowledgelab.org/guide/sections/3-w ...](https://pppknowledgelab.org/guide/sections/3-w...)

Yong K, Public-Private Partnerships Policy and practice: A Reference Guide, Commonwealth Secretariat, 37. 5

Consequently, the exact scope, remit and institutional arrangement need to be assessed in light of a particular country's needs and local context, which often lead to hybrid regulatory models being implemented. The PPP framework in Kenya has been catapulted by the need to invest in the infrastructural framework and the attendant desire to achieve the Vision 2030 goals by the Kenyan government. 26 Kenya's Vision 2030 (2008 – 2030) aims to transform Kenya into an industrialised middle-income country by 2030, which requires substantial investments in infrastructure services. Under-investment in infrastructure and related maintenance increases the cost of doing business, undermines competitiveness and adversely affects trade. 27 For Kenya to promote its economic growth, it is critical that it adopts the model of incorporating PPPs in its development blueprint for both National and County governments. 28 After a rigorous and extensive process, the Constitution of Kenya, 2010 was passed and became Kenya's supreme law on 27 th August 2010. One of the fundamental changes brought about by the 'New Constitution' was the devolution of governance. This led to the decentralisation of some of the critical powers and responsibilities such as the delivery of certain important public services from the national government to the 47 county governments. Some of the essential objectives of devolution are; ease of access of services, self-governance, 26 Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya' LLM Thesis, University of Nairobi, 2018, 7 27 Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya', 8 28 Lagat E, 'Review of the policy, legal and institutional framework of the Public-Private Partnerships (PPPs) in Kenya', 8

6 promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them. 29 In consideration of the objectives of devolution, the Constitution is evident on the functions and powers that will be carried out by each level of government. 30 The counties' mandate includes but is not limited to the provision of; county health services, public entertainment and public amenities such as libraries and museums; county transport such as the construction of county roads, street lighting, public road transport; housing; construction of markets; county public works and services such as storm-water management systems and water and sanitation services. 31 A practical and established strategy for procuring for such services and infrastructure is through Public-Private Partnerships (PPPs) rather than the traditional procurement process. However, despite the above advantages, county governments are still not keen on using PPPs to finance their projects and service delivery seven years later after their formation. The legal environment where projects often operate influences to a large extent, the willingness of the private sector and public entity to collaborate in infrastructure project development and public service delivery. 32 The success of public, private collaboration revolves around availing an adequate and enabling legal and regulatory framework that critically analyses services and 29 Article 174 , Constitution of Kenya, (2010). 30 Fourth Schedule, Constitution of Kenya, (2010). 31 Fourth Schedule, Constitution of Kenya, (2010). 32

83%

**MATCHING BLOCK 23/148**

**SA** 124370.docx (D111642785)

Diba, H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012, 23. 7

partners. 33 In Kenya, the legal framework for PPPs is mainly the Public-Private Partnership Act (No. 15 of 2013) and its regulations. However, this Act does not provide a mechanism through which counties should conduct PPPs. Instead, it treats them like other contracting authorities without acknowledging that county governments have autonomy and a Constitutional mandate to deliver certain services and build specific infrastructure without any further reference to the national government. It does so by requiring all contracting authorities including county governments, to seek the approval of national government agencies at all stages of the PPP project. The enactment of the PPP Act in Kenya was a welcome move. It is however not an end as of itself, as it ignored the devolved units in Kenya, which are critical in the implementation of infrastructure projects and attainment of Vision 2030. A 'Contracting Authority' under the PPP Act is defined as a state department, agency, state corporation or county government which intends to delegate any of it

functions to a private entity. 34 A contracting authority, including a county government, must submit its PPP project list to the PPP Unit 35 and the PPP Committee. 36 A contracting authority must also submit its project proposal to the Committee for approval and once approved it must implement the PPP unit's input in the project. 37 Further, a contracting authority's project appraisal team shall consist of a representative of the PPP 33 Zhang X, 'Critical success factors for public-private partnerships in infrastructure development', Journal of Construction Engineering and Management, 2005, 3-14. 34 Section 2,

Public Private Partnerships Act (No. 15

50%

**MATCHING BLOCK 27/148**

**W** [https://ppp.worldbank.org/public-private-partn ...](https://ppp.worldbank.org/public-private-partn...)

of 2013) 35 Section 23, Public Private Partnerships Act (No. 15 of 2013) 36 Section 24, Public Private Partnerships Act (No. 15 of 2013) 37 Section 31, Public Private Partnerships Act (No. 15

of 2013)

8 Unit 38 and the feasibility study conducted to determine the viability of undertaking the project must be approved by the PPP Committee. 39 Also, technical bids 40 and financial bids 41 must be approved by the proposal evaluation team, which consists of representatives of the PPP Unit and the Attorney General. Further and with the approval of the PPP Committee the contracting authority and the successful bidder may commence the negotiations , and the negotiating committee must consist of a nominee from the PPP Unit and other nominees from State departments recommended by the PPP Unit. 42 Finally, the PPP Project must be approved by the Committee and the Cabinet or Parliament before the contracting authority can proceed to execute the PPP Contract. 43 All the provisions of the Act highlighted above, illustrate that a county government cannot carry out a PPP project without the approval of national government agencies despite PPPs being an effective financing option for the delivery of the services and infrastructure bestowed upon them by the Constitution. Thus, it is prudent to examine the legal framework, institutional and policy mechanisms, to determine whether the existing environment is appropriate for the implementation of the PPPs by the county government in Kenya. 38 Section 32,

Public Private Partnerships

38%

**MATCHING BLOCK 30/148**

**W** [https://ppp.worldbank.org/public-private-partn ...](https://ppp.worldbank.org/public-private-partn...)

Act (No. 15 of 2013) 39 Section 35, Public Private Partnerships Act (No. 15 of 2013) 40 Section 47, Public Private Partnerships Act (No. 15 of 2013) 41 Section 48, Public Private Partnerships Act (No. 15 of 2013) 42 Section 52, Public Private Partnerships Act (No. 15 of 2013) 43 Section 57, Public Private Partnerships

Act (

No. 15 of 2013)

9 1.2 Statement of the Problem There are multiple sources that county governments in Kenya can obtain alternative sources of funding for building and maintaining public infrastructure and service delivery. They include conditional grants, loans, and donor funding. Loans as sources of county government revenue in Kenya may come from external sources or private lenders. However, conventional methods of funding have proven unreliable, mostly due to the costly procedures that have to be followed, making such funds attract huge interest rates. These challenges lead to the demand for a suitable partnership between the private and public sector through Public-Private Partnerships. However, despite the indisputable benefits of PPPs, there has not been a single PPP project at the county level that has been completed since the counties commenced their operations in 2013. Coincidentally, Kenya's main legal framework for PPPs, the Public-Private Partnership Act was also enacted in 2013, but the county governments are yet to reap the benefits of this legislation. According to the National Treasury report of January 2020, only 1 out of 47 counties have listed projects with the PPP unit for approval though none of the county governments in Kenya has completed or has an ongoing project. 44 This study, therefore, seeks to interrogate whether the Public-Private Partnerships Act and its Regulations (from now on "the Act") is responsible for the low and slow uptake PPP projects at the county government level. More specifically, the study's focus will be on whether the provisions of the Act that require county governments at various stages of the project to seek 44 Kenya PPP Pipeline Status Report, January 2020

<http://demo.pppunit.go.ke/wpcontent/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf>

on 5 March 2020

10 the approval of the national government for PPPs to take off has led the county governments to prefer other less effective forms of project financing. 1.3 The Objectives of the Study The objectives of this study are: a. To interrogate whether the current legislative framework for conducting PPPs is the cause of the slow uptake of PPPs at County level in Kenya; b. To compare how South Africa and Nigeria conduct their local PPP projects to identify best practices and draw lessons from them as the market leaders in infrastructure development in Africa; c. To make viable recommendations for reforms which should be taken into account to ensure that the PPPs' legal and institutional framework is sound for county governments. 1.4 Research Questions This paper seeks to answer the following questions: a. How is Kenya's current legal framework and regulatory structure stifling to opportunities presented for PPP's at the County level? b. Which countries in Africa have a similar economic, political and social challenges as Kenya and have successfully implemented PPPs at local level of government? c. What in Kenya's PPP legal framework should be reviewed to encourage devolved governments to have a more significant role in the procurement and management process of PPPs at the local level?

11 1.5 Research Hypothesis Kenya's current legal, institutional and procedural framework, which does not allow county governments to independently implement Public-Private Partnership projects, has resulted in low uptake of local infrastructure projects using the Public-Private Partnership model of financing. 1.6 Theoretical Framework In this study, the theoretical framework is based on the Local Autonomy Theory and Principal-Agent Theory (PAT). 1.6.1 Local Autonomy Theory The proponent of this theory is Gordon Clark. 45 This theory deliberately deals with the relations between different tiers of a State. 46 This theory states that local autonomy is desired by all but is compromised by many laws administered by higher tiers of the state. 47 The proposed theory, therefore, treats governments as entities, not merely as the derivative symbols of decentralised democratic politics. 48 It is premised upon two principles of power derived from Jeremy Bentham: initiative and immunity. 49 The first principle refers to the power of localities to function free from the oversight authority of higher tiers of the state and the power of local governments to regulate and legislate in their interests. 50 The latter principle refers to the 45 Clark G, A theory of local autonomy, 24 Annals of the Association of American Geographers, (1984), 195. 46 Clark G, A theory of local autonomy, 196. 47 Clark G, A theory of local autonomy, 195. 48 Clark G, A theory of local autonomy, 195. 49 Clark G, A theory of local autonomy, 195. 50 Clark G, A theory of local autonomy, 205.

12 immunity of local governments from the authority of higher tiers of the state and the power of localities to legislate and regulate the behaviour of residents. 51 The purpose of this study is to find out whether county governments have the freedom under the law to provide basic infrastructure to their constituents through PPPs without interference from the national government. Thus, this theory is relevant because local autonomy is the freedom of local authorities in the management of local problems. 52 The European Charter of Local Self-Government defines local autonomy as the right and the productive capacity of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their responsibility and in the interests of the local population. 53 Three elements form the autonomy and give it consistency which is; organisational, functional and administrative autonomy. 54 Organisational autonomy refers to the ability of local authorities to organise themselves according to local needs; functional autonomy refers to the ability of local authorities to operate based on self-managing and self-governing and administrative autonomy refers to the ability of local authorities to self-manage by using local patrimony for the proper performance of their powers. 55 51 Clark G, A theory of local autonomy, 205. 52 Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 15. 53 Article 3, The European Charter of Local Self-Government, 1985 54 Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 20 55 Bilouseac and Zaharia, 'Clarifications on the principle of the autonomy in local public administration, management', 20

13 Globalisation and information revolution have brought about a paradigm shift in the international competitiveness of nations. 56 The economic prosperity of a nation is now closely linked to the knowledge, skills and information base of its citizens rather the country's resource endowments. 57 It is recognised now that local governments are at the core of the future prosperity of a nation because of their better positioning to forge a competitive advantage to spur economic growth fostering a new knowledge-based economy. 58 For local government to be effective, then two key conditions must be met. 59 First, local authorities must possess sufficient power, independence and financial resources to govern distinctively, meeting the particular needs of their areas and the expectations of their citizenry. 60 Secondly, the quality of

local democracy must be such as to enable the participation of individuals, grant the responsiveness of local institutions and remove the need, actual or perceived, for a high level of central interference in the business of local government. 61 Given their democratic credentials and geographical and cultural proximity to those on behalf of whom they act, local authorities do occupy a pivotal position in the democratic life of the country, pursuing distinctive agendas appropriate to the needs and mores of their respective areas. 62 Local government could enable citizens to participate in governance more readily and 56 Anwar, Rehana and Sayeed, Empowering States and Provinces or Unshackling Local Governments, 339 57 Anwar, Rehana and Sayeed, Empowering States and Provinces, 339 58 Anwar, Rehana and Sayeed, Empowering States and Provinces, 339 59 Bailey and Elliot, 'Taking local government seriously: democracy, autonomy and the constitution', 3 60 Bailey and Elliot, 'Taking local government seriously, 3 61 Bailey and Elliot, 'Taking local government seriously,' 3 62 Bailey and Elliot, 'Taking local government seriously,' 3

14 to a greater extent than would be possible if all governance occurred at a national level. Local government is valuable because of its capacity for responsiveness: it has the potential to make decisions and deliver services in ways which are sensitive to local customs, economic and social conditions, and so on. 63 Economic growth is best advanced by allowing decisions to be taken in a way which properly reflects local circumstances which means that the focus should be on achieving real devolution of power to local and regional authorities as far as possible. 64 1.6.2 Principal-Agent Theory (PAT) Another theoretical approach used in this study is the PAT approach which in simple terms is typified in the behaviour of a boss (the principal) and an employee (the agent), where the boss cannot accurately monitor the productivity of his/her employee. 65 The Principal-Agent Theory or Agency Theory derives its disciplinary origins from economics. 66 The key assumptions underlying a PAT framework and which are similar to the basics of a PPP contract (where county government is the principal and the private investor as the agent) include: information asymmetry between the parties whereby the agent has more information about its own actions as compared to the principal; the agent pursues its interests which may run contrary to those of the principal. 67 63 Bailey and Elliot, 'Taking local government seriously,' 3 64 Bailey and Elliot, 'Taking local government seriously,' 3 65 Palma A, Leruth L and

100%

**MATCHING BLOCK 28/148**

W

[https://www.oecd.org/dac/evaluation/IOBstudy37 ...](https://www.oecd.org/dac/evaluation/IOBstudy37...)

Prunier G, 'Towards a Principal-Agent Based Typology of Risks in Public-Private

Partnerships', International Monetary Fund (IMF), (2009), 12. 66 Kivisto J, Agency Theory as a Framework for the Government-University Relationship, University of Tampere, 2007, 8. 67 Palma A et al, '

100%

**MATCHING BLOCK 29/148**

W

[https://www.oecd.org/dac/evaluation/IOBstudy37 ...](https://www.oecd.org/dac/evaluation/IOBstudy37...)

Towards a Principal-Agent Based Typology of Risks in Public-Private

Partnerships', 12.

15 An agency problem arises under conditions of asymmetry of information and conflict of interest between the principal and the agent. 68 Under this theory, the best results between the principal and agent can be achieved if there is a fully specified enforceable contract with stable terms over time, measurable output indicators that can be monitored and credible punishment against a party in case cheating is proved. 69 The PAT theory is relevant in the discussion of PPPs given the specific nature of risks existing in most PPP projects which in most cases are uninsurable. 70 The PAT approach addresses this by modelling the relation between the informed party (the Agent) and the less informed one (the Principal). 71 As a result of the information asymmetry, the question is how to efficiently allocate the risks between partners in the reference contract. 72 The target followed in the determination of risk allocation criteria is the total cost minimization which must maximize the Principal's utility. 73 The analytical process followed by the PAT approach consists in maximizing the principal's utility subject to the agent's participation and incentive constraints. 74 The respect of these two constraints must permit both partners to improve their situation, compared to a situation in 68 Solino A, Application of the Agency Theory for the Analysis of Performance Based Mechanisms in Road Management, 13th World Conference on Transport Research, 2010, 2 69 Palma A et al, '

100%

**MATCHING BLOCK 31/148**

W

[https://www.oecd.org/dac/evaluation/IOBstudy37 ...](https://www.oecd.org/dac/evaluation/IOBstudy37...)

Towards a Principal-Agent Based Typology of Risks in Public-Private

Partnerships', 14 70 Oudot J, Risk-Allocation: Theoretical and Empirical Evidences. Application to Public-Private Partnerships in the Defense Sector, Centre ATOM, University of Paris, 2005, 533. 71 Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences', 535 72 Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences', 537 73 Oudot J, 'Risk-Allocation: Theoretical and Empirical Evidences' 539. 74 Laffont J and Martimont

100%

**MATCHING BLOCK 32/148**

W

[https://www.iimb.ac.in/sites/default/files/201 ...](https://www.iimb.ac.in/sites/default/files/201...)

D, The Theory of Incentives: The Principal-Agent Model, Princeton University Press, 2002, 84. 16

which only one constraint would have been taken into account. This is underlined by the idea that "incentive and participation constraints define the set of incentive feasible allocation." Both risk allocation criteria registered by the PAT come from these two constraints. 75 In the PAT framework, the Agent's effort is not observable. 76 At the same time, the Agent's behaviour is at the root of the performance. To assure a certain level of performance, the principal should give the agent incentives to perform. 77 The incentive constraints should be tackled. The authors belonging to the PAT concentrate on imposing of potential cost overruns on partners as an incentive device. There are several general conclusions on PAT: Firstly, the

56%

**MATCHING BLOCK 33/148**

W

[https://smartnet.niua.org/sites/default/files/ ...](https://smartnet.niua.org/sites/default/files/...)

risk should be allocated to the agent to the extent he can manage the risk. Secondly, risk should be allocated to the

risk-averse partner to minimize the overall risk-bearing cost. 78 It is worth noting that PPP contracts often have high transactional costs that may be caused or increased by Principal-Agent problems. 79 The transaction costs in a PPP include costs required to initiate, negotiate and manage the PPP relationship over the life of the contract. One of the leading derivatives from local autonomy theory is that local authorities must possess sufficient power, independence and financial resources to govern distinctively. From the PAT 75 Laffont J and Martimont D, The Theory of Incentives, 84. 76 Laffont J and Martimont D, The Theory of Incentives, 88 77 Laffont J and Martimont D, The Theory of Incentives, 91 78 Boardman A, Siemiatycki M, Vining A 'The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere', The School of Public Policy, University of Calgary', 9(12), 2016, 14. 79 Boardman A, et al, 'The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere', 14.

17 approach the main inference is that PPP contracts often have high transactional costs that may be caused or increased by Principal-Agent problems. For success to be achieved using the PPP framework, it is prudent to develop internal structures that will allow members of both the private and public sectors to make independent decisions. However, each decision should be within cost-reduction parameters that ought to be set out initially. In light of the above, this study adopts both local autonomy theory and the PAT approach owing to the unique nature of the PPP models and the compelling need to as far as possible adequately address the concern of the equal partners of the partnership arrangement. 1.7 Literature Review In PPPs, the government agency chooses a private consortium which is in charge of both designing the quality attributes of the infrastructure, building those assets and finally managing them as efficiently as possible. 80 The prerequisites for the successful long-term public, private partnerships are market-driven competition, shared risk and transparency to achieve their intended purposes and protect the public from excessive risk. 81 Most countries have used PPPs because they improve operational efficiency, enable the innovation of technological and managerial skills, and increase the involvement of private entities in public services. 82 PPP projects are seen often as a solution concerning major projects insofar as their ability to defer 80 Martimort and Pouyet, "Build It or Not", 2 81 Martimort and Pouyet, "Build It or Not", 2 82 Chowdhury, Chen and Tiong, Analyzing the structure of public-private partnership projects using network theory, 247.

18 capital expenditures; lower whole life cost through integrated and bundled contracts; and introducing private sector expertise and innovation into public projects. 83 PPPs potentially bring the efficiency of business to public service delivery and avoid the politically contentious aspects of full privatisation. 84 PPPs allow governments to retain ownership while contracting the private sector to perform a specific function such as building, maintaining and operating infrastructures like roads and ports, or providing essential services like water and electricity. 85 Both sides stand to benefit from the contractual agreement. The government earns revenue by leasing state-owned assets or pays the private sector for improved infrastructure and better service delivery. 86 Often the private sector can do the job more efficiently, which can lower prices and improve rollout. 87 The private operator gets reimbursed either by the government or consumers for

doing its work, at a profit. 88 Given the previous benefits, there is a global trend for financing public projects via Public-Private Partnerships (PPPs). 89 Approximately USD 95 trillion in public and private investments will be needed in energy, transport, water, telecommunications infrastructure at 83 Uddin and Zack, 'Public private partnership projects-what, why & how is risk allocated?' 3. 84 Farlam P, 'Assessing Public-Private Partnerships in Africa,' 2, The South African Institute of International Affairs, Nepad Policy Focus Series, (2005).' 32 85 Farlam, 'Assessing

46%

**MATCHING BLOCK 34/148**

W

[https://en.wikipedia.org/wiki/Public%E2%80%93Private\\_Partnerships\\_in\\_Africa](https://en.wikipedia.org/wiki/Public%E2%80%93Private_Partnerships_in_Africa) ...

Public-Private Partnerships in Africa', 33 86 Farlam, 'Assessing Public-Private Partnerships in Africa', i. 87 Farlam, 'Assessing Public-Private Partnerships in Africa', i. 88 Farlam, 'Assessing Public-Private Partnerships in

Africa', i. 89 Tang, Shen, and Cheng, 'A review of studies on public-private partnership projects in the construction industry' 683.

19 the global level between 2016 and 2030 to support growth and sustainable development, which is equivalent to approximately USD 6.3 trillion per year over the next fifteen years. 90 Therefore, due to the scale of the needs and the tight budgets for governments, mobilizing private sources for financing will be critical, and PPPs could help narrow the infrastructure gap. 91 Since their debut in the United Kingdom in the 1990s, public-private partnerships (PPPs) have been adopted in many countries around the world, including in Kenya. However, there has always been a degree of cooperation between the public sector and the private sector. 92 In retrospect, private contracting for the provision of public services dates as back as the times in the Bible where Matthew was a private tax collector. 93 In the 21 st Century, the adoption of PPPs by governments has increased in both developed and developing countries especially following the global financial crises of 2007-2008 despite the commencement of the modern way of carrying out PPP projects in 1990 in the United Kingdom. 94 The use of Public-Private Partnerships for infrastructure development is now a significant part of the global solution to infrastructure development. 95 90 OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', OECD Multi-Level Governance Studies, OECD Publishing, 2018, 11 91 OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 11 92 Hodge, '

73%

**MATCHING BLOCK 35/148**

SA

Essay 1305130.pdf (D27838589)

Public private partnerships and legitimacy', 318 93 Hodge and Greve, 'Public - Private Partnerships: An International Performance Review', 546 94

Kyei and Chan, 'Review of studies on the Critical Success Factors for Public-Private Partnership (PPP) projects'1335. 95 Jooste and Scott, Organizations Enabling Public Private Partnerships, 4

20 In developing countries, the growth of private sector participation has been outstanding since, in 1990, only 58 projects in eight countries had gotten to financial close, but this number had increased to 288 projects in 64 countries by 2007. 96 PPPs may have the potential to solve sub-Saharan Africa's dense infrastructure and service backlogs. 97

96%

**MATCHING BLOCK 37/148**

W

[https://blogs.worldbank.org/ppps/infrastructur ...](https://blogs.worldbank.org/ppps/infrastructur...)

Facing the dearth of infrastructure funding, an increasing number of countries, notably emerging markets and developing economies (EMDE), are turning to Public-Private Partnerships (PPPs) to tap private capital. 98

In Africa, PPPs are a small market, and most of the projects are in

56%

**MATCHING BLOCK 38/148**

W

[https://blogs.worldbank.org/ppps/infrastructur ...](https://blogs.worldbank.org/ppps/infrastructur...)

South Africa, Nigeria and Kenya 99 which account for 48% of the 335 total PPP infrastructure projects in the Sub-Saharan region in the past 25 years. 100

Therefore, PPPs can provide alternative models of financing in this region where feasible projects are identified . 101 An effective and sustainable legal and institutional structure is essential for the identification, development and implementation of successful PPPs, but this is still evolving in Kenya. 102 Successful arrangement and completion of

projects can be largely attributed to the PPP legal framework in place. 103 There is need for a clear and firm legal environment for PPP projects, to attract financing, competition for projects and reduce risks which consequently will reduce 96 Yong K, Public- Private Partnerships policy and practice, 22 97 Farlam, 'Assessing Public-Private Partnerships in Africa,' i 98 Izuwah and Rana, Infrastructure & Africa's Development – the PPP imperative' 1 99 <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020 100 <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020 101 <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> on 5 March 2020 102 Odame and Kangai, 'Agribusiness public-private partnerships, 8 103 Arimoro, '

100%

**MATCHING BLOCK 39/148**

**SA** 5IJ09SS28340.doc (D112397500)

Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus' 5 21

project costs and this cannot be emphasized enough. 104 The PPP framework must be clear, predictable and stable as well as commercially oriented. 105 Traditional forms of state intervention are not enough to deal with complex social and infrastructural demands that governments are faced within the 21 st Century. 106 These demands are well-identified at the local level. This local knowledge plays an important role in tailoring capital investments to local characteristics. 107 This is why novel institutional arrangements that devolve responsibility from the national centres to local entities of government and engage the private sector are required. 108 Therefore, subnational governments may be the best placed to partner with the private sector for infrastructure improvements. 109 With capital mobility and deregulation, local governments as providers of infrastructure-related services, are more appropriate channels for attracting domestic and foreign investment. 110 The legal framework plays a critical role in the success of a PPP because it creates proper guides and controls for PPP contracts. . 111 In Kenya, the development of a comprehensive legal framework for PPPs was initially driven by the government's commitment to achieving the 104 Delmon, Creating a Framework for

83%

**MATCHING BLOCK 36/148**

**W** <https://unece.org/DAM/ceci/publications/ppp.pdf>

Public Private Partnership (PPP) Programmes, 5. 105 The United Nations Economic Commission for Europe, 29. 106

Lagat, 'Review of the Policy, Legal and Institutional Framework of Public, 33 107 OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 22. 108 OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', 22. 109 OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges' 23 110 Anwar S et al, 'Empowering States and Provinces or Unshackling Local Governments: Does It Matter for Peace, Order, Good Government, and Growth?', 339 111 <https://www.businessdailyafrica.com/analysis/columnists/Kenya-on-right-path-to-undertaking-projects/4259356-4797154-s2sap0/index.html> on 10 January 2020

22 objectives of Vision 2030, Kenya's development blueprint which aims to transform Kenya into an industrialized middle-income country by the year 2030. 112 It is particularly propelled by amongst others, the increased demand for quality and affordable public services by the citizens. However, the huge funding gap in the country to complete infrastructural projects coupled with the attendant desire to reduce sovereign borrowing has led to inadequate infrastructural facilities in the country. 113 To achieve this, Vision 2030 set out a 10% per annum GDP growth target, and to realise these high growth rates the Government emphasized on the importance of enabling private sector participation in infrastructure in Vision 2030's

83%

**MATCHING BLOCK 54/148**

**W** [https://www.tralac.org/images/docs/7848/kam-ec ...](https://www.tralac.org/images/docs/7848/kam-ec...)

First Medium Term Plan (2008 – 2012) and the Second Medium Term Plan (2013 – 2017). 114 The first Medium Term Plan (2008-2012)

under the Kenya Vision 2030 emphasized the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs. 115 Consequently, the Government put in place the Public Procurement and Disposal (Public-Private Partnerships) Regulations, 2009 which outlined what constituted a PPP and also created both the PPP Steering Committee and PPP Secretariat both of which were both established in 2010. 116 The Regulations provided for the institutional and regulatory basis for all kinds of public procurement but did not expressly provide for the 112 Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, viii 113 Kenya Vision 2030: A Globally Competitive

and Prosperous Kenya, viii 114 Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure: A Study for the UK Department for International Development (DFID), Kenya Country Case Study, 2015, 2 115 Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure, 2 116 Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure, 2.

23 legal basis for PPPs. 117 Illustrating the Government's commitment to PPPs, a PPP policy statement was released in 2011 which set the stage for the enactment of the Public-Private Partnerships Act in 2013 and its subsequent Regulations. However, PPP arrangements are still a relatively novel concept in the Kenyan system. Nonetheless, the government of Kenya has shown a growing interest in PPPs as a vehicle for the development of infrastructure. 118 For the period, 2012-2020, the total infrastructure investment needs across the 12 sectors amounted to USD 62,176 million, with the government of Kenya providing USD 25,000 million thus leaving a funding gap of USD 37,000 million. 119 With a projected reduction in the funding gap for infrastructure estimated at USD 40 Billion over the next 8 years, the government of Kenya is keener on PPPs as the demand for quality and affordable from its citizen's increases. 120 Kenya also ranks highest relative to the PPP investment (in excess of \$8.5 billion) in contrast to the neighbouring countries such as Rwanda, Tanzania, Uganda and Zambia. 121 The total population of Kenyan citizens has increased to 117 Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure, 3 118 Chileshe N, Njau C, Kibichii B, Macharia L, & Kavishe

100%

**MATCHING BLOCK 40/148**

SA 124370.docx (D111642785)

N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' International Journal of Construction Management, (2020), 1. 119

Chileshe et al, '

100%

**MATCHING BLOCK 41/148**

SA 124370.docx (D111642785)

Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 120

Chileshe et al, '

100%

**MATCHING BLOCK 42/148**

SA 124370.docx (D111642785)

Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 121

Tanzania Economic Update: The Road Less Traveled, Unleashing Public Private Partnerships in Tanzania, The World Bank Group, Africa Region Macroeconomics and Fiscal Management Global Practice, May 2016  
<http://www.worldbank.org/tania/ia/economicupdate> on 4 November 2020

24 49.7 million with a Gross Domestic Product (GDP) of 5.8% and an inflation rate of 6.3% since 2016 thus leading to a labour force of only 18.66 million. 122 In addition, the population of Kenya has been projected to increase to 59 million by the year 2030 and 75 million by 2050 and with the infrastructure development sector also being put in the frontline of the Vision 2030 projection board. 123 Vision 2030 emphasizes the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs. PPPs and county governments are the key drivers for achieving infrastructural programmes under Vision 2030. It is therefore imperative that the legal and regulatory framework is conducive for county government to implement infrastructure projects through PPPs. Given that the PPP Act is a fairly new piece of legislation having been enacted in the year 2013, there is need for research to investigate its adequacy to ignite debate for its improvement by comparing it to the more established policies, legislative and institutional frameworks in other African jurisdictions such as South Africa and Nigeria who have more successful PPPs at the local level and which have more mature PPP structures at the local level. However, there is a dearth of literature in Kenya, especially following the enactment of the PPP Act in 2013 and the establishment of county governments. This can be contrasted with literature in other developed jurisdictions where PPPs have evolved and where there have been significant scholarly works on PPPs, about devolved units. Again, literature is scarce when it comes to addressing the slow uptake of PPP frameworks in county governments owing to the 122 Chileshe et al, '

100%

**MATCHING BLOCK 43/148**

**SA** 124370.docx (D111642785)

Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 123

Chileshe et al, '

100%

**MATCHING BLOCK 44/148**

**SA** 124370.docx (D111642785)

Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 2 25

threat of autonomy by the central government. The idea that some decisions will have to be approved by the central government during PPP projects is a prospect that not many private entities would want to find appealing. Hence, this study seeks to assess whether the slow uptake of PPP frameworks is due to the central government involvement in such projects. By reviewing Kenya's public-private partnerships legal framework for implementing infrastructure projects by county governments, this paper will recommend improvements and give proposals on legal reform and consequently bridging the knowledge gap in literature regarding legislation on PPPs at local level. 1.8 Justification of the Study This study is important because it will shed light on the existing gaps in the PPP legislative framework regarding implementation of PPPs at county level. This study will therefore be necessary to policy makers in the PPP sector as it will help them better understand the legal challenges the county governments experience when conducting PPPs. This study will also be relevant to county government officials who may use it to lobby for reforms in the legislative framework of PPP to better suit counties so that they can leverage the benefits of financing projects using PPPs. This study will also be a point of reference for future researchers and academia on PPPs especially those that are to be conducted at local level. 1.9 Research Methodology 1.9.1 Primary and Secondary Sources of Information There exists extensive literature in PPPs, especially in legal, procurement, economics and infrastructure journals. Many of the scholars discuss PPPs as a better source of funding public infrastructure projects than traditional procurement sources. However, little literature exists on a thorough analysis of the legal regime governing PPPs for states and local governments for

26 African countries with a devolved system of governance. There is even less literature on the legal, institutional and procedural frameworks for carrying out PPPs by county governments in Kenya. Therefore, for each chapter, the author will review various literature from both primary and secondary sources on local autonomy, decentralisation, PPP laws and regulations conducted in devolved systems of governance throughout this research to gain more insight into this topic and to support the research hypothesis. Some of the literature reviewed will include books, articles, journals, conference papers, dissertations, Constitutions, relevant government statutes and case laws, international treaties and agreements, conventions and protocols. 1.9.2 Comparative Studies This research shall compare and contrast studies of countries to identify the principles they use to regulate PPPs at local levels of governance. The ultimate goal being establishing patterns of international best practices in the conduct of local projects through PPPs in decentralised governments. Finally, the paper shall review laws that these countries have in place that ensure that local PPPs are well managed. The identified countries are; South Africa and Nigeria in Africa since their local governments have been successful in implementing PPP projects at the local level. South Africa is regarded as a country that has developed a distinct PPP regime that takes into account the country's local settings and therefore its framework remains a good model for other developing and emerging economies. 124 In Nigeria, most state and local 124

91%

**MATCHING BLOCK 45/148**

**W** [https://pppknowledgelab.org/guide/sections/3-w ...](https://pppknowledgelab.org/guide/sections/3-w...)

Yescombe R, Public-Private Partnerships: Principles of Policy and Finance, Butterworth-Heinemann, (2007) 47. 27

governments have established PPP legislation and PPP units in their areas of jurisdiction and therefore will have key learnings for how to carry out PPPs at local level in Kenya. 125 1.10 Scope and Limitation of the Study This study has limited its scope to the legal, institutional and procedural framework governing PPPs carried out by County Governments in Kenya. It has therefore only analysed the laws and regulations on PPPs, county governments and procurement of public projects in Kenya. This study has limited itself only to legislative factors that may be directly linked to the low uptake of PPPs at the county level in Kenya and has not researched on other factors that may also be attributed to the low uptake such as corruption and lack of capacity, expertise or knowledge within county officials. 1.11 Chapter Breakdown The objectives of this study will be met by five distinct chapters. The first chapter will be an introduction to the study. The aim

of the chapter will be to give a general background of PPPs, how they work and the importance of a proper legislative framework to govern them. The chapter will also state the problem the study seeks to research on, the study's objectives and questions the study will seek to answer. Literature from various primary and secondary sources shall be reviewed on PPPs and how they are conducted locally in various jurisdictions including Kenya. The chapter will also state the preferred methodology for conducting the research and justify why the study is important and relevant in the current PPP landscape. 125 Ayoola O, Examining Public Private Partnership in Nigeria: Potentials and Challenges (A case study of some local government areas in Osun State)' Bsc Thesis, Obafemi Awolowo University, May 2015, xiii

28 The second chapter will be a review of the legal, institutional and procedural framework for conducting Public-Private Partnerships in County Governments in Kenya. This chapter will review the key tenets of devolution in Kenya and the operative constitutional and legal principles on the relationship between the national governments and the county governments on public services delivery. This chapter will also review the legal framework relating to county governments and the legal, institutional and procedural framework for conducting PPPs at the county level in Kenya. The third chapter will review the legal, institutional and procedural framework for carrying out PPPs in South Africa and Nigeria all of which have had more success in conducting local PPP projects than Kenya. The aim is to find out what role their respective legislative frameworks for conducting local PPPs has played in this success and compare this to the Kenyan legislative framework for conducting similar PPPs. The fourth chapter will analyse the best practices from South Africa and Nigeria for conducting local Public-Private Partnerships. It will draw out the key lessons from the legislative frameworks for conducting local PPPs in South Africa and Nigeria vis-à-vis the legislative framework for conducting local PPPs in Kenya and brings out the best practices that Kenya can borrow from these two African jurisdictions. The fifth chapter and final chapter will outline the findings of this study based on the preceding chapters. It will propose recommendations in the PPP legal, institutional and procedural framework to address the gaps that exist within the Kenyan county governments' legal framework in comparison to the legislative frameworks of South Africa, Nigeria and other international best practices.

29

30 Chapter 2 The Legal, Institutional and Procedural Framework for conducting Public-Private Partnerships in County Governments in Kenya. 2.1 Introduction This chapter will review the fundamental tenets of devolution in Kenya and the operative constitutional and legal principles on the relationship between the national governments and the county governments on public services delivery. This chapter will also review the legal framework relating to county governments and the legal, institutional and procedural framework for conducting PPPs at the county level in Kenya. This will form a basis for the comparative study in Chapter 3 which will interrogate whether the Kenyan PPP legal regime is in line with best practices aimed at enhancing and promoting the use of PPPs as a method of public financing by local governments. 2.2 Devolution After Kenya gained independence, the governance of the country was centralized, which harmed the delivery of public services and local governance. 126 However, decentralization and local governance in Kenya got a positive boost, in 2010, when the new Constitution was promulgated. One laudable critical elements contained in the 2010 Constitution is the creation of institutions to strengthen and sustain governance both nationally and locally, where locally 126 Hope R, 'Devolved government and local governance in Kenya: Implementing decentralization underpinned by the 2010 Constitution', 13 African and Asian Studies: Development Practice International, Toronto, Ontario, Canada, (2014), 339.

31 the devolved governments were created. 127 Devolution represents the transfer of power and resources to lower (sub-national) levels of government that are both relatively independent of the national government and are democratically elected. 128 According to the 2010 Constitution, the objectives of devolution of government in Kenya are inter alia: to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; ease of access of services, self-governance, promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them, ensure equitable sharing of national and local resources and to improve checks and balances and the separation of powers to promote the democratic and accountable exercise of power. 129 The governments at the national and county levels are distinct and interdependent and are required to conduct their mutual relations based on consultation and cooperation. 130 This is further emphasized in the Intergovernmental Relations Act which establishes a framework for consultation and cooperation between the national and county governments, and amongst county governments and establishes mechanisms for the resolution of intergovernmental disputes. 131 Some of the core principles of intergovernmental relations are the respect for the functional and institutional integrity of the two levels of government and respect for the constitutional status of the levels of government and the institutions of government establishes 127 Hope R, 'Devolved government and local governance in Kenya', 339 128 Hope R, 'Devolved government

and local governance in Kenya', 339 129 Article 174, Constitution of Kenya (2010) 130 Article 6, Article 212, Constitution of Kenya (2010) 131 Intergovernmental Relations Act, (No. 2 of 2012)

32 at either level of government. 132 Thus, both levels government should respect each other's constitutional mandate and should allow each other to carry out their constitutional mandate without undue interference. The 2010 Constitution also provides for the equitable sharing of national revenue among the national government and county governments. 133 The determination of the equitable shares is governed by a set of criteria that include: the national interest; the need to ensure that county governments can perform the functions allocated to them; the fiscal capacity and efficiency of county governments; developmental and other needs of counties; economic disparities within and among counties and the need to remedy them; the desirability of stable and predictable allocations of revenue; and the need for economic optimization of each county and to provide incentives for each county to optimize its capacity to raise revenue. 134 Moreover, the 2010 constitution also provides for the equitable share of the national revenue that is allocated to county governments to be at least 15 percent of all revenue collected by the national government. 135 There is also a further 0.5 percent of the total revenue collected by the national government each year which should be set aside in an equalization fund to be used to provide essential services and to minimize the disparity in the quality of services with the rest of the country, so far possible. 136 132 Section 4, Intergovernmental Relations Act, (No. 2 of 2012) 133

87%

**MATCHING BLOCK 46/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Article 202, Constitution of Kenya (2010) 134 Article 203 (1), Constitution of Kenya (2010) 135 Article 203 (2), Constitution of Kenya (2010) 136 Article 204 (2), Constitution of Kenya (2010) 33

In addition, the 2010 constitution required that a revenue fund be established for each county government into which shall be deposited all monies raised for or received on behalf of a

47%

**MATCHING BLOCK 61/148**

**W** [https://www.tralac.org/images/docs/7848/kam-ec ...](https://www.tralac.org/images/docs/7848/kam-ec...)

county government, except money reasonably excluded by an Act of Parliament. 137 Along with the fiscal transfers from the national government, a county government

may also mobilize revenue by levying taxes such as property rates, entertainment taxes, and any other tax or licensing fees that it is authorized to impose by an Act of Parliament 138 ; and by borrowing. 139 However, the national government must guarantee a county government loan must have the approval of the county government's assembly. 140 2.3 County Government Structure in Kenya During the colonial era, local governments in Kenya were considered to be relatively autonomous and had significant sources of revenue. 141 However, after the country attained independence in 1963, local authorities were weakened and simultaneously developed a bad reputation for incompetence. 142 After independence was achieved, the assumption of power by Kenyan political leaders triggered the consolidation of local governance that saw successful attempts to re-centralize which, in turn, undermined both the link and the relationship between local authorities and their constituents. 143 The re-centralization took form through measures 137

87%

**MATCHING BLOCK 47/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Article 206, Constitution of Kenya (2010) 138 Article 209 (3), Constitution of Kenya (2010) 139 Article 212, Constitution of Kenya (2010) 140 Article 212, Constitution of Kenya (2010) 141

Hope R, 'Devolved government and local governance in Kenya', 340 142 Oloo A, 'Devolution and Democratic Governance : Options in Kenya' in Kibua Tand Mwabu G (eds), Decentralization and Devolution in Kenya: New Approaches, University of Nairobi Press, 2008, 105 143 Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105

34 that led to the emergence of an administrative structure consisting of local authorities and national government administrative units which made up what was termed provincial administration. 144 The local authorities were required to provide only a small number of services and any other programs they considered essential for improving services to their residents. 145 The significant services they had responsibility for were primary education, health care, road maintenance, and agricultural extension. 146 However, in pursuit of its re- centralization policy, the national government decided to keep the pre-independence structure of local government. Still, it transferred most of the critical functions and powers

back to the national government, thereby severely restricting the autonomy of the local governments. 147 This dual system remained the basic framework for local governance and public service delivery in Kenya until the 2010 Constitution was passed overwhelmingly by Kenyans on 4 th August 2010. 148 The 2010 Constitution provides for a two-tier government structure which has the national government and the 47 counties. Further, under Article 1 of the Constitution, the sovereignty of the people is to be exercised at each level of government. The national government comprises of the Executive, the Legislature and the Judiciary. The Executive comprises of the President, deputy president and a cabinet of at least 14 but no more than 22 cabinet 144 Hope R, 'Devolved government and local governance in Kenya', 340 145 Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105 146 Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105 147 Oloo, 'Devolution and Democratic Governance : Options in Kenya', 105 148 Hope R, 'Devolved government and local governance in Kenya', 340

35 secretaries. 149 The Legislature comprises of the National Assembly, and the Senate 150 whilst the Judiciary consists of the all the courts and related infrastructure and all Tribunals. 151 On the other hand, Chapter 11 of the Constitution spells out in meticulous detail the objects and principles of devolved governments, the functions and powers of these 47 county governments, the boundaries of the counties, the relationships between and among county governments and the national government, the rationale and manner of suspension of the county governments and other general issues including county assembly powers and gender balance and diversity. 152 Each of the 47 county governments has an Executive which comprises of the governor, deputy governor and a county executive committee and a Legislative arm which is the county assembly. 153 For each county, the governor and the deputy governor are the Chief Executive and Deputy Chief Executive of the county respectively. 154 The governor is elected directly by the voters registered in the county for a term of five years and can hold office for only two terms. 155 The deputy governor is elected as a running mate by the governor, therefore, there is no separate election for the deputy governor required. 156 Each county also has a county 149 Chapter 9, Constitution of Kenya (2010) 150 Chapter 8, Constitution of Kenya (2010) 151 Chapter 10, Constitution of Kenya (2010) 152 Hope R, 'Devolved government and local governance in Kenya', 340 153

87%

**MATCHING BLOCK 48/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Article 176, Constitution of Kenya (2010) 154 Article 179(4), Constitution of Kenya (2010) 155 Article 180, Constitution of Kenya (2010) 156 Article 180 (6), Constitution of Kenya (2010) 36

assembly, elected for a five-year term, consisting of members elected by the voters in each ward; and the Speaker, who is an ex officio member. 157 Each county assembly has a speaker elected by the county assembly who presides over the sitting of the county assembly. 158 The county assembly is the legislative arm of the county and has the power to: make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government as required by the Constitution 159 ; exercise oversight over the county executive and any other county executive organs; 160 ; and receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions. 161 The executive authority of a county is vested in, and exercised by, a county executive committee. 162 The county executive committee consists of the county governor and his deputy; and non-assembly members appointed by the county government, with the approval of the assembly. 163 The number of members appointed shall not exceed a third of the number of members of the county assembly, if the assembly has less than 30 members; or 10, if the assembly has 30 or more members. 164 Members of a county executive committee are 157

87%

**MATCHING BLOCK 49/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Article 177, Constitution of Kenya (2010) 158 Article 178 (2), Constitution of Kenya (2010) 159 Article 185 (2), Constitution of Kenya (2010) 160 Article 185 (3), Constitution of Kenya (2010) 161

57%

**MATCHING BLOCK 50/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Article 185 (4), Constitution of Kenya (2010) 162 Article 179 (1), Constitution of Kenya (2010) 163 Article 179 (2), Constitution of Kenya (2010) 164 Article 179 (3), Constitution of Kenya (2010) 37 accountable to the county governor for the performance of the

functions and exercise of their powers. 165 The functions of a county executive committee are to: prepare proposed legislation; implement county and national legislation; manage and coordinate the functions of the county administration and its departments; preparation of county reports, 166 and perform any other functions conferred on it by the Constitution or national legislation. 167 All these Constitutional provisions are further operationalized through the County Governments Act, 2012. 2.4

83%

**MATCHING BLOCK 51/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Public-Private Partnership Laws in Kenya 2.4.1 Policy Statement on Public-Private Partnerships,

November 2011 This policy was the precursor for all other existing PPP laws in Kenya. From 1996 to 2011 when the Policy Statement on Public-Private Partnerships, 2011 (the "PPP Policy") was enacted, Kenya's government had illustrated its commitment to PPPs as a model for financing infrastructure in the country which led to investments by private stakeholders. 168 These infrastructure investments, however, happened without any legal framework for PPPs. 169 As a result, most of these transactions, took longer to be prepared and approved and feasibility studies were not adequately conducted. 170 There was also uncertainty about the legal process by which contracts should be tendered, procured and awarded. 171 165

83%

**MATCHING BLOCK 52/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Article 179 (6), Constitution of Kenya (2010) 166 Article 183 (3), Constitution of Kenya (2010) 167 Article 183 (1), Constitution of Kenya (2010) 168

85%

**MATCHING BLOCK 53/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Government of Kenya PPP Policy Statement, 2011, ii 169 Government of Kenya PPP Policy Statement, 2011, ii 170 Government of Kenya PPP Policy Statement, 2011, ii 171 Government of Kenya PPP Policy Statement, 2011,

ii

38 Therefore, the policy was formulated because the Kenyan government realized that the in order to attain Kenya's development agenda and to meet the infrastructure shortfall, private sector involvement would be required. 172 Therefore, a strong political will, robust legal and institutional framework would be required in order to successfully implement PPP projects. Consequently, the policy provided a basis for the enactment of a PPP law which would create clear and certain project development process and establish public institutions such as sector state departments, statutory bodies, public enterprises, county governments and local authorities that would implement and champion PPPs as a viable method of infrastructure development. 173 2.4.2 The Constitution of Kenya, 2010 The Constitution of Kenya, 2010 (the "Constitution") is the highest law of the land and any law that is inconsistent with the Constitution is void to the extent of the inconsistency. 174 Therefore, this study will interrogate whether the PPP legal, institutional and procedural framework governing the conduct of PPPs at the county level is inconsistent with the provisions of Constitution that provide for the devolution of government. To begin with, PPPs are a method of financing public projects. They, therefore, should adhere to Chapter 12 of the Constitution, 2010, which provides the principles guiding all aspects of 172

76%

**MATCHING BLOCK 55/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

Government of Kenya PPP Policy Statement, 2011, ii 173 Government of Kenya PPP Policy Statement, 2011, 8 174 Article 4, Constitution of Kenya (2010) 39

public finance in both levels of government which are fairness, equity, transparency competitive and cost effective. 175 In addition to the principles of public finance, any form of public borrowing shall be guided by the following principles: Need to ensure the stability of domestic financial markets; Promotion of inter-generational equity in the sharing of burdens and benefits of public borrowing; determination of thresholds of borrowing rights for both levels of government; use of objective criteria for evaluating national government entities or county government eligibility for national government debt guarantee; and prudence and equity in setting limits for debt stock levels for each county government. 176 Because

of the foregoing, the national government was devolved to give powers to ease of access of services, self-governance, promotion of socio-economic growth, ability to manage their affairs and make decisions concerning them. 177 In exercising its mandate under the Constitution, a county government may enter into partnerships with any public or private organization per the provisions of any law relating to public or private partnerships for any work, service or function it is responsible for. 178 For that reason, county governments provide abundant PPP opportunities since some of the services that are devolved include the provision of water and sanitation, education, county roads and street lighting, county health, county housing, public entertainment, public amenities and 175 Article 201, Constitution of Kenya, (2010) 176 Republic of Kenya, Public Debt and Borrowing Policy, June 2020, 5 177 Article 174 (d), Constitution of Kenya (2010) 178 Section 6 (3), County Governments Act (Act No.17 of 2012)

40 construction of markets. 179 Article 189 (a) of the Constitution expressly states that government at either level shall have due regard to the functional and institutional integrity of the other when exercising its powers and respect the Constitutional status and institutions of government the other level. 180 This study seeks to interrogate whether the PPP Act is in line with the spirit of Article 189 of the Constitution. 2.4.3 The Public-Private Partnerships Act, 2013 The Public-Private Partnerships Act, 2013 (the "PPP Act") was assented to on 14 th January 2013 and came into force on 8 th February 2013 which is close to 2 years after the PPP Policy was rolled out. It is the principal legislation that governs the implementation of PPP projects in Kenya. 181 When there is a conflict between the provisions of the PPP Act and any other law , the provisions of the PPP Act shall take precedence. 182 This is echoed in the Public Procurement and Asset Disposal Act, 2015, which states that procurement and asset disposal carried out in

50%

**MATCHING BLOCK 56/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

the PPP Act shall not be subjected to its provisions. 183 The PPP Act allows the private sector to participate in the financing, construction, development, operation, or maintenance of infrastructure or development projects of

various state authorities through and establishes institutions that regulate, monitor and supervise the 179 Fourth Schedule, Part 2, Constitution of Kenya (2010) 180 Article 189 (a), Constitution of Kenya, (2010). 181 Section 3, Public Private Partnerships Act (Act No.15 of 2013) 182 Section 63 (2), Public Private Partnerships Act (Act No.15 of 2013) 183 Section 4 (2)(e), Public Procurement and Asset Disposal Act, (No. 33 of 2015)

41 implementation of project agreements on infrastructure or development projects. 184 It provides for both the institutional and the procedural framework for conducting a PPP project in Kenya. 2.4.4

86%

**MATCHING BLOCK 57/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

The Public-Private Partnerships Regulations 2.4.4.1 The Public-Private Partnerships Regulations, 2014 The Public-Private Partnerships Regulations, 2014 (

the "Regulations") were enacted in 2014 according to Section 71 of the PPP Act to , to provide for the procedure for appointment of the PPP Committee, and the PPP Unit and their respective roles, to establish a minimum value of investment costs, the maximum value of performance security during the construction and operation phase of a project and to provide guidelines to be observed during the entire project cycle and financial and disclosure forms to be used by the contracting authority. 185 The Regulations apply to every contract for the design, financing, construction, operation, equipping or maintenance of a PPP project as long as the project is not a national project with a contract value

59%

**MATCHING BLOCK 58/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl ...>

of fewer than eighty-five million shillings or a county government project with a contract value of fewer than five million shillings. 186 2.4.4.2

The Public-Private Partnerships (Project Facilitation Fund) Regulations, 2017 (the "Fund") The Fund is established by the Public-Private Partnership Act to support contracting authorities in the preparation phase,, project appraisal and tendering phase of a project, to support the activities of the PPP Unit, to extend finance to capital intensive projects, to meet unforeseeable 184 Preamble, Public Private Partnerships Act (Act No.15 of 2013) 185 Section 71,

87%

**MATCHING BLOCK 59/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Public Private Partnerships Act (Act No.15 of 2013) 186 Regulation 2, Public Private Partnerships (Regulations), (2014) 42

liabilities arising from a project and to settle the transaction advisors' retainer fees. 187 The Fund's main sources of money are levies imposed on projects, donations, grants, appropriations-in-aid, success fees paid to the PPP unit, and monies from the Treasury. 188 The PPP Committee is in charge of the management of the Fund and ensures that only eligible projects are authorized for funding. 189 The Director of the PPP Unit is the Officer administering the Fund and is supported by the Secretariat, which consists of members of staff from the PPP Unit. 190 Information on the amount and the source of money received into the Fund and the total number of projects supported by the Fund should be published annually on the PPP Unit's website by the Officer administering the Fund. 191 2.4.5 The Public-Private Partnerships (Amendment) Bill, 2017 The Public-Private Partnerships (Amendment) Bill, 2017 was passed by the National Assembly on 31 st July 2018 and by the Senate on 20 th February 2019 with recommended amendments. 192 However, it is yet to be assented to by the President. 193 It proposes to amend the PPP Act by adding a new section, 54 A and 54 B which if passed will amend the procedural framework for county PPPs to allow county governments to approve local PPPs unless the PPP 187 Section 68,

54%

**MATCHING BLOCK 60/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Public Private Partnerships Act (Act No.15 of 2013) 188 Section 68 (2), Public Private Partnerships Act (Act No.15 of 2013) 189 Regulation, Public Private Partnerships (Project Facilitation Fund) Regulations, 2017 190

Regulation 20 & 23, Public Private Partnerships (Project Facilitation Fund) Regulations, 2017 191 Regulation, Public Private Partnerships (Project Facilitation Fund) Regulations, 2017 192 Report on the Consideration of Senate Amendments to the Public Private Partnerships (Amendment) Bill, 2017, April 2019. 193 <http://kenyalaw.org/kl/index.php?id=6819> on 27 February 2020

43 project requires a form of national government support or exceeds the budget threshold that has been prescribed by the Cabinet Secretary in charge of Finance. 194 However, all other provisions of the PPP Act shall still apply to county governments. 2.5 Institutional Framework 2.5.1 The Public-Private Partnership Committee The first institution created by the PPP Act is the Public-Private Partnership Committee (the "PPP Committee"). The PPP Committee's members include; the Principal Secretaries in the State departments responsible for matters relating to finance, national planning, land, county governments, transport, infrastructure, energy; the Attorney General; the Director of the PPP unit; and four professionals who are not public officers with more than 10 years professional experience in their respective fields. 195 The PPP Committee's core mandate is to supervise and oversee all the other institutions tasked with the implementation of PPP projects in the country. 196 They do so by formulating policy guidelines, standards, and procedures for awarding contracts and they ensure that there is an efficient implementation of any project agreement and that

84%

**MATCHING BLOCK 72/148**

**W** [https://www.oraro.co.ke/tag/procurement-and-co ...](https://www.oraro.co.ke/tag/procurement-and-co...)

each project is consistent with the provisions of the PPP Act and the

national priorities specified in Government policies. 197 The PPP Committee also approves project proposals, feasibility studies and project lists, authorizes 194 Section 16, The Public-Private Partnerships (Amendment) Bill, (Bill No.52 of 2017) 195 Section 4,

52%

**MATCHING BLOCK 62/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

Public Private Partnerships Act (Act No.15 of 2013) 196 Section 8, Public Private Partnerships Act (Act No.15 of 2013) 197 Section 7, Public Private Partnerships

Act (Act No.15 of 2013)

44 allocations from the Project Facilitation Fund and is also in charge of regularly reviewing the legal, institutional and regulatory framework of PPPs. 198 Parliament is required to ratify a PPP project agreement only in instances where the

project is a concession for the exploitation of natural resources under Article 71 of the Constitution. 199 2.5.2 The Public-Private Partnership Unit The Public-Private Partnership Unit (the "PPP Unit") is the secretariat of the PPP Committee and is composed of employees of the State department responsible for matters relating to finance. 200 It provides legal, technical and financial advisory services to the PPP Committee and the PPP Node. 201 It is also the resource hub on matters relating to PPPs by maintaining a record of all PPP project documentation, collating, analyzing, disseminating information by rating, compiling and maintaining an inventory of PPP projects that are likely to attract private sector investment. 202 It is also tasked to provide capacity building and assisting contracting authorities to design, identify, select, prioritize, appraise, evaluate, negotiate projects, conducting research on ho to improve performance of PPP and create awareness and build capacity amongst stakeholders. 203 They are also mandated to advise the Committee on the support that should be accorded to 198 Section 7,

52%

**MATCHING BLOCK 63/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl...>

Public Private Partnerships Act (Act No.15 of 2013) 199 Section 55, Public Private Partnerships Act (Act No.15 of 2013) 200 Section 11 & 12, Public Private Partnerships

Act (Act No.15 of 2013) 201 Section 14 (1), Public Private Partnerships Act (Act No.15 of 2013) 202 Section 14 (2) (a,d,g,j), Public Private Partnerships Act (Act No.15 of 2013) 203 Section 14 (2) (b,c,f,m), Public Private Partnerships Act (Act No.15 of 2013)

45 each project, to develop systems that would aid in ensuring transparency and equity in the implementation and monitoring of projects. 204 The PPP unit reports to the PPP Committee. It is the enforcement authority, ensuring that all the directives of the PPP Committee are implemented in the PPP sector and individual projects. 2.5.3 The Public-Private Partnership Nodes A Public-Private Partnership Node (the "Node"), is the project implementation team formed by a contracting authority conducting a PPP. It comprises of the accounting, financial, technical, procurement and the legal personnel of the contracting authority. 205 Each member of the Node, other than the Accounting Officer, must be a departmental head in the contracting authority. 206 As the steering team on behalf of the contracting authority they ensure the projects are legally sound and commercially viable. They also undertake the tendering process and oversee the project's implementation. 207 It also maintains a record of all PPP documentation and agreements and must submit to the unit regular and annual reports of the PPP projects conducted by the contracting authority. 208 The node must implement the recommendations and guidelines issued by the PPP Unit. 209 204 Section 14 (2) (e,p,k,o), Public Private Partnerships Act (

37%

**MATCHING BLOCK 64/148**

**W** <https://ppp.worldbank.org/public-private-partn...>

Act No.15 of 2013) 205 Section 16, Public Private Partnerships Act (Act No.15 of 2013) 206 Regulation 8 (2) Public Private Partnerships (Regulations), 2014 207 Section 17, Public Private Partnerships Act (Act No.15 of 2013) 208 Section 17, Public Private Partnerships Act (Act No.15 of 2013) 209 Section 17 (2), Public Private Partnerships

Act (Act No.15 of 2013)

46 2.5.4 The Petition Committee The PPP Act together with the PPP Regulations also provides for a dispute resolution mechanism by creating a separate committee known as the Petition Committee to hear and determine any disputes that may arise during the project cycle before the project agreement is executed.. 210 This was emphasized in the Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR where the court held that this provision is all- encompassing and grants the Petition Committee the power to determine all complaints which means that the Committee is not limited in the kind of the complaints that it can consider and determine. In the case of Mota-Engil Engenharia E Construcao Africa SA & 4 others v Public Private Partnership Petition Committee & another; Meridiam Infrastructure Africa Fund (MIAF) & 2 others (Interested Parties) [2019] eKLR, the court held that the Petition Committee has jurisdiction to determine all matters under the PPP Act. When dealing with a petition or a complaint, the petition committee may allocate costs of hearing the petition. 211 The Petition Committee consists of a chairperson who should be qualified to be a High Court judge , as well as four other subject matter experts and the Director of the PPP Unit. 212 Further, the Cabinet Secretary in charge of finance will also appoint a secretariat to support the Petition Committee. The petition committee term expires after three years after which the members are eligible for re-appointment for one more

term.. 213 Petitions brought before the Petition Committee that are based on an administrative decision of the PPP Committee, the

39%

**MATCHING BLOCK 65/148**

**W** <https://su-plus.strathmore.edu/bitstream/handl...>

PPP Unit 210 Section 67 (1), Public Private Partnerships Act (Act No.15 of 2013) 211 Regulation 60 (1) (e), Public Private Partnerships (Regulations), 2014 212 Section 67 (2), Public Private Partnerships Act (Act No.15 of 2013) 213 Section 67 (3), Public Private Partnerships

Act (  
Act No.15 of 2013)  
47 and the contracting authority must be determined within fifteen days from the date of the decision, and this decision is final and binding on both parties. 214 This was upheld

89%

**MATCHING BLOCK 66/148**

**W** <https://chambers.com/articles/a-matter-of-comp...>

in Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM Terminals [2015] eKLR

where the court held that the refusal by the Petition Committee to order disclosure in that case was a final decision. All other petitions must be determined within seven days after the hearing. 215 The Petition Committee may suspend the tendering process while the petition is being heard and determined. 216 2.6 Procedural Framework The PPP Act elaborately lays down the procedures to be followed by a contracting authority when carrying out a PPP project. A contracting authority is a government agency which delegates its functions to a private party. 217 Contracting authorities are required to submit to the PPP Unit a list of the PPP projects they intend to undertake on a priority basis. 218 The contracting authority may update the project list every year, but the final project list must be submitted to the PPP Unit at least three months before the end of the financial year. 219 The project list is then assessed by the PPP unit and approved by the PPP Committee. 220 214 Section 67,

Public Private Partnerships Act (  
Act No.15 of 2013) 215 Regulation 60 (3), Public Private Partnerships Act (

36%

**MATCHING BLOCK 67/148**

**W** <https://ppp.worldbank.org/public-private-partn...>

Act No.15 of 2013) 216 Regulation 60 (2), Public Private Partnerships Act (Act No.15 of 2013) 217 Section 2, Public Private Partnerships Act (Act No.15 of 2013) 218 Section 23, Public Private Partnerships Act (Act No.15 of 2013) 219 Regulation 11, Public Private Partnerships (Regulations), 2014 220 Section 24, Public Private Partnerships

Act (  
Act No.15 of 2013)  
48 The  
Node, in consultation with the PPP unit, is responsible for conceptualizing and identifying potential projects and must consider the benefits of entering into a PPP compared to carrying out the project independently. 221 Before entering into a PPP, a contracting authority must undertake a sectorial diagnostic study that is submitted to the PPP committee for review and approval. t 222 Once the PPP Committee has approved the proposal, the contracting authority shall undertake a feasibility study of the project which should consider the following aspects: (1) technical requirements, (2) legal requirements and (3) socio-economic and environmental impact of the project. 223 The contracting authority shall then prepare and submit a report with the findings of the feasibility study within two months after concluding the study to the PPP Unit and the PPP Committee for review and evaluation. 224 After the PPP Committee has approved the report after consideration of the PPP Unit's recommendation, the project is finally approved by Cabinet. 225 After receipt of the approval and in consultation with the PPP Unit, the contracting authority will request for bidders through advertisement in

at least two local print dailies print media.. 226 After issuance of the public notice, the contracting authority shall constitute a pre- 221 Section 31,

Public Private Partnerships Act (

**30%**

**MATCHING BLOCK 68/148**

**W** <https://ppp.worldbank.org/public-private-partn ...>

Act No.15 of 2013) 222 Section 20, Public Private Partnerships Act (Act No.15 of 2013) 223 Section 33 (2), Public Private Partnerships Act (Act No.15 of 2013) 224 Section 34, Public Private Partnerships Act (Act No.15 of 2013) 225 Section 35 (4), Public Private Partnerships Act (Act No.15 of 2013) 226 Section 37, Public Private Partnerships

Act (Act No.15 of 2013)

49 qualification committee whose role will be to pre-qualify the bidders. 227 The pre-qualification committee must have a representative of the PPP Unit and the Node and other technical, financial and legal experts who will shortlist the qualified bidders. 228 After that, still, in consultation with the PPP Unit, the contracting authority may hold a preliminary meeting with the qualified bidders to discuss the conditions and requirements in the notice and the bidders can make enquiries about the proposed project. 229 The contracting authority may alter the project qualifications based on the deliberations above, but the alterations should not affect pre-qualification criteria and shall be made before the invitation to bid is issued. 230 After the pre-qualification process laid out above has been completed, the contracting authority in consultation with the PPP Unit shall prepare an invitation to bid and tender documents for the project. 231 The tender documents should include the general information if the project, technical and financial conditions to be met by the bidders, specifications of the final product or service, key performance indicators, basic terms and conditions of the project agreement, the criteria for evaluation of the bids, forms and documents required to be submitted by the bidders, the value of the bid security to be submitted, conditions for bidders to seek clarifications and the deadline and place for submission of the tender documents by the bidders. 232 227 Section 39 (1), Public Private Partnerships Act (

**30%**

**MATCHING BLOCK 69/148**

**W** <https://ppp.worldbank.org/public-private-partn ...>

Act No.15 of 2013) 228 Section 39 (2), & Section 40 (1), Public Private Partnerships Act (Act No.15 of 2013) 229 Section 41, Public Private Partnerships Act (Act No.15 of 2013) 230 Section 42, Public Private Partnerships Act (Act No.15 of 2013) 231 Section 43 (1), Public Private Partnerships Act (Act No.15 of 2013) 232 Section 43 (2), Public Private Partnerships

Act (Act No.15 of 2013)

50 Once the bids have been submitted, the contracting authority must constitute a proposal evaluation team to sift through the applications. 233 The proposal evaluation should have not only representatives of the contracting authority but also a representative of the PPP Unit, the Attorney General and the Node. 234 The technical bids should be evaluated before the financial bids. 235 In evaluating the financial bids, the proposal evaluation team must take into account the economic advantage that would accrue to the contracting authority, and the comparative balance for the financial and technical elements of the bid set out in the tender documents. 236 Upon evaluating the bids and before declaring the first ranked bidder, the proposal evaluation team shall prepare an evaluation report specifying the evaluation criteria and give reasons why the first ranked bidder satisfied the requirements specified in the tender documents in comparison to the other bidders. 237 After that, the contracting authority, with the approval of the PPP Committee, enter into negotiations on the technical and financial terms of the project agreement with the successful bidder and request the second-ranked bidder to extend the validity of its bid pending the completion of negotiations with the successful bidder. 238 The negotiating committee shall consist of a representative from the PPP Unit, the Node, related State departments and members 233 Section 47,

Public Private Partnerships Act (

**30%**

**MATCHING BLOCK 70/148**

**W** <https://ppp.worldbank.org/public-private-partn ...>

Act No.15 of 2013) 234 Section 47(2), Public Private Partnerships Act (Act No.15 of 2013) 235 Section 44 (2), Public Private Partnerships Act (Act No.15 of 2013) 236 Section 48, Public Private Partnerships Act (Act No.15 of 2013) 237 Section 49, Public Private Partnerships Act (Act No.15 of 2013) 238 Section 52, Public Private Partnerships

Act (Act No.15 of 2013)

51 of the transaction advisors that have been appointed by the contracting authority. 239 However, the negotiations and the resolutions of the parties should not result into an increase in pricing and shall not affect the non-negotiable terms and conditions in the invitation to tender, the financial structure and conditions that the bidder raised no reservations in the bid. 240 After the negotiations, the negotiating committee prepares and submits to the contracting authority a project report specifying the negotiated terms together with its recommendations. 241 After that, the contracting authority will submit the negotiation report to the PPP Unit. 242 The PPP Unit, if satisfied with the project and risk assessment report, shall submit the report to the Debt Management Office for confirmation of its initial approval at feasibility stage based on the final contract and preferred bidder submission. 243 The PPP Unit shall then submit the project report to the PPP Committee with its recommendations for consideration. 244 The committee will then submit the project report with its recommendations to the Cabinet for approval. 245 Within thirty days of receipt of the Cabinet's approval, the PPP Committee will inform the contracting authority of the Cabinet's decision and the authority will have the green light to finalize the project agreement for execution by the parties to the project and communicate the decision of the Cabinet, in writing, 239 Section 52 (2),

Public Private Partnerships Act (

**30%**

**MATCHING BLOCK 71/148**

**W** [https://ppp.worldbank.org/public-private-partn ...](https://ppp.worldbank.org/public-private-partn...)

Act No.15 of 2013) 240 Section 52 (4), Public Private Partnerships Act (Act No.15 of 2013) 241 Section 53 (1), Public Private Partnerships Act (Act No.15 of 2013) 242 Section 53 (2), Public Private Partnerships Act (Act No.15 of 2013) 243 Section 53 (4), Public Private Partnerships Act (Act No.15 of 2013) 244 Section 54 (1), Public Private Partnerships

Act (Act No.15 of 2013) 245 Section 54 (4), Public Private Partnerships Act (Act No.15 of 2013)

52 to all the bidders who participated in the bidding of the project. 246 After that, the successful bidder shall form a Special Purpose Vehicle (SPV) incorporated as a company, and the contracting authority may own shares in the company as a minority shareholder. 247 Also, the project company must submit performance security, in the form of an unconditional and irrevocable letter of guarantee in favour of the contracting authority issued by a bank licensed to operate in Kenya. 248 The performance security must be submitted before the project agreement is signed between the project company and the contracting authority. 249 Finally, the contracting authority will execute the contract awarded to the bidder as a Public- Private Partnership project and

**44%**

**MATCHING BLOCK 74/148**

**W** [http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

publish in two local dailies of national circulation and online the results of the tender together with the nature, scope, successful bidder, project costs at net present value,

the

**87%**

**MATCHING BLOCK 75/148**

**W** [http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

project value and tariff and the duration of the project. 250 Once the

project agreement has been executed, the PPP Unit must preserve an electronic copy and a paper copy of the agreement for at least six years after the execution. 251 2.7 Public Finance Management Act The objective of the Public Finance Management Act (from now on "PFM Act") is to provide for the effective management of public finances by both National and County Governments, the overall oversight of Parliament and County Assemblies and the different responsibilities of 246 Section 56, Public Private Partnerships Act (

Act No.15 of 2013) 247 Section 59, Public Private Partnerships Act (Act No.15 of 2013) 248 Regulation 50 (2), Public Private Partnerships (Regulations), 2014 249 Regulation 50 (1), Public Private Partnerships (Regulations), 2014 250 Section 57 & 60, Public Private Partnerships Act (Act No.15 of 2013) 251 Regulation 6, Public Private Partnerships (

Regulations), 2014

53 government and other entities. 252 Under the County Governments Act, 2012, the funds and financial management of county governments should be as provided under the law relating to public finance. 253 In addition, the procedure of budgeting, borrowing powers and grants management shall be as provided in the law relating to public finance. 254 Therefore, the PFM Act is relevant, especially concerning the approval by the Debt Management Office of any PPP project as well as the issuance of government support such as guarantees, undertaking or binding letters of comfort. 255 Additionally, under the PFM Act, the Cabinet Secretary for the National Treasury is required to submit to Parliament on or before 15 th February every year the national government's debt strategy over the medium term in respect to actual and potential liabilities arising from loans and guarantees. 256 It is for that reason that the PPP Unit does seek the confirmation of the Debt Management Office in respect of a PPP project report to ensure the project's affordability 257 as well as assessment and approval of financial risk and contingent liabilities. 258 According to the PFM Act, the Cabinet Secretary for the National Treasury in April 2015 published the Public Finance Management (Roads Annuity Fund) Regulations for purposes of implementing the roads annuity programme through procurement of long term contracts for the design, 252 Preamble, Public Finance Management Act, (No. 18 of 2015) 253 Section 131(1), County Governments Act (No. 17 of 2012) 254 254 Section 131(2), County Governments Act (No. 17 of 2012) 255 Section 27, Public Private Partnerships Act (Act No.15 of 2013) 256 Section 33, Public Finance Management Act, (No. 18 of 2015) 257 Section 64(2)(b), Public Private Partnerships Act (Act No.15 of 2013) 258 Section 35(2), Public Private Partnerships Act (Act No.15 of 2013)

54 finance, construction and maintenance of up to 10,000-kilometre priority roads under a PPP arrangement. 259 2.8 Conclusion The legal framework of PPPs in Kenya is first and foremost based on the Constitution, 2010, which enshrines good governance, integrity, transparency and accountability in governance institutions and county government. 260 The critical statute that specifically spells out the legal framework for PPPs in Kenya is the Public-Private Partnerships Act, together with the Regulations thereunder. It is the framework legislation which fundamentally and primarily regulates the PPP arrangements in Kenya. The analysis of these legislation has been pegged on procedural requirements undertaken during the execution of the project with specific regard paid to the institutional and regulatory/administrative mechanisms established by the PPP Act. This has also informed the legal framework of the PPP arrangements in Kenya. The Public Finance Management Act has also been examined as they also contain provisions which directly affects the PPP arrangements in one way or the other. The PPP arrangements are also hinged on contract law which further assures the private sector that the contractual arrangements will be honoured. 261 From the analysis, it is evident that the PPP laws do not independently provide for legal, institutional or procedural framework tailored explicitly for carrying out PPPs by the County Governments. Instead, the county governments are regarded in the same footing as any other 259 Regulation 2(2), Legal Notice No. 36 of 2015, Kenya Gazette Supplement No. 35 of 2015 260 Article 10, Constitution of Kenya, 2010. 261 Mwaniki Gachoka, "Enter Public Private Partnerships," Kenya Procurement Journal, 70

55 national government agency. However, they have the constitutional mandate to provide core services to the public just as the national government. This creates an additional bureaucratic bottleneck and consequently discouraging the use of PPPs as a method of financing public projects at the county level. Also, the Public-Private Partnerships (Amendment) Bill, (Bill No.52 of 2017), which should ideally improve the PPP landscape for county governments provides that county approvals be limited to projects below a certain budgetary threshold. This means that the control of PPP projects at the county level will still be at the mercy of the national government if the amendment bill is passed. This begs the question of whether the PPP framework is aiding the development of successful PPPs at the County level. The next chapter in this study will interrogate how South Africa and Nigeria conduct their sub- national, State, and municipal PPPs and compare their national PPP policy framework with the Kenyan legal framework to ascertain the role of legislation in uptake successful PPPs at local the level of governance.

56 Chapter 3 Review of the Legal, Institutional and Procedural Framework for Conducting Local Public-Private Partnerships in South Africa and Nigeria. 3.1 Introduction This chapter reviews the legal, institutional and procedural framework for carrying out PPPs in South Africa and Nigeria, all of which have had more success in conducting local PPP projects than Kenya. The aim is to find out what role their respective legislative frameworks for conducting local PPPs has

played in this success and compare this to the Kenyan legislative framework for conducting similar PPPs. 3.2 South Africa South Africa is a constitutional democracy with a three-tier system of government consisting of National, Provincial and Local (Municipal) levels and an independent judiciary. These levels of government all have legislative and executive authority in their spheres and are defined in the Constitution as distinctive, interdependent and interrelated. 262 The country is divided into nine provinces which have their executive and legislative branches. The local government consists of municipalities governed by municipal councils. The country's strong PPP track record informs the choice to study the South African PPP regulatory system in the adoption of the PPP model of public service delivery. PPPs in South Africa has delivered significant projects across several sectors. Examples of PPP projects that have since been concluded include: the Gautrain light rail concession concluded in 2006 for the US \$3,483.00 Million (railway); Mozambique - South Africa Gas Pipeline concluded in 262 Farlam, 'Assessing Public-Private Partnerships in Africa 1.

57 2003 for US \$1,200.00 Million (natural gas); Xina Solar One CSP concluded in 2015 for the US \$900.00 Million (electricity); and, N3 Toll Road concluded in 1999 for US \$794.70 Million (roads). In total, as at November 2019, 96 PPP projects with a total investment of US \$20,680.00 Million had been completed since 1990. 263 A total of 78 other projects with a total investment of US \$20,680.00 Million are still under construction or operation both at the national and local level. 264 This presents a solid track record in PPP implementation and is undoubtedly a strong complement to the governing regulatory framework. This track record is even more impressive because South Africa's PPP regulatory framework does not have a long history. Regulation of PPPs in South Africa can be traced back to April 1997 when the then cabinet approved the appointment of an interdepartmental task team to develop policy, legislation and institutional reforms to enable the use of PPPs. 265 Several pioneering PPPs were carried out by the South African Roads Agency, Department of Public Works and Correctional Services, South African National Parks, and two municipalities. The lessons learned from these preliminary projects helped in the development of a Strategic Framework for PPPs in 1999. 266 Consequently, a Public Finance Management Act (PFMA) was enacted in 1999. 267 The broad objective of the Act was to create a good governance structure for the procurement of goods 263 <https://PPPknowledgelab.org/countries/south-africa> on 28 September, 2020 264 <https://PPPknowledgelab.org/countries/south-africa> on 28 September, 2020 265 Burger P, 2006. The Dedicated PPP Unit of the South African National Treasury. Policy, Finance & Management for Public-Private Partnerships, 2008, 6. 266 Burger P, 2006. The Dedicated PPP Unit of the South African National Treasury. 6. 267 Public Finance Management Act, (Act No. 1 of 1999) (South Africa).

58 and services by the public sector. Section 76 of the Act provided for the formulation of regulations or instructions applicable to all institutions to which the Act applied concerning among other things, the determination of a framework for an appropriate procurement and provisioning

100%

**MATCHING BLOCK 77/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

system which is fair, equitable, transparent, competitive and cost-effective. 268

According to this provision, the Treasury Regulation 16 was enacted in the year 2000 as the central legislation governing PPPs for national and provincial governments. In 2004, the

75%

**MATCHING BLOCK 76/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

National Treasury issued the National Treasury PPP Practice Note Number 02 of 2004 'South African Regulations for PPPs' (

PPP Manual) to facilitate the application of the PFMA and Regulation 16. Municipalities are however not subject to the PFMA or Treasury Regulation 16. PPPs for municipal government is governed by the Municipal Systems Act, 2000 (MSA), and the Municipal Finance Management Act, 2003 (MFMA). The central legislation governing municipal PPPs is in chapter 11 Part 2 of the MFMA. There is also the Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations), which address the PPP provisions in both the MSA and the MFMA, and other matters in the MFMA related to the procurement of multi-year PPP agreements. 269 A PPP Unit set up in the year 2000 following the approval of the Strategic Framework for PPPs in 1999 constitutes the institutional framework governing PPPs in South Africa. Its vital role is the procurement and management of PPPs in South Africa. 3.2.1 Legal Framework 268 Section 76 (4) (c) & (g) Public Finance Management Act, (South Africa). 269 Municipal Service Delivery and PPP Guidelines, (South Africa), 21.

59 3.2.1.1 Legal Framework for National and Provincial Levels of Government As already pointed out, regulation of PPPs at the national and provincial levels of government as provided for under the PFMA and Treasury Regulation 16 to the PFMA. The following section gives a brief overview of the same. a. The Public Finance Management Act (PFMA) This Act forms the underlying legislation of PPP regulation in South Africa. Its focus on financial management is on outputs and responsibilities aimed at improving the public sector's financial management. The heads of departments in public institutions

92%

**MATCHING BLOCK 78/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates. 270 These officials, therefore, need to evaluate value- for-money choices

continually. Consequently, if a PPP is opted for as a mechanism for the delivery of public service, it will require investigation as to whether it provides value for money. PPPs, in their very nature, entails targeted public spending, leveraging private sector finance and efficiencies,

96%

**MATCHING BLOCK 83/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

and allocating risks to the party best able to manage them. As a mechanism of delivery,

therefore,

100%

**MATCHING BLOCK 81/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

a PPP is firmly in line with the intent of the PFMA. 271

It is because of this that the provisions of the Act as may affect PPPs were operationalized with the Treasury enacting the Treasury Regulation 16 according to section 76 of the Act. b. Treasury Regulation 16 to the Public Finance Management Act, 1999 270 South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs.

<https://www.gtac.gov.za/Publications/630-Module%2001.pdf> on 28 September, 2020 271

<https://www.gtac.gov.za/Publications/630-Module%2001.pdf> on 28 September, 2020

60 Enacted according to section 76 of the Act, Regulation 16 provides precise and detailed instructions for PPPs.

61%

**MATCHING BLOCK 79/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

The Regulation defines PPPs and set out the phases and tests they will have to go through.

For application, the

57%

**MATCHING BLOCK 89/148**

W

[https://www.gtac.gov.za/Publications/630-Modul ...](https://www.gtac.gov.za/Publications/630-Modul...)

National Treasury's PPP Manual and Standardized PPP Provisions (PPP Manual) is issued according to the PFMA and Treasury Regulation 16. They are issued for national and provincial departments, constitutional institutions, and public entities

affected by the PFMA and the Treasury Regulation 16.

82%

**MATCHING BLOCK 80/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

PPP Manual is issued as a PPP Practice Note, in terms of section 76(4) (g) of the PFMA. These PPP practice notes, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations.

The regulations apply to

100%

**MATCHING BLOCK 82/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

all national and provincial government departments; all constitutional institutions listed in schedule 1 to the PFMA;

and,

100%

**MATCHING BLOCK 84/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity. 272 The

regulations do not, however, apply to entities listed in schedule 2 to the PFMA nor Municipalities.

84%

**MATCHING BLOCK 85/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

A PPP is defined as a contract between a public sector institution and a private party, in which the private party assumes the substantial financial, technical and operational risk in the design, financing, building and operation of a project. 273

82%

**MATCHING BLOCK 86/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

Regulation caters for various types of PPPs. It allows such projects to be developed with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets. 274 272

Regulation 1.2.1. Treasury Regulation 16 to the PFMA, (South Africa) 273 Regulation 16.1 (Definitions) Treasury Regulation 16 to the PFMA, (South Africa) 274 South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 5

61 As regards PPP financing, the Regulation does not prescribe any structure with the assumption being that the mode of financing

100%

**MATCHING BLOCK 87/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal.

Nevertheless, all PPPs governed by the Regulation are governed by a three-pronged test: whether

54%

**MATCHING BLOCK 95/148**

W

[https://www.gtac.gov.za/Publications/630-Modul ...](https://www.gtac.gov.za/Publications/630-Modul...)

the institution can afford the deal; whether the PPP is a value for money solution and whether substantial technical, operational and financial risk

shall be transferred to the private party. 275 PPP agreements can only be entered into by the accounting officer or the accounting authority of the institution. The Regulation provides six distinctive stages of PPP project cycle. These stages are project inception, feasibility study, procurement, management, delivery and exit. The Regulation requires that

100%

**MATCHING BLOCK 88/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage.

Further, the Regulations require that those specific treasury approvals are given at various phases of the project cycle. At the project inception stage, the accounting officer or the

**92%**

**MATCHING BLOCK 90/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

accounting authority must in writing register the PPP with the relevant treasury and inform the relevant treasury of the expertise within that institution to proceed with a PPP.

The accounting officer or authority may

**95%**

**MATCHING BLOCK 91/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

appoint a project officer from within or outside the institution and a transaction advisor if the relevant treasury so requests. 276

A feasibility study must be conducted by the accounting officer or authority

**100%**

**MATCHING BLOCK 92/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

to determine whether the proposed PPP is in the best interests of an institution. The

parameters to be met by the study are specified under regulation 16.4.1. (a) – (f). The 275 South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 6 276 Regulation 16.3.1. Treasury Regulation 16 to the PFMA, (South Africa)

62 relevant treasury's approval, according to the feasibility study, is mandatory before the project can move to the procurement phase. The next stage is procurement.

**90%**

**MATCHING BLOCK 93/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

The regulation sets out clear procurement steps that must be followed by institutions and prescribes distinct treasury approvals that must be obtained in this phase. The

procurement procedure must be per

**100%**

**MATCHING BLOCK 94/148**

**W**

[http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

a system that is fair, equitable, transparent, competitive and cost-effective.

**100%**

**MATCHING BLOCK 96/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

All bidders at each stage of a procurement process must have an equal chance of competing for the contract, and no action taken by

the government may prejudice their competitiveness. 277 The relevant treasury's approval will be required before the issuance of the procurement documentation, including the draft PPP Agreement and before appointing the preferred bidder

85%

**MATCHING BLOCK 97/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

after evaluation of bids. To obtain this latter approval, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid. 278

Upon the conclusion of the procurement stage, the relevant treasury's approval must be obtained before the accounting officer or authority concludes a PPP agreement. 279 This approval is meant to assess: (i) whether

100%

**MATCHING BLOCK 98/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as

had been approved at the procurement stage; (ii) that the management plan presented by the 277 South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 9. 278 Regulation 16.5.4. Treasury Regulation 16 to the PFMA, (South Africa) 279 Regulation 16.6.1. Treasury Regulation 16 to the PFMA, (South Africa)

63 institution

92%

**MATCHING BLOCK 99/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and (iii) that satisfactory due diligence including legal, due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party concerning matters of their respective competence and capacity to enter into the PPP agreement. 280

As regards the management phase,

90%

**MATCHING BLOCK 100/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the accounting officer or accounting authority of the institution is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved

by the relevant treasury

94%

**MATCHING BLOCK 101/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

for measuring the outputs of the PPP agreement; monitoring the implementation of the PPP agreement and performances under the PPP agreement; liaising with the private party; resolving disputes and differences with the private party; generally overseeing the day-to-day management of the PPP agreement; and, reporting on the PPP agreement in the institution's annual report. 281

The Regulation provides for the amendment of the PPP Agreements. 282 The relevant treasury's approval is required for any material amendment. This approval will only be granted if the said amendments will ensure

83%

**MATCHING BLOCK 102/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

that the PPP Agreement will continue to provide for: value for money; affordability; and substantial technical, operational and financial risk transfer to the private 280

Regulation 16.6.1 (a), (b) and (c) Treasury Regulation 16 to the PFMA, (South Africa) 281 Regulation 16.7.1. Treasury Regulation 16 to the PFMA, (South Africa) 282 Regulation 16.8. Treasury Regulation 16 to the PFMA, (South Africa)

64 party. The treasury has, however a raft of conditions that must be met by the institution before being exempted. 283 A PPP agreement entered into by an institution is binding to

**65%**

**MATCHING BLOCK 103/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the State only if they were entered into by the accounting officer or accounting authority of that institution and if

the relevant authority granted all treasury approvals required under the Regulation. 284 The Regulation also provides for exemption from compliance with any or all of its provisions. This exemption may be granted upon appropriate terms and conditions by the relevant treasury upon written from an institution. This exemption may be with a specific PPP or a general one in terms of which the institution is exempt. 285 3.4.1.2 Legal Framework for Municipal Governments PPP regulation for municipal governments is provided for under the MFMA, MSA and the Municipal Service Delivery and PPP Guidelines of 2007. a. Municipal Finance Management Act, 2003 (MFMA) Chapter 11 Part, 2 of the MFMA, forms the basis of PPP regulation for municipalities. It provides that a municipality may enter into a public-private partnership agreement if it shows that the agreement will: provide value for money to the municipality;

be affordable for the municipality; and, transfer

**100%**

**MATCHING BLOCK 104/148**

**W**

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

appropriate technical, operational and financial risk to the private party. 286

It is further provided that if the PPP involves the provision of municipal service, 283 South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 12, 13. 284 Regulation 16.9. Treasury Regulation 16 to the PFMA, (South Africa) 285 Regulation 16.10. Treasury Regulation 16 to the PFMA, (South Africa) 286 Section 120 (1), Municipal Finance Management Act (South Africa)

65 Chapter 8 of the MSA must be complied with. 287 A feasibility study must be conducted before a PPP is concluded. 288 Once the feasibility study is concluded, the accounting officer of the municipality is to submit the report to the municipality's council for a decision as to whether the municipality should continue with the PPP. Sixty days before the meeting

**55%**

**MATCHING BLOCK 105/148**

**W**

[http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

of the council, the accounting officer must make public the particulars of the PPP and the feasibility study

report for purposes of public participation. 289 Further, the accounting officer must seek the views of the National Treasury; the National Department responsible for Local Government; if the PPP involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and, any other national or provincial organ of State as may be prescribed. 290 The provisions of the Act relating to supply chain management apply to PPP procurement. 291 Each municipality is required to have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for the municipal supply chain management. 292 The Policy should cover areas concerning the procurement processes that may be used, when a particular procurement process must be used, procedure and mechanism for each process, transparent 287 Section 120 (3). Municipal Finance Management Act (South Africa) 288 Section 120 (4). Municipal Finance Management Act (South Africa) 289 Section 120 (6). Municipal Finance Management Act (South Africa) 290 Section 120 (7). Municipal Finance Management Act (South Africa) 291 Part 1 of Chapter 11 Municipal Finance Management Act (South Africa) 292 Section 111 and 112, Municipal Finance Management Act (South Africa)

66 prequalification process, competitive bidding processes, bid documentation, evaluation of tenders, the participation of stakeholders and public, preventive measures to combat corruption and other malpractices, contract management and dispute settlement. 293 The Act also allows for unsolicited proposals but in a very controlled way. The municipality is not

obliged to consider these bids received outside its normal bidding process. If these bids are to be considered, then they should be handled in strict compliance with a prescribed framework. This framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes. 294 b. Municipal Systems Act, MSA The Act provides for different ways through which a municipality may provide a municipal service in its area or a part of its area including an external mechanism or any other institution, entity or person legally competent to operate a business activity. 295 This envisages engaging a private entity in a PPP set up. Suppose the municipality decides on an external mechanism of service delivery. In that case, it is required to give notice to the local community of its intention to explore the provision of the municipal service through this mechanism. The appropriate mechanism is to be assessed based on the direct and indirect costs and benefits associated with the project, the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service, the views 293 Section 112, Municipal Finance Management Act (South Africa) 294 Section 113, Municipal Finance Management Act (South Africa) 295 Section 76 (b) (v), Municipal Systems Act (South Africa)

67 of the local community, the likely impact on development, job creation and employment patterns in the municipality and the views of organized labour. 296 Once a particular mechanism has been settled upon, a feasibility study must be undertaken along the parameters provided for in the Act. 297 After conducting a feasibility study, the municipality must then conduct a selection process of the service provider which must be fair, equitable, transparent, cost-effective and competitive, and as may be provided for in other applicable national legislation. Further, the process complies with Chapter 11 of the MFMA. 298 Once a prospective bidder has been selected, the municipality is then to negotiate an agreement with the said bidder in strict adherence to the bid documents. The copies of the agreement are to be made available for public inspection. 299 c. Municipal PPP Regulations Section 168(1)(d) of the MFMA provides that the Minister of Finance may, with the concurrence of the Minister for Provincial and Local Government, issue regulations and guidelines regulating the financial commitments of municipalities and municipal entities in terms of public-private partnerships (PPPs). Section 86A of the Municipal Systems Act (2000) (MSA), read together with section 120 (1) and (2) of the Municipal Finance Management Act provide that the Minister for Provincial and Local Government may issue guidelines for 296 Section 78 (3), Municipal Systems Act (South Africa) 297 Section 78 (3) (c), Municipal Systems Act (South Africa) 298 Section 83, Municipal Systems Act (South Africa) 299 Section 84, Municipal Systems Act (South Africa)

68 municipalities when assessing options for the provision of a municipal service, the different categories of municipal services and the different categories of service providers. Accordingly, with effect from 1 April 2005, the Municipal Public-Private Regulations were issued. 300 These Regulations address the PPP provisions in both the MSA and the MFMA and other matters in the MFMA related to the procurement of multi-year PPP agreements. They also define the elements of

**63%**

**MATCHING BLOCK 106/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

a municipal PPP and set out the stages and approvals it will have to go through. 301 The Regulation

does not provide for the financing structure for PPPs with the underlying assumption being

**100%**

**MATCHING BLOCK 107/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

that these will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal. However,

**100%**

**MATCHING BLOCK 108/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding. 302

The Regulation divides the PPP cycle into four phases: project inception, feasibility study, procurement and contract management.

100%

**MATCHING BLOCK 109/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

The PPP project cycle enables the three regulatory tests of affordability, value for money and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement.

Additionally, the views and recommendations of the national treasury and the relevant provincial treasury should be sought at various stages. 300 Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations) 2007. 301 South Africa

70%

**MATCHING BLOCK 110/148**

**W** [https://www.gtac.gov.za/Publications/630-Modul ...](https://www.gtac.gov.za/Publications/630-Modul...)

National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 2. 302 South Africa National Treasury, PPP

Manual, Module 1: South African Regulation for PPPs, 7.

69 At the project inception stage, the accounting officer of the municipality must notify the national treasury and the relevant provincial treasury in writing of the municipality's intention together with the information on the capacity of the municipality to comply with section 120 (1) of the MFMA. Besides, and if he has been requested to do so by the national or the relevant provincial treasury, appoint a competent person as a transaction advisor to assist in the preparation and procurement of PPP agreement. These provisions are made applicable under section 78 (2) of the MSA in the event of a provision of municipal service through an external mechanism to be appointed in terms of a PPP agreement. 303 A feasibility study must then be conducted in terms of section 120 (4) of the MFMA, and other matters to be covered by the survey are provided for in the Regulation. 304 A feasibility study under this provision of the MFMA need not be conducted if the project is a municipal service for which a feasibility study has already been conducted under the MSA. At the procurement stage, the accounting officer must ensure compliance with Part 1 of Chapter 11 of the MFMA. In so doing, the accounting officer

68%

**MATCHING BLOCK 111/148**

**W** [http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

must solicit the views and recommendations of the national and the relevant provincial treasury on the

proposed bid documentation thirty days before bids are publicly invited and on the evaluation of the received bids and of any preferred bidder at least thirty days before any award is made. An award of the PPP agreement must be subject to compliance with section 120 (6) and section 33 of MFMA. 305 Other views and recommendations of the national and the relevant provincial treasuries must be sought on the proposed terms of the draft PPP agreement, the municipality's plan for effective management 303 Regulation 2, Municipal Public-Private Regulations, (South Africa) 304 Regulation 3 (1), Municipal Public-Private Regulations, (South Africa) 305 Regulation 4 (2), Municipal Public-Private Regulations, (South Africa)

70 of the agreement and the preferred bidder's competencies and capacity to comply with its obligations under the agreement. 306 The accounting officer of a municipality is the officer authorized to sign the agreement on behalf of the municipality. 307 3.2.2 Institutional Framework The institutional regulatory framework for PPPs in South Africa is the national and relevant provincial treasuries. The national treasury has been given the duty under the PFMA to formulate regulations and issue practice notes and guidelines for the implementation of public service delivery mechanisms, including PPPs. 308 Consequently, the treasury has formulated the Treasury Regulations 16 to the PFMA that constitute the legal framework for PPP regulation at the national and provincial levels. In order to effectively perform its functions, the PPP Unit of South Africa was established in mid-2000 consisting of five professional staff drawn from both the public and private sectors. This was following the endorsement of a Strategic Framework for PPPs by the cabinet in December 1999 and enactment of the PFMA which was largely influenced by the lessons drawn from pioneering PPP projects conducted from 1997 to 2000 309 and the international experience. The PPP Unit was established under

93%

**MATCHING BLOCK 112/148**

**W** <https://www.gtac.gov.za/>

the Government Technical Advisory Centre (GTAC) which is an agency of the National Treasury, established to support public finance management through professional advisory services, programme and project management and transaction 306

Regulation 4 (3), Municipal Public-Private Regulations, (South Africa) 307 Regulation 6 (1), Municipal Public-Private Regulations, (South Africa) 308 Section 168, Public Finance Management Act, (South Africa). 309 South Africa National Roads Agency for the N3 and N4 toll roads, <https://www.gtac.gov.za/> on 28 September, 2020

71 support. 310 Currently, the PPP Unit consists of seventeen professional staff drawn from at least fourteen sectors who are allocated projects depending upon individual sector expertise and interest. 311 The primary function of the South African PPP unit is to ensure compliance with the legal requirements of affordability, value for money and sufficient risk transfer for every PPP project. To fulfil the abovementioned function, the

78%

**MATCHING BLOCK 128/148**

**W** <https://www.oecd.org/mena/governance/37146964.pdf>

PPP Unit has two broad tasks: to provide technical assistance to government departments, provinces and municipalities

who want to set up and manage PPPs, and to provide national treasury approvals and recommendations during the phases of PPP implementation cycle. 3.2.3 Procedural Framework The critical steps in a municipal PPP project cycle are the inception stage, feasibility study stage, the procurement stage, the PPP contract management stage. 312 At the inception stage, the key steps are the identification of the project, notification of the municipal desk at the national treasury's PPP unit, the provincial treasury, the appointment of the project officer and the project secretariat, assessment of the project budgets, setting up the project team. 313 A project should originate from an integrated development plan which identifies the gaps in municipal services and has a draft plan to eliminate these gaps. 314 Project identification should 310 <https://www.gtac.gov.za/> on 28 September, 2020 311 <http://www.PPP.gov.za/Pages/About.aspx> on 28 September, 2020 312

100%

**MATCHING BLOCK 113/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Project Inception, vii 313

100%

**MATCHING BLOCK 114/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Project Inception, 1 314

100%

**MATCHING BLOCK 115/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Project Inception, 1

72 describe the nature and size of the project, the current municipal budget, projected development costs and the initial list of risks. 315 After that, the National Treasury PPP Unit will assign an internal project adviser to the municipal PPP project. 316 The next stage is the feasibility study stage which provides information about costs, indicates whether the

46%

**MATCHING BLOCK 116/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

costs can be met from within municipal budgets without disruptions to other local projects, identifies, allocates, quantifies and mitigates risks, prompts municipalities to consider how the project will be structured, identifies constraints

that cause the project to be halted and ensures that a proper business plan is developed for the project. 317 The critical steps in this stage are public participation, need analysis, technical and service delivery analysis, project due diligence, full value assessment, simplified value assessment, procurement plan and submission of the feasibility report to the council and the national PPP unit and revisiting the feasibility study report to the council incorporating the council's and the PPP unit's recommendations. 318 The subsequent stage is the procurement stage.

80%

**MATCHING BLOCK 117/148**

**W** [http://pubdocs.worldbank.org/en/91031144829907 ...](http://pubdocs.worldbank.org/en/91031144829907...)

The municipality must solicit the views and recommendations of the National Treasury and the provincial treasury on the

bid documentation at least 30 days before bids are publicly invited. 319 The key processes in this stage in chronological order include issuing a Request for Qualification (RFQ), selecting the 315

100%

**MATCHING BLOCK 118/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Project Inception, 1 316

100%

**MATCHING BLOCK 119/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Project Inception, 6 317

100%

**MATCHING BLOCK 120/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Feasibility Study, 1 318

100%

**MATCHING BLOCK 121/148**

**W** [https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 3: Feasibility Study, 1 319 Sub-regulation 4 (1) (a), Local Government: Municipal Finance Management Act 2003, Municipal Public- Private Partnership Regulations, 1

73 pre-qualified bidders, issuing the Request for Proposals (RFP), selection of preferred bidder, the announcement of the preferred bidder, PPP contract negotiation and signing and financial closure where the conditions precedent in the contract are satisfied. 320 The final stage is the PPP contract management stage. The three primary functions of the PPP contract management are partnership management which is concerned with the

90%

**MATCHING BLOCK 122/148**

**W** [https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

structures of accountability and how the municipality and the private party relate to each other.

The next function is the service delivery management which deals with

100%

**MATCHING BLOCK 123/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the systems and procedures designed to manage risk and performance.

The last function is contract administration function which covers

84%

**MATCHING BLOCK 124/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

the administrative processes required to ensure that all the procedures contained in the contract and all the documentation relating to the contract are effectively managed. 321 3.3.

Nigeria 3.3.1 Legal Framework Nigeria is relevant to this study because it is one of the African countries with a robust and many successful PPPs in the region. It is also the regional economic hub in West Africa and so is Kenya in East Africa. Also, though it has a federal system of governance, most of the provision of core services are decentralized to the state and local governments, which may have some similarities to the devolved governance structure in Kenya. 320

100%

**MATCHING BLOCK 125/148**

W

[https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 5: PPP procurement, 1 321

100%

**MATCHING BLOCK 126/148**

W

[https://ppp-certification.com/ppp-certificatio ...](https://ppp-certification.com/ppp-certificatio...)

National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,

Module 5: PPP procurement, 1

74 The Federal Republic of Nigeria consists of 1 central federal government, 36 state governments and 768 local governments, and each has a Constitutional mandate to develop infrastructure in its territory. 322 The Constitution divides legislative powers between the federal government and state government and lists the exclusive roles of each government. 323 Based on this distribution of legislative powers by the Constitution, the Federal Government and several States in the federation have enacted specific laws regulating PPPs. 324 From the late 1990s, the federal government of Nigeria began to shed some of its responsibility for infrastructure development by increasing private participation in critical sectors of the economy which over the years led to PPPs projects being commissioned. 325 Between 1999 to 2007, Nigeria produced a series of regulatory documents and assessments which led to the legislative implementation of PPPs. 326 The Infrastructure Concession Regulatory Commission Act, 2005 (the 'ICRC Act') was one of the legislations that was passed

96%

**MATCHING BLOCK 127/148**

W

[https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

for the participation of the private sector in financing, construction, development, operation or 322

Werneck B, Saadi M, 'Nigeria' in Onuobia F and Okechukwu J, The Public-Private Partnership Law Review, Law Business Research Ltd, London, 2018, 178-187 323 Section 4 (2) Constitution of the Federal Republic of Nigeria (1999) 324

100%

**MATCHING BLOCK 132/148**

SA

Essay 1305130.pdf (D27838589)

Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', European Procurement & Public Private Partnership Law Review, 7

ed (4), (2012), 268. 325 Werneck B, Saadi M, 'Nigeria' 178 326 Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 18 Washington University Global Studies Law Review, 3, (2019), 701

75

79%

**MATCHING BLOCK 129/148**

**W** [https://su-plus.strathmore.edu/bitstream/handl ...](https://su-plus.strathmore.edu/bitstream/handl...)

maintenance of infrastructure or development projects of the federal government through concession or contractual arrangements. 327 However, the

ICRC Act only applies to federal authorities undertaking federal projects. 328 Thus, each Nigerian State has autonomy over its PPP projects, units, laws and regulations within state borders unless the project requires the federal government's funding. 329 In that regard, some of the states such as Lagos, Ekiti, Rivers, Kogi, and Cross River have enacted their respective PPP laws. 330 For example, in 2007, Lagos State enacted the Lagos State Roads (Private Sector Participation) Authority Law and Lagos State Public Private Partnership Law in 2011. 331 Rivers State enacted the Rivers State Public-Private Participation in Infrastructure Development Law in 2009 and Kogi State's Public-Private Partnership Law was passed in 2014, and the Bureau of Public-Private Partnerships was established in 2016. 332 3.3.2 Institutional Framework At the federal level, the Infrastructure Concession Regulatory Commission is in charge of PPPs, and its essential functions include but are not limited to taking custody of all concession agreements, monitoring compliance of the agreements and ensuring efficient execution of any 327 Memorandum, Infrastructure Concession Regulatory Commission Act, 2005 (Nigeria) 328 Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 703. 329 Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 703. 330 Werneck B, Saadi M, 'Nigeria' 178 331 Werneck B, Saadi M, 'Nigeria' 178 332 Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 704.

76 concession agreement entered into by the federal government. 333 There is also the Bureau of Public Enterprises (BPE) established under the Public Enterprise (Privatisation & Commercialisation) Act, 1999 which is responsible for effecting the privatization or commercialization of government enterprises that use PPP models. 334 For states with PPP-specific laws, all these laws have established a body with the responsibility for PPPs in the State. 335 For example, in Lagos State, the Office of Public Partnerships is in- charge of granting, negotiating, monitoring, approving the budgets and ensuring compliance in all the concession contracts within the State. 336 3.3.3 Procedural Framework At the federal level, the laws that govern PPP procedures are the ICRC Act and the Public Procurement Act, 2007. 337 On the other hand, for the state governments, the bid and award process will differ from the federal process and in each State since the legal framework is different. 338 Nevertheless, on all levels of governance, the procurement process is guided by the same principles of open competitive bidding, promotion of competition, transparency and accountability and the PPP projects at all levels have similar stages in the project cycle. 339 The 333 Werneck B, Saadi M, 'Nigeria' 180 334 Werneck B, Saadi M, 'Nigeria' 181 335 Werneck B, Saadi M, 'Nigeria' 181 336 Werneck B, Saadi M, 'Nigeria' 181 337 Werneck B, Saadi M, 'Nigeria' 182 338 Werneck B, Saadi M, 'Nigeria' 182 339 Werneck B, Saadi M, 'Nigeria' 183.

77 key steps are the procurement preparation phase, prequalification phase, the negotiation and tendering phase, contract close and financial close. 340 3.5 Conclusion In this chapter, a review of the legal, institutional and procedural framework of PPPs in South Africa and Nigeria have been compared with the Kenyan PPP legislative arrangement. Chapter 4 below will analyze the findings, key lessons and best practices from South Africa and Nigeria for PPPs conducted at the local level in Kenya. 340

100%

**MATCHING BLOCK 131/148**

**SA** Essay 1305130.pdf (D27838589)

Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', 276. 78

Chapter 4 Best Practices from South Africa and Nigeria for Conducting Local Public-Private Partnerships. 4.1 Introduction South Africa and Nigeria cumulatively account for almost half of Sub-Saharan Africa's gross domestic product. This can not only be attributed to their large size and population but also the development of their respective economies through infrastructure development. South Africa has the most significant cumulative experience of public-private partnerships in Africa, with over 50 such partnerships in development or implementation at the national or provincial level, and 300 projects at the municipal level, since 1994. On the other hand, Nigeria has a decentralized system of governance like

Kenya does, but it has a more advanced PPP legislative and regulatory framework, especially at the local level. Given the preceding, both of these African countries will have relatable insights on how to implement local PPPs in Kenya.

Therefore, this chapter draws out the key lessons from the legislative frameworks for conducting local PPPs in South Africa and Nigeria vis-à-vis the legislative framework for conducting local PPPs in Kenya and brings out the best practices that Kenya can borrow from these two African jurisdictions. 4.2 Best Practices from South Africa The PPP environment in South Africa was reviewed through an analysis of the provisions of Regulation 16 under the South African Public Finance Management Act and various Regulations issued by the National Treasury in South Africa. In so doing the chapter has

79 discussed the key learning areas which could be borrowed for purposes of law reform and improvement of PPP implementation in Kenya at County government level. South Africa has enacted laws that would apply correctly to municipalities. From the analysis in Chapter 3 of its legislative framework, it is clear that South Africa has an elaborate PPP legal framework specific to the municipalities. These are the MFMA, MSA and the Municipal Service Delivery and PPP Guidelines of 2007. Likewise, Kenya ought to have a PPP legislation that is specific to the counties because their structures of governance are different from those of other public institutions. Secondly, according to the MSA, the feasibility study approvals and the negotiations are done by the Municipality with minimal interference by the national PPP unit. Therefore, though there is a national PPP unit, its role in project identification and negotiation should not be heavily pronounced as it is now in the Kenyan PPP legal landscape. Also, the national PPP unit for South Africa has a municipal desk. Therefore, the Kenya national PPP unit should have a specialized county PPP office to ensure that counties have the requisite support tailored to their unique circumstances and governance structures. Also, the municipalities get their approvals at each stage of the PPP projects from the National PPP unit. Still, the roles of the local officials such as the mayor, executive and non-executive councillors are clearly defined. Therefore, the presence of legal framework and regulations guiding local government regarding PPP has accelerated infrastructure development in South Africa both at National government and Local government. In contrast, Kenya has adopted a single Act to govern all PPP aspects both in the national government and county. There is need for Kenya to have legal framework and regulations guiding county government on adoption and implementation of

80 PPP, like South Africa. This would help in bridging the gap in infrastructure development both at the county level, which will be a step closer in the attainment of Vision 2030. 4.3 Best Practices from Nigeria In Nigeria, all states have the autonomy to enact their own PPP laws and form their own local PPP units. Similarly, County governments in Kenya, through their county assemblies have the constitutional mandate to enact any laws that are necessary for, or incidental to the effective performance of their functions and in the exercise of their powers in the Constitution which would include the provision of key public services and building infrastructure. 341 Therefore, counties should be encouraged to enact their own PPP laws, but this can only be done through amendments to the current PPP laws to have provisions that allow the county governments to come up with their own PPP legislation. As it is at the moment, any PPP law enacted by a county would be rendered obsolete in so far as it contradicts the PPP Act due to the hierarchy of laws provided by the Constitution. 342 Another lesson from the Nigeria PPP legislative regime is that regardless of the autonomy to legislate and to procure for PPPs independently, States that require the federal government support in the form of sovereign guarantee or national government funding are subject to federal government PPP laws. Kenya, may adopt the same concept whereby, counties are allowed to undertake local PPPs without much national government interference if the PPP does not require any sovereign guarantees, national government funding or any other form of national government assistance. 341 Article 185, Constitution of Kenya, (2010) 342 Article 191, Constitution of Kenya, (2010)

81 4.4 Conclusion Kenya ought to revise its legal, institutional, and procedural framework for PPPs to create a specific legal regime for the county governments since they have the constitutional mandate to provide essential infrastructure for their constituents. County governments should also enact their PPP legislation and create their PPP units to oversee local PPPs. This may increase the uptake of PPP projects at the county level in Kenya.

82 Chapter 5 Summary of Findings, Recommendations and Conclusion 5.1 Introduction This final chapter outlines the findings of this author's study based on Chapter 3 and Chapter 4. Proposed, are recommendations in the PPP legal, institutional and procedural framework to address the gaps that exist within the Kenyan county governments legal framework in comparison to the legislative frameworks of South Africa, Nigeria and other international best practices. 5.2 Summary of Findings 5.2.1 Legal and Regulatory Framework Where there are multiple levels of government, there are instances when the higher level of government has a compelling national interest to influence, control and affect the legal framework for the lower level of government. 343 This study's findings illustrate this point in the Kenyan legal and regulatory landscape for PPPs. The Kenya PPP policy, 2011, was enacted right after the new Constitution that created devolution. However, it did not provide for guidelines on how County governments would conduct PPPs. Subsequently, the Public Partnerships Act, 2013 (the 'PPP Act'), the Public-Private Partnerships Regulations, 2014 and the Public-Private

Partnerships (Project Facilitation Fund) Regulations, 2017, were enacted by the National government. These laws did not recognize that County PPPs required their custom 343 <https://ppp-certification.com/ppp-certification-guide/154-framework-sub-national-ppps> on 3 March 2020

83 PPP laws because they were constitutionally mandated to provide critical services through infrastructure development. South Africa has a much more favourable legal regime for local PPP projects than Kenya. The Public Finance Management Act 1999 (PFMA) and the Treasury Regulation 16 govern all PPPs in the country but the Local Government: Municipal Finance Management Act 2003 (MFMA), the Municipal Systems Act 2003 (MSA) and the Municipal PPP Regulations have specific provisions for PPPs implemented at the municipal level to ensure that there are financial accountability and no wastage of public resources at the local level. The MFMA and the MSA set out a governance framework by clearly laying down the responsibilities of the mayor, executive and non-executive councillors and other local officials and the Municipal PPP regulations define the elements of

64%

**MATCHING BLOCK 130/148**

W

[https://www.gtac.gov.za/Publications/1160-PPP% ...](https://www.gtac.gov.za/Publications/1160-PPP%...)

a municipal PPP and set out the stages and approvals it will have to go through. The

national PPP unit is also not very heavily involved in municipal PPPs in comparison to the Kenya PPP unit. Also, this study found that Nigeria, which has a decentralized structure of governance, has given its states and local governments complete autonomy to legislate on PPPs at the local level. The federal government interferes only if the project cuts across more than one State. In Nigeria, the primary legislation for PPPs is the Infrastructure Concession Regulatory Commission Act, 2005, but it only applies to federal authorities undertaking federal projects. Nigerian states self-govern their PPP projects unless the project requires the federal government's funding or support. In both countries, the PPP model of financing is much more prevalent in financing local projects than it is in Kenya, which can be attributed mainly to the independence the local governments have in regulating their PPPs.

84 5.2.2 Institutional Framework In Kenya, all the institutions for PPP implementation and oversight are centralized at the National Treasury. The two principal institutions are the PPP Committee and the PPP Unit. The PPP Committee which is constituted by the principal secretaries in the national ministries supervises and oversees all the other institutions tasked with the implementation of PPP projects at both the national and the county level. The PPP Unit, which is the secretariat and the technical arm of the PPP Committee, provides technical, financial and legal expertise to the PPP Committee. The PPP Unit operates from the National Treasury and is the resource centre for all PPPs in the country. It also assists contracting authorities to design, identify, select, prioritize, appraise, evaluate, and negotiate projects at various stages of a PPP project cycle. There is also a PPP Petition Committee which is tasked with resolution of PPP disputes during the project cycle. In South Africa, like Kenya, there is one central national PPP unit that is based at the national treasury. It is the centre for PPP knowledge and expertise, provides technical assistance to all public institutions at all levels of the PPP cycle and provides PPP training to all industry players. Regulation of PPPs in Nigeria

67%

**MATCHING BLOCK 133/148**

W

[https://www.lexology.com/library/detail.aspx?g ...](https://www.lexology.com/library/detail.aspx?g...)

mostly depends on the approach followed by each State. In cases where PPP enabling legislation is limited to specific types of projects, for example transportation, it is common that the State's department of transportation is charged with the execution and performance of the applicable PPP project. In other States,

the PPP projects would be implemented by more than one state authority.

85 5.2.3 Procedural Framework This study found that all the countries studied, including Kenya, have similar processes and phases in a local PPP project cycle. These phases include the project development and inception phase, the feasibility study phase, the procurement stage and the contract management stage. The critical difference is the approval process. In Kenya and South Africa, at all stages of a PPP project, a contracting authority including a local government must involve, get approval and recommendations from the national PPP Unit at all stages of the PPP project cycle. However, the South African procedural framework is not an ideal example for Kenya since the local governments in South Africa are not entirely independent from the national government like Kenya since South Africa does not have a decentralized system of governance. In Nigeria,

most PPP projects are procured at the state or local level. Some localities and other municipalities, such as city governments or transportation authorities, have traditionally entered into PPPs based on the powers assigned to them under home rule laws or the general powers granted to authorities. 5.3

Conclusion In most instances, infrastructure projects grab the attention of the national government, but infrastructure investment is also critical at the local level. Most local governments customarily have the constitutional mandate to provide essential infrastructure services such as water and electricity, health care, education, urban passenger transport, street lighting, solid waste management, but traditional sources of funds are inadequate and inefficient to meet these needs. Also, the national government, more often than not, will prioritize projects that fit into their agenda or political affiliations. Still, the local governments have a better understanding

86 of what services are of priority for their constituents. They, therefore, should be given the autonomy to procure their PPPs at the local level within the proposed legal parameters. Therefore, private engagement in the provision of public services and infrastructure through PPPs may aid in the delivery of such infrastructure and service requirements and encourage private sector investment at the local level. This study concludes that local PPPs, though smaller, can make a massive difference to people's lives and improve their quality of life more rapidly than national PPPs. Kenya should, therefore, consider the proposed reforms to the legal, institutional and procedural framework for PPPs, which will likely increase the number of PPPs at the local level and expand local infrastructure and in turn the local's quality of life significantly. 5.4 Recommendations 5.4.1 Legal and Regulatory Reforms a. This study recommends amendment of the Public-Private Partnerships Act and its Regulations to limit the contracting authorities under the Act to national government public authorities. The Act should apply to national PPPs only unless there is a compelling public interest for national involvement or collaboration. The effect of this is that County Governments will enact their own PPP Laws that will not be in contradiction with the national laws. However, projects like those affecting ports of entry, interstate highways or infrastructural interests that benefit the entire country shall have national government participation and coordination. b. This study recommends enactment of PPP County Regulations under the Public-Private Partnership Act, which will govern county PPPs that require the national government funding or a national security guarantee.

87 c. This study also recommends that County Governments enact their legal framework for conducting PPPs in their jurisdictions. The counties' legal framework should be in harmony with the national PPP Act but will have consideration for local application. 5.4.2 Institutional Reforms a. This study proposes that each county government should create a PPP unit made of technical and financial experts to act as the resource, capacity and knowledge centre for local PPPs and to be in charge of all the PPPs carried out at the county level. b. This study also recommends that the PPP laws are reviewed to reduce the national PPPs authority and interference in county PPPs c. This study also encourages that County governments combine efforts and carry out infrastructure PPPs that traverse two or more counties such as roads, dams or implement social infrastructure PPPs that could benefit all the counties involved such as hospitals and educational centres. d. The study also recommends that the national PPP unit should provide guidance, training, knowledge transfer and capacity building for County PPP units during a PPP project cycle. This will help ease capacity concerns by the private bidders. 5.4.3 Procedural Reforms a. This study proposes that the county PPP unit should give all the approvals required at all the stages of the county PPPs unless that PPP requires national government funding, national security guarantee or the project traverses more than one county.

88 b. This study also recommends that the national PPP unit should prepare guidelines, compile international best practices and create model agreements and checklists for local PPPs that will be used by the counties for reference when they need to implement their PPPs.

89 6 BIBLIOGRAPHY 6.1 Journals Anwar S, Rehana S and Sayeed A, Empowering States and Provinces or Unshackling Local Governments: Does It Matter for Peace, Order, Good Government, and Growth? 49 The Pakistan Development Review, (2010). Arimoto A, '

Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus'

University of Maiduguri Law Journal (2018). Bailey S and Elliot M, Taking local government seriously: democracy, autonomy and the Constitution, 68 The Cambridge Law Journal, (2009) Bilouseac I and Zaharia P, 'Clarifications on the principle of the autonomy in local public administration, management', 16 Annales Universitatis Apulensis Series Oeconomica,1 (2014) Boardman A, Seimiatycki M and Vining A, 'The theory and evidence concerning public- private partnerships in Canada and elsewhere', 9, The School of Public Policy SPP research papers, University of Calgary, (2016). Chang I, 'Use of public, private partnerships to meet future army needs', RAND Arroyo Center, (1999). Chileshe N, Njau C, Kibichii B, Macharia L, & Kavishe

100%

**MATCHING BLOCK 134/148**

SA 124370.docx (D111642785)

N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' International Journal of Construction Management, (2020), 90

Clark G.L, A theory of local autonomy, 24, Annals of the Association of American Geographers, 2, (1984). Delmon J, Creating a Framework for Public Private Partnership (PPP) Programmes: A Practical Guide for Decision Makers, PPIAF and the World Bank Group, (2015). Farlam P, 'Assessing Public-Private Partnerships in Africa,' 2 The South African Institute of International Affairs, Nepad Policy Focus Series, (2005). Grimsey D and Lewis M, Public Private Partnerships: The Worldwide Revolution in Infrastructure, Edward Elgar Publishing, 2007. Hall D,

100%

**MATCHING BLOCK 135/148**

W [https://www.world-psi.org/sites/default/files/ ...](https://www.world-psi.org/sites/default/files/...)

Why Public-Private Partnerships don't work: The many advantages of the public alternative,

Public Services International (PSI) Research Unit, University of Greenwich, UK, 2015

100%

**MATCHING BLOCK 142/148**

SA Essay 1305130.pdf (D27838589)

Hodge G and Greve C, 'Public – Private Partnerships: An International Performance Review' Public Administration Review-

Journal, (2007). Hodge G, 'Public private partnerships and legitimacy', 55 University of New South Wales Law Journal 29 (3), (2006). Hope R, 'Devolved government and local governance in Kenya: Implementing decentralization underpinned by the 2010 Constitution', 13 African and Asian Studies: Development Practice International, Toronto, Ontario, Canada, (2014). Istrate E and Puentes R, Moving Forward on Public Private Public Partnerships: the U.S and International Experience with PPP Units, (2011).

91 Jooste S and Scott W, Organizations Enabling Public Private Partnerships: An Organization Field Approach, Working Paper 49, Collaboratory for Research on Global Projects, 1(2009). Kyei R and Chan A, 'Review of studies on the

62%

**MATCHING BLOCK 137/148**

SA 124370.docx (D111642785)

Critical Success Factors for Public-Private Partnership (PPP) projects from 1990 to 2013', 33 International Journal of Project Management, (2015).

Laffont J and Martimont

89%

**MATCHING BLOCK 138/148**

W [https://www.iimb.ac.in/sites/default/files/201 ...](https://www.iimb.ac.in/sites/default/files/201...)

D, The Theory of Incentives: The Principal-Agent Model, Princeton University Press, 2002. Martimort D

and Pouyet J, "Build It or Not": Normative and Positive Theories of Public- Private Partnerships, H11, Journal of Economic Literature, (2006). Matey R, 'A comparison of Public-Private Partnerships in Nigeria and South Africa', 18 Washington University Global Studies Law Review, 3, (2019). Mula R, Rai N, Kulkarni V and Singh A, Public-Private Partnership and impact of ICRISAT's pearl millet hybrid parents research, Journal of SAT Agricultural Research 5 (1), 2007 Mustafa A,

90%

**MATCHING BLOCK 139/148**

**W** [https://docplayer.net/20773528-Concept-and-bac ...](https://docplayer.net/20773528-Concept-and-bac...)

Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, Iraq Institute for Economic Reforms (IIER), 2009

100%

**MATCHING BLOCK 147/148**

**SA** Essay 1305130.pdf (D27838589)

Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', European Procurement & Public Private Partnership Law Review, 7

ed (4), (2012). Nwangwu G, 'Does Nigeria need a regulator for

60%

**MATCHING BLOCK 148/148**

**SA** Essay 1305130.pdf (D27838589)

Public-Private Partnerships', 11 European Procurement & Public Private Partnership Law Review, 4 (2016). 92 Odame H and Kangai E, 'Agribusiness public-private partnerships –

A country report of Kenya,' FAO Country Case Studies- Africa, (2013). OECD, 'Subnational Public-Private Partnerships: Meeting Infrastructure Challenges', OECD Multi-Level Governance Studies, OECD Publishing, (2018) Oudot J, Risk-Allocation: Theoretical and Empirical Evidences. Application to Public- Private Partnerships in the Defense Sector, Centre ATOM, University of Paris, 2005. Oloo A, 'Devolution and Democratic Governance: Options in Kenya' in Kibua Tand Mwabu G (eds), Decentralization and Devolution in Kenya: New Approaches, University of Nairobi Press, 2008. Palma A, Leruth L and

100%

**MATCHING BLOCK 141/148**

**W** [https://www.oecd.org/dac/evaluation/IOBstudy37 ...](https://www.oecd.org/dac/evaluation/IOBstudy37...)

Prunier G, 'Towards a Principal-Agent Based Typology of Risks in Public-Private

Partnerships', International Monetary Fund (IMF), (2009). Prussing T, 'Public-Private Partnership Financing in South Africa' Masters in Commerce in Financial Management, University of Capetown, May 2015. Russell A.D, Tawiah P, DeZoysa S, 'Project innovation—a function of procurement mode?', 33 Canadian Journal of Civil Engineering, 12 (2006). Siemiatyacki M, Delivering Transportation Infrastructure through Public Private Partnerships, Journal Note No 224, The World Bank Group, American Planning Association 76 (1) 2000 Solino A, Application of the Agency Theory for the Analysis of Performance Based Mechanisms in Road Management, 13th World Conference on Transport Research, (2010). Soyaju O, 'Legal Framework for Public-Private Partnership in Nigeria,' 46 De Jure 3, (2013).

93 Tang, L., Shen, Q., Cheng, E.W.L, 'A review of studies on public-private partnership projects in the construction industry' International Journal of Project Management, (2010). Tanzania Economic Update: The Road Less Traveled, Unleashing Public Private Partnerships in Tanzania, The World Bank Group, Africa Region Macroeconomics and Fiscal Management Global Practice, May 2016 Torres L, Pina V, Acerete B, Public-Private Partnership in Spanish Local Governments, 4 European Business Organization Law Review, 3 (2003) Uddin M and Zack J, 'Public private partnership projects-what, why & how is risk allocated?' Navigant Construction Forum, (2016). Werneck B, Saadi M, 'Nigeria' in Onuobia F and Okechukwu J, The Public-Private Partnership Law Review, Law Business Research Ltd, London, (2018).

73%

**MATCHING BLOCK 143/148**

**W** [https://pppknowledgelab.org/guide/sections/3-w ...](https://pppknowledgelab.org/guide/sections/3-w...)

Yescombe R, Public-Private Partnerships: Principles of Policy and Finance, Butterworth- Heinemann, (2007) Yong K, Public-Private Partnerships

Policy and Practice: A reference guide, Commonwealth Secretariat, (2010). Zhang X, 'Critical success factors for public-private partnerships in infrastructure development', Journal of Construction Engineering and Management, (2005).

94 6.3 Dissertations Ayoola O, Examining Public Private Partnership in Nigeria: Potentials and Challenges (A case study of some local government areas in Osun State)' B.Sc Thesis, Obafemi Awolowo University, May 2015, Bruchez M, 'Public-

Private Partnerships (PPPs) in South Africa: To what extent are PPPs suitable for the long-term development of infrastructure in South Africa? Master's Thesis, University of Bern, 22 April 2014.

83%

**MATCHING BLOCK 144/148**

**SA** 124370.docx (D111642785)

Diba. H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012.

Kivisto J, Agency Theory as a Framework for the Government-University Relationship, University of Tampere, 1 st June 2007. Lagat E, 'Review of the Policy, Legal and Institutional Framework of Public-Private Partnerships (PPPs) in Kenya,' Master of Laws in International Trade and Investment Law, University of Nairobi, 2018. Prussing T, 'Public-Private Partnership Financing in South Africa' Masters in Commerce in Financial Management, University of Capetown, May 2015.

95 6.4 Internet Sources

90%

**MATCHING BLOCK 145/148**

**SA** 124370.docx (D111642785)

<http://demo.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report- January-2020.pdf>

<https://www.businessdailyafrica.com/analysis/columnists/Kenya-on-right-path-to-undertaking-projects/4259356-4797154-s2sap0/index.html> <https://www.bloomberg.com/news/articles/2017-09-03/worst-may-be-over-as-africa-s-biggest-economies-emerge-from-rut> [http://moad-web.s3.amazonaws.com/heracles-production/054/a90/437/054a904372eb7953f0c545270fe9a77e94e5983013f86bfc16561a05\\_ee55/61-System-of-government-75e046216.pdf](http://moad-web.s3.amazonaws.com/heracles-production/054/a90/437/054a904372eb7953f0c545270fe9a77e94e5983013f86bfc16561a05_ee55/61-System-of-government-75e046216.pdf) <http://countrystudies.us/south-africa/75.htm> <https://www.oecd.org/mena/governance/37146964.pdf> <https://ppp-certification.com/ppp-certification-guide/154-framework-sub-national-ppps> <https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative> <http://kenyalaw.org/kl/index.php?id=6819> [https://www.law.cornell.edu/wex/commerce\\_clause#:~:text=Most%20importantly%2C%20the%20Supreme%20Court,\(1941\)%20and%20Wickard%20v](https://www.law.cornell.edu/wex/commerce_clause#:~:text=Most%20importantly%2C%20the%20Supreme%20Court,(1941)%20and%20Wickard%20v) <https://www.lexology.com/library/detail.aspx?g=>

100%

**MATCHING BLOCK 146/148**

**W** [https://www.lexology.com/library/detail.aspx?g ...](https://www.lexology.com/library/detail.aspx?g=)

d1d1835b-849e-4ded-87a6-fd79b0fc6d54

<https://www.gtac.gov.za/Publications/630-Module%2001.pdf> <https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships>

96 7. APPENDICES 7.1 Similarity Index Report

97 7.2 Ethical Clearance Certificate

## Hit and source - focused comparison, Side by Side

**Submitted text** As student entered the text in the submitted document.  
**Matching text** As the text appears in the source.

<b>2/148</b>	<b>SUBMITTED TEXT</b>	26 WORDS	<b>43% MATCHING TEXT</b>	26 WORDS
<p>SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE IN MASTER OF LAWS (LL.M) STRATHMORE LAW SCHOOL, STRATHMORE UNIVERSITY,</p>		<p>Submitted in partial fulfillment of the requirements for the Master of Laws Degree ( International Financial Law and Regulation) Strathmore Law School, Strathmore University.</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t ...</a></p>				

<b>1/148</b>	<b>SUBMITTED TEXT</b>	34 WORDS	<b>100% MATCHING TEXT</b>	34 WORDS
<p>Declaration I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief,</p>		<p>DECLARATION I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief,</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t ...</a></p>				

<b>7/148</b>	<b>SUBMITTED TEXT</b>	44 WORDS	<b>100% MATCHING TEXT</b>	44 WORDS
<p>thesis contains no material previously published or written by another person except where due reference is made in the thesis itself. © No part of this thesis may be reproduced without the permission of the author and Strathmore University</p>		<p>thesis contains no material previously published or written by another person except where due reference is made in the thesis itself. © No part of this thesis may be reproduced without the permission of the author and Strathmore University.</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t ...</a></p>				

<b>8/148</b>	<b>SUBMITTED TEXT</b>	34 WORDS	<b>47% MATCHING TEXT</b>	34 WORDS
<p>Strathmore Law School, Strathmore University Dr. Peter Kwenjera, Dean, Strathmore Law School, Strathmore University Dr. Bernard Shibwabo, Director, Office of Graduate Studies, Strathmore University</p>		<p>Strathmore Business School Strathmore University. Dr Luis G Franceschi, Dean, Strathmore Law School, Strathmore University. Professor Ruth Kiraka Dean, School of Graduate Studies, Strathmore University.</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t ...</a></p>				

<b>3/148</b>	<b>SUBMITTED TEXT</b>	14 WORDS	<b>83% MATCHING TEXT</b>	14 WORDS
<p>Public-Private Partnership Laws in Kenya          ..... 37 2.4.1 Policy          Statement on Public-Private Partnerships,</p>		<p>Public Private Partnerships in Kenya . 33 3.1          Introduction          .....          ..... 33 3.2 Policy Statement on Public Private          Partnerships 2011 ..... 35 3.3</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>4/148</b>	<b>SUBMITTED TEXT</b>	27 WORDS	<b>76% MATCHING TEXT</b>	27 WORDS
<p>The Public-Private Partnerships Act, 2013          ..... 40 2.4.4 The Public-          Private Partnerships Regulations          ..... 41 2.4.4.1 The Public-Private          Partnerships Regulations, 2014 ..... 41          2.4.4.2 The Public-Private Partnerships (</p>		<p>the Public Private Partnership Regulations, 2014 163          Section 34 of the Public Private Partnership Regulations,          2014 164 Section 55(1) of the Public Private Partnership          Regulations, 2014 165 the Public Private Partnership</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>5/148</b>	<b>SUBMITTED TEXT</b>	32 WORDS	<b>50% MATCHING TEXT</b>	32 WORDS
<p>The Public-Private Partnerships (Amendment) Bill, 2017          ..... 42 2.5 Institutional Framework          ..... 43 2.5.1          The Public-Private Partnership Committee          ..... 43 2.5.2 The Public-Private          Partnership Unit ..... 44          2.5.3 The Public-Private Partnership</p>		<p>the Public Private Partnership Regulations, 2014          163 Section 34 of the Public Private Partnership          Regulations, 2014 164 Section 55(1) of the Public Private          Partnership Regulations, 2014 165 Section 55 (2) of the          Public Private Partnership</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>6/148</b>	<b>SUBMITTED TEXT</b>	22 WORDS	<b>82% MATCHING TEXT</b>	22 WORDS
<p>Public-Private Partnerships Act (No. 15 of 2013) 6. Public-          Private Partnerships (Regulations), (2014) 7. Public-Private          Partnerships (Project Facilitation Fund) Regulations, 2017          8.</p>		<p>Public Private Partnerships Act (Act No. 15 of 2013) 2. The          Public Private Partnerships Regulations, 2014 3. The Public          Private Partnerships Facilitation Fund Regulations, 2017. 1  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>9/148</b>	<b>SUBMITTED TEXT</b>	14 WORDS	<b>100% MATCHING TEXT</b>	14 WORDS
<p>South Africa) 4. National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines. (</p>		<p>South Africa National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]</p>		
<p><b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a></p>				
<b>10/148</b>	<b>SUBMITTED TEXT</b>	23 WORDS	<b>91% MATCHING TEXT</b>	23 WORDS
<p>United Nations Economic Commission for Europe, 'Guidebook on Promoting Good Governance in Public-Private Partnerships', The United Nations, (2008).</p>		<p>United Nations Economic Commission for Europe GUIDEBOOK ON PROMOTING GOOD GOVERNANCE IN PUBLIC-PRIVATE PARTNERSHIPS UNITED NATIONS</p>		
<p><b>W</b> <a href="https://unece.org/DAM/ceci/publications/ppp.pdf">https://unece.org/DAM/ceci/publications/ppp.pdf</a></p>				
<b>16/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>88% MATCHING TEXT</b>	17 WORDS
<p>Republic v Public Private Partnerships Petition Committee &amp; 3 others ex parte APM Terminals [2015] eKLR</p>		<p>Republic vs. Public Private Partnerships Petition Committee &amp; 3 Others ex Parte APM Terminals (2015) eKLR (</p>		
<p><b>W</b> <a href="https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in-...">https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in- ...</a></p>				
<b>11/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>92% MATCHING TEXT</b>	18 WORDS
<p>PFMA Public Finance Management Act PPIAF Public-Private Infrastructure Advisory Facility PPP Public-Private Partnerships RFP Request for Proposals</p>		<p>PFMA Public Finance Management Act PPIAF Public-Private Infrastructure Advisory Facility PPP public-private partnership RA Republic RfP request for proposals</p>		
<p><b>W</b> <a href="https://ppiaf.org/documents/2262/download">https://ppiaf.org/documents/2262/download</a></p>				
<b>12/148</b>	<b>SUBMITTED TEXT</b>	13 WORDS	<b>95% MATCHING TEXT</b>	13 WORDS
<p>are increasingly envisaged as attractive propositions for involving the private sector in</p>		<p>are increasingly envisaged as an attractive proposition for involving the private sector in</p>		
<p><b>W</b> <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf</a></p>				

<b>13/148</b>	<b>SUBMITTED TEXT</b>	9 WORDS	<b>55% MATCHING TEXT</b>	9 WORDS
<p>public-private-partnership/about-public-private-partnerships on 4 November 2020 4  <a href="https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships">https://ppp.worldbank.org/public-private-partnership/about-public-private-partnerships</a></p>				
<p><b>SA</b> Essay 1305130.pdf (D27838589)</p>				

<b>14/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>80% MATCHING TEXT</b>	17 WORDS
<p>As neoliberal limits on government borrowing spread, so too did PPPs. 16 In Europe</p>				
<p>As neoliberal limits on government borrowing spread, so did PPPs – for example in Europe,</p>				
<p><b>W</b> <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a></p>				

<b>15/148</b>	<b>SUBMITTED TEXT</b>	74 WORDS	<b>87% MATCHING TEXT</b>	74 WORDS
<p>encouraged the adoption of PPPs in the 1990s, especially in the water 11</p>				
<p>encouraged the spread of PPPs in the 1990s, especially in the water</p>				
<p><b>W</b> <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a></p>				

<b>19/148</b>	<b>SUBMITTED TEXT</b>	42 WORDS	<b>66% MATCHING TEXT</b>	42 WORDS
<p>Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, Iraq Institute for Economic Reforms (IIER), 2009, 1 15 Mustafa A, Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, 1. 16</p>				
<p>CONCEPT AND BACKGROUND TO PUBLIC PRIVATE PARTNERSHIP (PPP) / PRIVATE FINANCE INITIATIVE (PFI) UK EXPERIENCE - PDF Free Download • Log in • Registration Search for CONCEPT AND BACKGROUND TO PUBLIC PRIVATE PARTNERSHIP (PPP) / PRIVATE FINANCE INITIATIVE (PFI) UK EXPERIENCE •</p>				
<p><b>W</b> <a href="https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-f...">https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-f...</a></p>				

<b>17/148</b>	<b>SUBMITTED TEXT</b>	13 WORDS	<b>100% MATCHING TEXT</b>	13 WORDS
<p>Why Public-Private Partnerships don't work: The many advantages of the public alternative,</p>				
<p>WHY PUBLIC-PRIVATE PARTNERSHIPS DON'T WORK The many advantages of the public alternative</p>				
<p><b>W</b> <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a></p>				

<b>18/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>87% MATCHING TEXT</b>	17 WORDS
<p>which would imply stricter rules for PPPs and a desire to promote privatization in general which</p>		<p>which would require much stricter rules for PPPs – and a desire to promote privatisation in general, which</p>		
<p><b>W</b> <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a></p>				

<b>20/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
<p>governments regulate and ensure the provision of public services to</p>		<p>Governments regulate and ensure the provision of public services to</p>		
<p><b>W</b> <a href="https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_fi...">https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_fi ...</a></p>				

<b>22/148</b>	<b>SUBMITTED TEXT</b>	19 WORDS	<b>96% MATCHING TEXT</b>	19 WORDS
<p>Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012. 21</p>		<p>Diba, H. R. (2012). Critical success factors for public private partnership projects in the Kenyan road sub-sector.</p>		
<p><b>SA</b> 124370.docx (D111642785)</p>				

<b>21/148</b>	<b>SUBMITTED TEXT</b>	19 WORDS	<b>96% MATCHING TEXT</b>	19 WORDS
<p>Diba H 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', 2012. 22</p>		<p>Diba, H. R. (2012). Critical success factors for public private partnership projects in the Kenyan road sub-sector.</p>		
<p><b>SA</b> 124370.docx (D111642785)</p>				

<b>24/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>88% MATCHING TEXT</b>	16 WORDS
<p>Yong K, Public-Private Partnerships Policy and practice: A Reference Guide, Commonwealth Secretariat, 37. 25</p>		<p>Yong, H.K., ed. 2010. Public-Private Partnerships Policy and Practice: A Reference Guide. London: Commonwealth Secretariat.</p>		
<p><b>W</b> <a href="https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership">https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership</a></p>				

<b>25/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>88% MATCHING TEXT</b>	18 WORDS
<p>Yong K, Public-Private Partnerships Policy and practice: A Reference Guide, Commonwealth Secretariat, 37. 5</p>		<p>Yong, H.K., ed. 2010. Public-Private Partnerships Policy and Practice: A Reference Guide. London: Commonwealth Secretariat.</p>		
<p><b>W</b> <a href="https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership">https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership</a></p>				

<b>23/148</b>	<b>SUBMITTED TEXT</b>	27 WORDS	<b>83% MATCHING TEXT</b>	27 WORDS
<p>Diba. H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012, 23. 7</p>		<p>Diba, H. R. (2012). Critical success factors for public private partnership projects in the Kenyan road sub-sector. Nairobi: University Nairobi.</p>		
<p><b>SA</b> 124370.docx (D111642785)</p>				

<b>27/148</b>	<b>SUBMITTED TEXT</b>	37 WORDS	<b>50% MATCHING TEXT</b>	37 WORDS
<p>of 2013) 35 Section 23, Public Private Partnerships Act (No. 15 of 2013) 36 Section 24, Public Private Partnerships Act (No. 15 of 2013) 37 Section 31, Public Private Partnerships Act (No. 15</p>		<p>of the Public-Private Partnership Act No. 5 dated January 18 2013 • Public-Private Partnership Act No. 45 dated June 15 2012 • Public Act No. 28</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>30/148</b>	<b>SUBMITTED TEXT</b>	61 WORDS	<b>38% MATCHING TEXT</b>	61 WORDS
<p>Act (No. 15 of 2013) 39 Section 35, Public Private Partnerships Act (No. 15 of 2013) 40 Section 47, Public Private Partnerships Act (No. 15 of 2013) 41 Section 48, Public Private Partnerships Act (No. 15 of 2013) 42 Section 52, Public Private Partnerships Act (No. 15 of 2013) 43 Section 57, Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (PPP) Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>26/148</b>	<b>SUBMITTED TEXT</b>	2 WORDS	<b>75% MATCHING TEXT</b>	2 WORDS
<p><a href="http://demo.pppunit.go.ke/wpcontent/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf">http://demo.pppunit.go.ke/wpcontent/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf</a></p>		<p><a href="http://www.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf">http://www.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf</a></p>		
<p><b>SA</b> 124370.docx (D111642785)</p>				

<b>28/148</b>	<b>SUBMITTED TEXT</b>	12 WORDS	<b>100% MATCHING TEXT</b>	12 WORDS
Prunier G, 'Towards a Principal-Agent Based Typology of Risks in Public-Private		Prunier, G. (2009), Towards a principal-agent based typology of risks in public-private		
<p><b>W</b> <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf</a></p>				

<b>29/148</b>	<b>SUBMITTED TEXT</b>	10 WORDS	<b>100% MATCHING TEXT</b>	10 WORDS
Towards a Principal-Agent Based Typology of Risks in Public-Private		Towards a principal-agent based typology of risks in public-private		
<p><b>W</b> <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf</a></p>				

<b>31/148</b>	<b>SUBMITTED TEXT</b>	10 WORDS	<b>100% MATCHING TEXT</b>	10 WORDS
Towards a Principal-Agent Based Typology of Risks in Public-Private		Towards a principal-agent based typology of risks in public-private		
<p><b>W</b> <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf</a></p>				

<b>32/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>100% MATCHING TEXT</b>	18 WORDS
D, The Theory of Incentives: The Principal-Agent Model, Princeton University Press, 2002, 84. 16		D. (2009). The theory of incentives: the principal-agent model. Princeton university press. 25.		
<p><b>W</b> <a href="https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partners...">https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partners...</a></p>				

<b>33/148</b>	<b>SUBMITTED TEXT</b>	23 WORDS	<b>56% MATCHING TEXT</b>	23 WORDS
risk should be allocated to the agent to the extent he can manage the risk. Secondly, risk should be allocated to the		risk should be allocated to the party best able to control the likelihood of the risk occurring Secondly, risk should be allocated to the		
<p><b>W</b> <a href="https://smartnet.niua.org/sites/default/files/resources/gnci_v360_ppp_infra_framework_detailed.pdf">https://smartnet.niua.org/sites/default/files/resources/gnci_v360_ppp_infra_framework_detailed.pdf</a></p>				

<b>34/148</b>	<b>SUBMITTED TEXT</b>	31 WORDS	<b>46% MATCHING TEXT</b>	31 WORDS
<p>Public-Private Partnerships in Africa', 33 86 Farlam, 'Assessing Public-Private Partnerships in Africa', i. 87 Farlam, 'Assessing Public-Private Partnerships in Africa', i. 88 Farlam, 'Assessing Public-Private Partnerships in</p>		<p>Public-private partnerships in Canada • Public-private partnerships in India • Public-private partnerships in the United States • Public-private partnership in</p>		
<p><b>W</b> <a href="https://en.wikipedia.org/wiki/Public%E2%80%93private_partnership_unit">https://en.wikipedia.org/wiki/Public%E2%80%93private_partnership_unit</a></p>				

<b>35/148</b>	<b>SUBMITTED TEXT</b>	23 WORDS	<b>73% MATCHING TEXT</b>	23 WORDS
<p>Public private partnerships and legitimacy', 318 93 Hodge and Greve, 'Public – Private Partnerships: An International Performance Review', 546 94</p>				
<p><b>SA</b> Essay 1305130.pdf (D27838589)</p>				

<b>37/148</b>	<b>SUBMITTED TEXT</b>	32 WORDS	<b>96% MATCHING TEXT</b>	32 WORDS
<p>Facing the dearth of infrastructure funding, an increasing number of countries, notably emerging markets and developing economies (EMDE), are turning to Public-Private Partnerships (PPPs) to tap private capital. 98</p>		<p>Facing the dearth of infrastructure funding, an increasing number of countries, notably emerging markets and developing economies (EMDE), are turning to Public-Private Partnerships (PPPs) in order to tap private capital.</p>		
<p><b>W</b> <a href="https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative">https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative</a></p>				

<b>38/148</b>	<b>SUBMITTED TEXT</b>	33 WORDS	<b>56% MATCHING TEXT</b>	33 WORDS
<p>South Africa, Nigeria and Kenya 99 which account for 48% of the 335 total PPP infrastructure projects in the Sub-Saharan region in the past 25 years. 100</p>		<p>South Africa, Nigeria, Kenya, and Uganda. Together these account for 48% of the 335 total PPP infrastructure projects in the region in the past 25 years. In the past five years,</p>		
<p><b>W</b> <a href="https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative">https://blogs.worldbank.org/ppps/infrastructure-africa-s-development-ppp-imperative</a></p>				

<b>39/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>100% MATCHING TEXT</b>	17 WORDS
<p>Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus' 5 21</p>				
<p><b>SA</b> 5IJ09SS28340.doc (D112397500)</p>				

<b>36/148</b>	<b>SUBMITTED TEXT</b>	19 WORDS	<b>83% MATCHING TEXT</b>	19 WORDS
Public Private Partnership (PPP) Programmes, 5. 105 The United Nations Economic Commission for Europe, 29. 106		Public-Private Partnership (PPP) Alliance of the United Nations Economic Commission for Europe (		
<b>W</b> <a href="https://unece.org/DAM/ceci/publications/ppp.pdf">https://unece.org/DAM/ceci/publications/ppp.pdf</a>				

<b>54/148</b>	<b>SUBMITTED TEXT</b>	26 WORDS	<b>83% MATCHING TEXT</b>	26 WORDS
First Medium Term Plan (2008 – 2012) and the Second Medium Term Plan (2013 – 2017). 114 The first Medium Term Plan (2008-2012)		First Medium Term Plan 2008-2012 and the Second Medium Term plan 2013-2017. The Vision and Second Medium Term Plan		
<b>W</b> <a href="https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf">https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf</a>				

<b>40/148</b>	<b>SUBMITTED TEXT</b>	25 WORDS	<b>100% MATCHING TEXT</b>	25 WORDS
N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' International Journal of Construction Management, (2020), 1. 119		N. (2020). Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya. International Journal of Construction Management.		
<b>SA</b> 124370.docx (D111642785)				

<b>41/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>100% MATCHING TEXT</b>	18 WORDS
Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 120		Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya.		
<b>SA</b> 124370.docx (D111642785)				

<b>42/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>100% MATCHING TEXT</b>	18 WORDS
Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 121		Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya.		
<b>SA</b> 124370.docx (D111642785)				

<b>43/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>100% MATCHING TEXT</b>	18 WORDS
	Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 1 123		Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya.	
	<b>SA</b> 124370.docx (D111642785)			
<b>44/148</b>	<b>SUBMITTED TEXT</b>	20 WORDS	<b>100% MATCHING TEXT</b>	20 WORDS
	Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' 2 25		Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya.	
	<b>SA</b> 124370.docx (D111642785)			
<b>45/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>91% MATCHING TEXT</b>	17 WORDS
	Yescombe R, Public-Private Partnerships: Principles of Policy and Finance, Butterworth-Heinemann, (2007) 47. 27		Yescombe, E.R. 2007. Public-Private Partnerships: Principles of Policy and Finance. Oxford: Butterworth-Heinemann.	
	<b>W</b> <a href="https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership">https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership</a>			
<b>46/148</b>	<b>SUBMITTED TEXT</b>	38 WORDS	<b>87% MATCHING TEXT</b>	38 WORDS
	Article 202, Constitution of Kenya (2010) 134 Article 203 (1), Constitution of Kenya (2010) 135 Article 203 (2), Constitution of Kenya (2010) 136 Article 204 (2), Constitution of Kenya (2010) 33		Article 1, Constitution of Kenya (2010) 4 Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) 3	
	<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>			
<b>61/148</b>	<b>SUBMITTED TEXT</b>	27 WORDS	<b>47% MATCHING TEXT</b>	27 WORDS
	county government, except money reasonably excluded by an Act of Parliament. 137 Along with the fiscal transfers from the national government, a county government		county governments, except money reasonably excluded by an act of Parliament. The money shall be withdrawn from the Revenue Fund of a county government	
	<b>W</b> <a href="https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf">https://www.tralac.org/images/docs/7848/kam-economic-and-legal-policy-guidebook-2015.pdf</a>			

<b>47/148</b>	<b>SUBMITTED TEXT</b>	35 WORDS	<b>87% MATCHING TEXT</b>	35 WORDS
<p>Article 206, Constitution of Kenya (2010) 138 Article 209 (3), Constitution of Kenya (2010) 139 Article 212, Constitution of Kenya (2010) 140 Article 212, Constitution of Kenya (2010) 141</p>		<p>Article 1, Constitution of Kenya (2010) 4 Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) 3  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>48/148</b>	<b>SUBMITTED TEXT</b>	36 WORDS	<b>87% MATCHING TEXT</b>	36 WORDS
<p>Article 176, Constitution of Kenya (2010) 154 Article 179(4), Constitution of Kenya (2010) 155 Article 180, Constitution of Kenya (2010) 156 Article 180 (6), Constitution of Kenya (2010) 36</p>		<p>Article 1, Constitution of Kenya (2010) 4 Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) 3  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>49/148</b>	<b>SUBMITTED TEXT</b>	36 WORDS	<b>87% MATCHING TEXT</b>	36 WORDS
<p>Article 177, Constitution of Kenya (2010) 158 Article 178 (2), Constitution of Kenya (2010) 159 Article 185 (2), Constitution of Kenya (2010) 160 Article 185 (3), Constitution of Kenya (2010) 161</p>		<p>Article 1, Constitution of Kenya (2010) 4 Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) 3  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>50/148</b>	<b>SUBMITTED TEXT</b>	49 WORDS	<b>57% MATCHING TEXT</b>	49 WORDS
<p>Article 185 (4), Constitution of Kenya (2010) 162 Article 179 (1), Constitution of Kenya (2010) 163 Article 179 (2), Constitution of Kenya (2010) 164 Article 179 (3), Constitution of Kenya (2010) 37 accountable to the county governor for the performance of the</p>		<p>Article 1, Constitution of Kenya (2010) 4 Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) P a g e account for the exercise of the</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>51/148</b>	<b>SUBMITTED TEXT</b>	12 WORDS	<b>83% MATCHING TEXT</b>	12 WORDS
<p>Public-Private Partnership Laws in Kenya 2.4.1 Policy Statement on Public-Private Partnerships,</p>		<p>Public Private Partnerships in Kenya . 33 3.1 Introduction ..... ..... 33 3.2 Policy Statement on Public Private Partnerships 2011 ..... 35 3.3</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>52/148</b>	<b>SUBMITTED TEXT</b>	28 WORDS	<b>83% MATCHING TEXT</b>	28 WORDS
<p>Article 179 (6), Constitution of Kenya (2010) 166 Article 183 (3), Constitution of Kenya (2010) 167 Article 183 (1), Constitution of Kenya (2010) 168</p>		<p>Article 10, Constitution of Kenya (2010) 5 Article 10 (2) (a), (c) and (d), Constitution of Kenya (2010) 6 Article 201, Constitution of Kenya (2010) 3  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>53/148</b>	<b>SUBMITTED TEXT</b>	38 WORDS	<b>85% MATCHING TEXT</b>	38 WORDS
<p>Government of Kenya PPP Policy Statement, 2011, ii 169            Government of Kenya PPP Policy Statement, 2011, ii 170            Government of Kenya PPP Policy Statement, 2011, ii 171            Government of Kenya PPP Policy Statement, 2011,</p>		<p>Government of Kenya PPP Policy Statement 135 Section 3.4 (i) Government of Kenya PPP Policy Statement 136 Section 3.4 (ii) Government of Kenya PPP Policy Statement. 137 Section 3.4 (iii-vi) Government of Kenya PPP Policy Statement. 37  </p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>55/148</b>	<b>SUBMITTED TEXT</b>	32 WORDS	<b>76% MATCHING TEXT</b>	32 WORDS
<p>Government of Kenya PPP Policy Statement, 2011, ii 173            Government of Kenya PPP Policy Statement, 2011, 8 174            Article 4, Constitution of Kenya (2010) 39</p>		<p>Government of Kenya PPP Policy Statement 136 Section 3.4 (ii) Government of Kenya PPP Policy Statement. 137 Section 3.4 (vi) Government Kenya</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>56/148</b>	<b>SUBMITTED TEXT</b>	37 WORDS	<b>50% MATCHING TEXT</b>	37 WORDS
<p>the PPP Act shall not be subjected to its provisions. 183            The PPP Act allows the private sector to participate in the financing, construction, development, operation, or maintenance of infrastructure or development projects of</p>		<p>the PPP Act is to provide for the participation of the private sector in the financing, construction, development operation, or maintenance of infrastructure or development projects of</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>57/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>86% MATCHING TEXT</b>	16 WORDS
<p>The Public-Private Partnerships Regulations 2.4.4.1 The Public-Private Partnerships Regulations, 2014 The Public-Private Partnerships Regulations, 2014 (</p>		<p>the Public Private Partnership Regulations, 2014 163 Section 34 of the Public Private Partnership Regulations, 2014 164 Section 55(1) of the Public Private Partnership Regulations, 2014 165</p>		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

58/148	SUBMITTED TEXT	26 WORDS	59% MATCHING TEXT	26 WORDS
	of fewer than eighty-five million shillings or a county government project with a contract value of fewer than five million shillings. 186 2.4.4.2			of less than eighty-five (85) million Kenyan shillings or a county government project that has a capital expenditure of more than five (5) million Kenyan shillings. 157
	<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>			

59/148	SUBMITTED TEXT	22 WORDS	87% MATCHING TEXT	22 WORDS
	Public Private Partnerships Act (Act No.15 of 2013) 186 Regulation 2, Public Private Partnerships (Regulations), (2014) 42			Public Private Partnerships Act (Act No. 15 of 2013) 2. The Public Private Partnerships Regulations, 2014 3.
	<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>			

60/148	SUBMITTED TEXT	35 WORDS	54% MATCHING TEXT	35 WORDS
	Public Private Partnerships Act (Act No.15 of 2013) 188 Section 68 (2), Public Private Partnerships Act (Act No.15 of 2013) 189 Regulation, Public Private Partnerships (Project Facilitation Fund) Regulations, 2017 190			Public Private Partnerships Act (Act No. 15 of 2013) 2. The Public Private Partnerships Regulations, 2014 3. The Public Private Partnerships Facilitation Fund Regulations, 2017. 1
	<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>			

72/148	SUBMITTED TEXT	14 WORDS	84% MATCHING TEXT	14 WORDS
	each project is consistent with the provisions of the PPP Act and the			each project agreement is consistent with the provisions of the PPP Act. The
	<b>W</b> <a href="https://www.oraro.co.ke/tag/procurement-and-construction/">https://www.oraro.co.ke/tag/procurement-and-construction/</a>			

62/148	SUBMITTED TEXT	28 WORDS	52% MATCHING TEXT	28 WORDS
	Public Private Partnerships Act (Act No.15 of 2013) 196 Section 8, Public Private Partnerships Act (Act No.15 of 2013) 197 Section 7, Public Private Partnerships			Public Private Partnerships Act (Act No. 15 of 2013) 2. The Public Private Partnerships Regulations, 2014 3. The Public Private Partnerships
	<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>			

<b>63/148</b>	<b>SUBMITTED TEXT</b>	30 WORDS	<b>52% MATCHING TEXT</b>	30 WORDS
Public Private Partnerships Act (Act No.15 of 2013) 199 Section 55, Public Private Partnerships Act (Act No.15 of 2013) 200 Section 11 & 12, Public Private Partnerships		Public Private Partnerships Act (Act No. 15 of 2013) 2. The Public Private Partnerships Regulations, 2014 3. The Public Private Partnerships		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>64/148</b>	<b>SUBMITTED TEXT</b>	59 WORDS	<b>37% MATCHING TEXT</b>	59 WORDS
Act No.15 of 2013) 205 Section 16, Public Private Partnerships Act (Act No.15 of 2013) 206 Regulation 8 (2) Public Private Partnerships (Regulations), 2014 207 Section 17, Public Private Partnerships Act (Act No.15 of 2013) 208 Section 17, Public Private Partnerships Act (Act No.15 of 2013) 209 Section 17 (2), Public Private Partnerships		Act No. 9 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (PPP) Policy • Public-Private Partnership Act, 2010 • Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...</a></p>				

<b>65/148</b>	<b>SUBMITTED TEXT</b>	107 WORDS	<b>39% MATCHING TEXT</b>	107 WORDS
PPP Unit 210 Section 67 (1), Public Private Partnerships Act (Act No.15 of 2013) 211 Regulation 60 (1) (e), Public Private Partnerships (Regulations), 2014 212 Section 67 (2), Public Private Partnerships Act (Act No.15 of 2013) 213 Section 67 (3), Public Private Partnerships		PPP development 162 Section 16 (2) Public Private Partnership Regulations, 2014 163 Section 34 of the Public Private Partnership Regulations, 2014 164 Section 55(1) of the Public Private Partnership Regulations, 2014 165 Section 55 (2) of the Public Private Partnership		
<p><b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a></p>				

<b>66/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>89% MATCHING TEXT</b>	18 WORDS
in Republic v Public Private Partnerships Petition Committee & 3 others ex parte APM Terminals [2015] eKLR		in Republic vs. Public Private Partnerships Petition Committee & 3 Others ex Parte APM Terminals (2015) eKLR (		
<p><b>W</b> <a href="https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in-...">https://chambers.com/articles/a-matter-of-competing-principles-confidentiality-and-disclosure-in-...</a></p>				

<b>67/148</b>	<b>SUBMITTED TEXT</b>	58 WORDS	<b>36% MATCHING TEXT</b>	58 WORDS
<p>Act No.15 of 2013) 216 Regulation 60 (2), Public Private Partnerships Act (Act No.15 of 2013) 217 Section 2, Public Private Partnerships Act (Act No.15 of 2013) 218 Section 23, Public Private Partnerships Act (Act No.15 of 2013) 219 Regulation 11, Public Private Partnerships (Regulations), 2014 220 Section 24, Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated December 21, 2011 • Public Private Partnership Act Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (PPP) Policy • Public-Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>68/148</b>	<b>SUBMITTED TEXT</b>	62 WORDS	<b>30% MATCHING TEXT</b>	62 WORDS
<p>Act No.15 of 2013) 222 Section 20, Public Private Partnerships Act (Act No.15 of 2013) 223 Section 33 (2), Public Private Partnerships Act (Act No.15 of 2013) 224 Section 34, Public Private Partnerships Act (Act No.15 of 2013) 225 Section 35 (4), Public Private Partnerships Act (Act No.15 of 2013) 226 Section 37, Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>69/148</b>	<b>SUBMITTED TEXT</b>	67 WORDS	<b>30% MATCHING TEXT</b>	67 WORDS
<p>Act No.15 of 2013) 228 Section 39 (2), &amp; Section 40 (1), Public Private Partnerships Act (Act No.15 of 2013) 229 Section 41, Public Private Partnerships Act (Act No.15 of 2013) 230 Section 42, Public Private Partnerships Act (Act No.15 of 2013) 231 Section 43 (1), Public Private Partnerships Act (Act No.15 of 2013) 232 Section 43 (2), Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (PPP) Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>70/148</b>	<b>SUBMITTED TEXT</b>	61 WORDS	<b>30% MATCHING TEXT</b>	61 WORDS
<p>Act No.15 of 2013) 234 Section 47(2), Public Private Partnerships Act (Act No.15 of 2013) 235 Section 44 (2), Public Private Partnerships Act (Act No.15 of 2013) 236 Section 48, Public Private Partnerships Act (Act No.15 of 2013) 237 Section 49, Public Private Partnerships Act (Act No.15 of 2013) 238 Section 52, Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>71/148</b>	<b>SUBMITTED TEXT</b>	65 WORDS	<b>30% MATCHING TEXT</b>	65 WORDS
<p>Act No.15 of 2013) 240 Section 52 (4), Public Private Partnerships Act (Act No.15 of 2013) 241 Section 53 (1), Public Private Partnerships Act (Act No.15 of 2013) 242 Section 53 (2), Public Private Partnerships Act (Act No.15 of 2013) 243 Section 53 (4), Public Private Partnerships Act (Act No.15 of 2013) 244 Section 54 (1), Public Private Partnerships</p>		<p>Act No. 9 of 2011 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>74/148</b>	<b>SUBMITTED TEXT</b>	29 WORDS	<b>44% MATCHING TEXT</b>	29 WORDS
<p>publish in two local dailies of national circulation and online the results of the tender together with the nature, scope, successful bidder, project costs at net present value,</p>		<p>publish in at least two newspapers of national circulation and in the electronic media the results of the tender, as well as information on the nature and scope of the project, the successful bidder, project cost at net present value,</p>		
<p><b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a></p>				

<b>75/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>87% MATCHING TEXT</b>	16 WORDS
<p>project value and tariff and the duration of the project. 250 Once the</p>		<p>project value and tariff, and the duration of the project. The</p>		
<p><b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a></p>				

<b>73/148</b>	<b>SUBMITTED TEXT</b>	58 WORDS	<b>40% MATCHING TEXT</b>	58 WORDS
<p>Act No.15 of 2013) 247 Section 59, Public Private Partnerships Act (Act No.15 of 2013) 248 Regulation 50 (2), Public Private Partnerships (Regulations), 2014 249 Regulation 50 (1), Public Private Partnerships (Regulations), 2014 250 Section 57 &amp; 60, Public Private Partnerships Act (Act No.15 of 2013) 251 Regulation 6, Public Private Partnerships (</p>		<p>Act No. 9 dated December 21, 2011 • Public Private Partnership Act Regulations Supplement No. 17 dated June 3, 2011 • National Public Private Partnership (PPP) Policy • Public-Private Partnership Act, 2010 • Public-Private Partnership Act Regulations, 2015 Commentaries: • Public Private Partnerships</p>		
<p><b>W</b> <a href="https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi...">https://ppp.worldbank.org/public-private-partnership/legislation-regulation/laws/ppp-and-concessi ...</a></p>				

<b>77/148</b>	<b>SUBMITTED TEXT</b>	13 WORDS	<b>100% MATCHING TEXT</b>	13 WORDS
	system which is fair, equitable, transparent, competitive and cost-effective. 268		system which is fair, equitable, transparent, competitive and cost-effective.	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>76/148</b>	<b>SUBMITTED TEXT</b>	19 WORDS	<b>75% MATCHING TEXT</b>	19 WORDS
	National Treasury issued the National Treasury PPP Practice Note Number 02 of 2004 'South African Regulations for PPPs' (		National Treasury' s PPP National Treasury PPP Practice Note Number 02 of 2004 see South African Regulations for PPPs (	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>78/148</b>	<b>SUBMITTED TEXT</b>	35 WORDS	<b>92% MATCHING TEXT</b>	35 WORDS
	are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates. 270 These officials, therefore, need to evaluate value- for-money choices		are directly accountable to Parliament or the provincial legislature for the effective and efficient management of their budgets to achieve their public mandates. These responsible officials need constantly to evaluate value-for-money choices.	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>83/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>96% MATCHING TEXT</b>	17 WORDS
	and allocating risks to the party best able to manage them. As a mechanism of delivery,		and efficiencies • allocating risks to the party best able to manage them. As a mechanism of delivery,	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>81/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>100% MATCHING TEXT</b>	16 WORDS
	a PPP is firmly in line with the intent of the PFMA. 271		a PPP is firmly in line with the intent of the PFMA.	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>79/148</b>	<b>SUBMITTED TEXT</b>	18 WORDS	<b>61% MATCHING TEXT</b>	18 WORDS
	The Regulation defines PPPs and set out the phases and tests they will have to go through.		the PFMA defines a PPP, and sets out the phases and tests it will have to go through.	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			

<b>89/148</b>	<b>SUBMITTED TEXT</b>	34 WORDS	<b>57% MATCHING TEXT</b>	34 WORDS
<p>National Treasury's PPP Manual and Standardized PPP Provisions (PPP Manual) is issued according to the PFMA and Treasury Regulation 16. They are issued for national and provincial departments, constitutional institutions, and public entities</p>		<p>National Treasury's PPP Manual and Standardised PPP Provisions are founded the PFMA and Treasury Regulation 16, and have been produced for national and provincial departments, constitutional institutions, and public entities</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/630-Module%2001.pdf">https://www.gtac.gov.za/Publications/630-Module%2001.pdf</a></p>				

<b>80/148</b>	<b>SUBMITTED TEXT</b>	44 WORDS	<b>82% MATCHING TEXT</b>	44 WORDS
<p>PPP Manual is issued as a PPP Practice Note, in terms of section 76(4) (g) of the PFMA. These PPP practice notes, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations.</p>		<p>PPP Provisions, is issued by National Treasury as a PPP Practice Note, in terms of section 76(4)(g) of the PFMA. These PPP practice notes, which will be updated from time to time, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations.</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				

<b>82/148</b>	<b>SUBMITTED TEXT</b>	17 WORDS	<b>100% MATCHING TEXT</b>	17 WORDS
<p>all national and provincial government departments; all constitutional institutions listed in schedule 1 to the PFMA;</p>		<p>all national and provincial government departments • all constitutional institutions listed in schedule 1 to the PFMA</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				

<b>84/148</b>	<b>SUBMITTED TEXT</b>	30 WORDS	<b>100% MATCHING TEXT</b>	30 WORDS
<p>all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity. 272 The</p>		<p>all national and provincial public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity. The</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				

<b>85/148</b>	<b>SUBMITTED TEXT</b>	43 WORDS	<b>84% MATCHING TEXT</b>	43 WORDS
<p>A PPP is defined as a contract between a public sector institution and a private party, in which the private party assumes the substantial financial, technical and operational risk in the design, financing, building and operation of a project. 273</p>		<p>A PPP is a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project. 4</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				

86/148	SUBMITTED TEXT	106 WORDS	82% MATCHING TEXT	106 WORDS
	Regulation caters for various types of PPPs. It allows such projects to be developed with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets. 274 272		Regulation 16 caters for a wide variety of PPP types. It allows such projects to be developed in South Africa with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets.	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

87/148	SUBMITTED TEXT	28 WORDS	100% MATCHING TEXT	28 WORDS
	will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal.		will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal.	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

95/148	SUBMITTED TEXT	24 WORDS	54% MATCHING TEXT	24 WORDS
	the institution can afford the deal; whether the PPP is a value for money solution and whether substantial technical, operational and financial risk		the institution afford the deal? • Is it a value-for-money solution? • Is substantial technical, operational and financial risk	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/630-Module%2001.pdf">https://www.gtac.gov.za/Publications/630-Module%2001.pdf</a></p>			

88/148	SUBMITTED TEXT	19 WORDS	100% MATCHING TEXT	19 WORDS
	the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage.		the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

90/148	SUBMITTED TEXT	29 WORDS	92% MATCHING TEXT	29 WORDS
	accounting authority must in writing register the PPP with the relevant treasury and inform the relevant treasury of the expertise within that institution to proceed with a PPP.		accounting authority must in writing – (a) register the PPP with the relevant treasury; (b) inform the relevant treasury of the expertise within that institution to proceed with a PPP; (	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

<b>91/148</b>	<b>SUBMITTED TEXT</b>	24 WORDS	<b>95% MATCHING TEXT</b>	24 WORDS
<p>appoint a project officer from within or outside the institution and a transaction advisor if the relevant treasury so requests. 276</p>		<p>appoint a project officer from within or outside the institution; and (d) appoint a transaction advisor if the relevant treasury so requests.</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>92/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>100% MATCHING TEXT</b>	16 WORDS
<p>to determine whether the proposed PPP is in the best interests of an institution. The</p>		<p>To determine whether the proposed PPP is in the best interests of an institution, the</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>93/148</b>	<b>SUBMITTED TEXT</b>	27 WORDS	<b>90% MATCHING TEXT</b>	27 WORDS
<p>The regulation sets out clear procurement steps that must be followed by institutions and prescribes distinct treasury approvals that must be obtained in this phase. The</p>		<p>The regulation sets out clear PPP procurement steps that must be followed by institutions, and prescribes distinct treasury approvals that must be obtained in this phase. The</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>94/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
<p>a system that is fair, equitable, transparent, competitive and cost-effective.</p>		<p>a system that is fair, equitable, transparent, competitive, and cost-effective. 268</p>		
<p><b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a></p>				
<b>96/148</b>	<b>SUBMITTED TEXT</b>	25 WORDS	<b>100% MATCHING TEXT</b>	25 WORDS
<p>All bidders at each stage of a procurement process must have an equal chance of competing for the contract, and no action taken by</p>		<p>all bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				

97/148	SUBMITTED TEXT	60 WORDS	85% MATCHING TEXT	60 WORDS
	after evaluation of bids. To obtain this latter approval, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid. 278		After the evaluation of the bids, but prior to appointing the preferred the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

98/148	SUBMITTED TEXT	21 WORDS	100% MATCHING TEXT	21 WORDS
	the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as		the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

99/148	SUBMITTED TEXT	68 WORDS	92% MATCHING TEXT	68 WORDS
	explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and (iii) that satisfactory due diligence including legal, due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party concerning matters of their respective competence and capacity to enter into the PPP agreement. 280		explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and (c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement. 16.6.2	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

100/148	SUBMITTED TEXT	36 WORDS	90% MATCHING TEXT	36 WORDS
	the accounting officer or accounting authority of the institution is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved		The accounting officer or accounting authority of the institution that is party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

<b>101/148</b>	<b>SUBMITTED TEXT</b>	58 WORDS	<b>94% MATCHING TEXT</b>	58 WORDS
	for measuring the outputs of the PPP agreement; monitoring the implementation of the PPP agreement and performances under the PPP agreement; liaising with the private party; resolving disputes and differences with the private party; generally overseeing the day-to-day management of the PPP agreement; and, reporting on the PPP agreement in the institution's annual report. 281		for – (a) measuring the outputs of the PPP agreement; (b) monitoring the implementation of the PPP agreement and performances under the PPP agreement; (c) liaising with the private party; (d) resolving disputes and differences with the private party; (e) generally overseeing the day-to-day management of the PPP agreement; and (f) reporting on the PPP agreement in the institution's annual report. 16.7.2	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>102/148</b>	<b>SUBMITTED TEXT</b>	86 WORDS	<b>83% MATCHING TEXT</b>	86 WORDS
	that the PPP Agreement will continue to provide for: value for money; affordability; and substantial technical, operational and financial risk transfer to the private 280		that the PPP agreement, if so amended, will continue to provide – (a) value for money; (b) affordability; and (c) substantial technical, operational and financial risk transfer to the private	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>103/148</b>	<b>SUBMITTED TEXT</b>	21 WORDS	<b>65% MATCHING TEXT</b>	21 WORDS
	the State only if they were entered into by the accounting officer or accounting authority of that institution and if		the state only if the agreement was entered into on behalf of an institution – (a) by the accounting officer or accounting authority of that institution; and (b) if	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>104/148</b>	<b>SUBMITTED TEXT</b>	14 WORDS	<b>100% MATCHING TEXT</b>	14 WORDS
	appropriate technical, operational and financial risk to the private party. 286		appropriate technical,operational and financial risk to the private party •	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			
<b>105/148</b>	<b>SUBMITTED TEXT</b>	19 WORDS	<b>55% MATCHING TEXT</b>	19 WORDS
	of the council, the accounting officer must make public the particulars of the PPP and the feasibility study		of the MSA, the accounting officer must: ? Publicly disclose the particulars of the proposed PPP, including the report on the feasibility study ?	
	<b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a>			

<b>106/148</b>	<b>SUBMITTED TEXT</b>	22 WORDS	<b>63% MATCHING TEXT</b>	22 WORDS
<p>a municipal PPP and set out the stages and approvals it will have to go through. 301 The Regulation</p>		<p>a PPP, and sets out the phases and tests it will have to go through. The gazetted regulation</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>107/148</b>	<b>SUBMITTED TEXT</b>	31 WORDS	<b>100% MATCHING TEXT</b>	31 WORDS
<p>that these will vary widely from project to project and sector to sector and will be closely linked to the funding sources that can be secured for each deal. However,</p>		<p>that these will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal. However,</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>108/148</b>	<b>SUBMITTED TEXT</b>	26 WORDS	<b>100% MATCHING TEXT</b>	26 WORDS
<p>affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding. 302</p>		<p>affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding. "</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>109/148</b>	<b>SUBMITTED TEXT</b>	33 WORDS	<b>100% MATCHING TEXT</b>	33 WORDS
<p>The PPP project cycle enables the three regulatory tests of affordability, value for money and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement.</p>		<p>The PPP project cycle enables the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement.</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>				
<b>110/148</b>	<b>SUBMITTED TEXT</b>	20 WORDS	<b>70% MATCHING TEXT</b>	20 WORDS
<p>National Treasury, PPP Manual, Module 1: South African Regulation for PPPs, 2. 302 South Africa National Treasury, PPP</p>		<p>NATIONAL TREASURY PPP MANUAL MODULE 1: SOUTH AFRICAN REGULATIONS FOR PPPs NATIONAL TREASURY PPP</p>		
<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/630-Module%2001.pdf">https://www.gtac.gov.za/Publications/630-Module%2001.pdf</a></p>				

111/148	SUBMITTED TEXT	17 WORDS	68% MATCHING TEXT	17 WORDS
	must solicit the views and recommendations of the national and the relevant provincial treasury on the		must also solicit the views and recommendations of the National Treasury, the provincial treasury, and the	
	<b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a>			

112/148	SUBMITTED TEXT	92 WORDS	93% MATCHING TEXT	92 WORDS
	the Government Technical Advisory Centre (GTAC) which is an agency of the National Treasury, established to support public finance management through professional advisory services, programme and project management and transaction 306		The Government Technical Advisory Centre, or GTAC, is an agency of the National Treasury, established to support public finance management through professional advisory services, programme and project management and transaction	
	<b>W</b> <a href="https://www.gtac.gov.za/">https://www.gtac.gov.za/</a>			

128/148	SUBMITTED TEXT	17 WORDS	78% MATCHING TEXT	17 WORDS
	PPP Unit has two broad tasks: to provide technical assistance to government departments, provinces and municipalities		PPP unit in Nat Treasury has two broad tasks: -- Provide technical assistance to government Provide technical assistance to government departments, provinces and municipalities	
	<b>W</b> <a href="https://www.oecd.org/mena/governance/37146964.pdf">https://www.oecd.org/mena/governance/37146964.pdf</a>			

113/148	SUBMITTED TEXT	11 WORDS	100% MATCHING TEXT	11 WORDS
	National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]	
	<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>			

114/148	SUBMITTED TEXT	11 WORDS	100% MATCHING TEXT	11 WORDS
	National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]	
	<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>			

115/148	SUBMITTED TEXT	11 WORDS	100% MATCHING TEXT	11 WORDS
	National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]	
	<p><b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a></p>			

116/148	SUBMITTED TEXT	33 WORDS	46% MATCHING TEXT	33 WORDS
	costs can be met from within municipal budgets without disruptions to other local projects, identifies, allocates, quantifies and mitigates risks, prompts municipalities to consider how the project will be structured, identifies constraints		costs can be met from within institutional budgets without disruptions to other activities. • It allows for the identification, quantification, mitigation and allocation of risks. • It prompts institutions to consider how the project will be structured. • It identifies constraints	
	<p><b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a></p>			

117/148	SUBMITTED TEXT	19 WORDS	80% MATCHING TEXT	19 WORDS
	The municipality must solicit the views and recommendations of the National Treasury and the provincial treasury on the		The municipality must also solicit the views and recommendations of the National Treasury, the provincial treasury, and the	
	<p><b>W</b> <a href="http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf">http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf</a></p>			

118/148	SUBMITTED TEXT	11 WORDS	100% MATCHING TEXT	11 WORDS
	National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]	
	<p><b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a></p>			

119/148	SUBMITTED TEXT	11 WORDS	100% MATCHING TEXT	11 WORDS
	National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]	
	<p><b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a></p>			

<b>120/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]		
<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>				
<b>121/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]		
<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>				
<b>122/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>90% MATCHING TEXT</b>	16 WORDS
structures of accountability and how the municipality and the private party relate to each other.		structures of accountability and how the institution and the private party relate to each other. •		
<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>				
<b>123/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
the systems and procedures designed to manage risk and performance.		the systems and procedures designed to manage risk and performance. •		
<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>				
<b>124/148</b>	<b>SUBMITTED TEXT</b>	30 WORDS	<b>84% MATCHING TEXT</b>	30 WORDS
the administrative processes required to ensure that all the procedures contained in the contract and all the documentation relating to the contract are effectively managed. 321 3.3.		the administrative processes required to ensure that all the procedures contained in the PPP agreement and all the documentation relating to the PPP agreement are effectively managed.		
<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>				
<b>125/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]		
<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>				

<b>126/148</b>	<b>SUBMITTED TEXT</b>	11 WORDS	<b>100% MATCHING TEXT</b>	11 WORDS
National Treasury PPP Unit, Municipal Service Delivery and PPP Guidelines,		National Treasury PPP Unit (2007) Municipal Service Delivery and PPP Guidelines. [112]		
<b>W</b> <a href="https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units">https://ppp-certification.com/ppp-certification-guide/176-roles-and-benefits-ppp-units</a>				

<b>127/148</b>	<b>SUBMITTED TEXT</b>	75 WORDS	<b>96% MATCHING TEXT</b>	75 WORDS
for the participation of the private sector in financing, construction, development, operation or 322		for the participation of the private sector in the financing, construction, development operation, or		
<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>				

<b>132/148</b>	<b>SUBMITTED TEXT</b>	24 WORDS	<b>100% MATCHING TEXT</b>	24 WORDS
Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', European Procurement & Public Private Partnership Law Review, 7				
<b>SA</b> Essay 1305130.pdf (D27838589)				

<b>129/148</b>	<b>SUBMITTED TEXT</b>	21 WORDS	<b>79% MATCHING TEXT</b>	21 WORDS
maintenance of infrastructure or development projects of the federal government through concession or contractual arrangements. 327 However, the		maintenance of infrastructure or development projects of the Kenya Government through concession or other contractual arrangements; the		
<b>W</b> <a href="https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...">https://su-plus.strathmore.edu/bitstream/handle/11071/6780/Public-private%20partnerships%20in%20t...</a>				

<b>131/148</b>	<b>SUBMITTED TEXT</b>	21 WORDS	<b>100% MATCHING TEXT</b>	21 WORDS
Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', 276. 78				
<b>SA</b> Essay 1305130.pdf (D27838589)				

130/148	SUBMITTED TEXT	18 WORDS	64% MATCHING TEXT	18 WORDS
	a municipal PPP and set out the stages and approvals it will have to go through. The		a PPP, and sets out the phases and tests it will have to go through. The	
	<b>W</b> <a href="https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf">https://www.gtac.gov.za/Publications/1160-PPP%20Manual.pdf</a>			

133/148	SUBMITTED TEXT	50 WORDS	67% MATCHING TEXT	50 WORDS
	mostly depends on the approach followed by each State. In cases where PPP enabling legislation is limited to specific types of projects, for example transportation, it is common that the State's department of transportation is charged with the execution and performance of the applicable PPP project. In other States,		mostly depends on the approach followed by each state. In those cases where, for example, PPP enabling legislation is limited to specific types of projects, such as transportation, it is commonly the state's department of transportation that is charged with the execution and performance of the applicable PPP project. In other states,	
	<b>W</b> <a href="https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54">https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54</a>			

136/148	SUBMITTED TEXT	49 WORDS	100% MATCHING TEXT	49 WORDS
	most PPP projects are procured at the state or local level. Some localities and other municipalities, such as city governments or transportation authorities, have traditionally entered into PPPs based on the powers assigned to them under home rule laws or the general powers granted to authorities. 5.3		most PPP projects are procured at the state or local level. Some localities and other municipalities, such as city governments or transportation authorities, have traditionally entered into PPPs based on the powers assigned to them under home rule laws or the general powers granted to authorities.	
	<b>W</b> <a href="https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54">https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54</a>			

140/148	SUBMITTED TEXT	12 WORDS	100% MATCHING TEXT	12 WORDS
	Legal framework for Public-Private Partnership: South Africa and Nigeria in Focus'			
	<b>SA</b> 5IJ09SS28340.doc (D112397500)			

134/148	SUBMITTED TEXT	27 WORDS	100% MATCHING TEXT	27 WORDS
	N, 'Critical success factors for Public Private Partnership (PPP) infrastructure and housing projects in Kenya,' International Journal of Construction Management, (2020), 90		N. (2020). Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya. International Journal of Construction Management.	
	<b>SA</b> 124370.docx (D111642785)			

<b>135/148</b>	<b>SUBMITTED TEXT</b>	13 WORDS	<b>100% MATCHING TEXT</b>	13 WORDS
<p>Why Public-Private Partnerships don't work: The many advantages of the public alternative,</p>		<p>WHY PUBLIC-PRIVATE PARTNERSHIPS DON'T WORK The many advantages of the public alternative</p>		
<p><b>W</b> <a href="https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf">https://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf</a></p>				
<b>142/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>100% MATCHING TEXT</b>	16 WORDS
<p>Hodge G and Greve C, 'Public – Private Partnerships: An International Performance Review' Public Administration Review-</p>				
<p><b>SA</b> Essay 1305130.pdf (D27838589)</p>				
<b>137/148</b>	<b>SUBMITTED TEXT</b>	20 WORDS	<b>62% MATCHING TEXT</b>	20 WORDS
<p>Critical Success Factors for Public-Private Partnership (PPP) projects from 1990 to 2013', 33 International Journal of Project Management, (2015).</p>		<p>Critical success factors for public private partnerships (ppp) infrastructure and housing projects in Kenya. International Journal of Construction Management.</p>		
<p><b>SA</b> 124370.docx (D111642785)</p>				
<b>138/148</b>	<b>SUBMITTED TEXT</b>	15 WORDS	<b>89% MATCHING TEXT</b>	15 WORDS
<p>D, The Theory of Incentives: The Principal-Agent Model, Princeton University Press, 2002. Martimort D</p>		<p>D. (2009). The theory of incentives: the principal-agent model. Princeton university press. 25. Lewis, D. (2002). 15</p>		
<p><b>W</b> <a href="https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partners...">https://www.iimb.ac.in/sites/default/files/2018-06/An%20Analysis%20of%20Public-Private%20Partners...</a></p>				
<b>139/148</b>	<b>SUBMITTED TEXT</b>	21 WORDS	<b>90% MATCHING TEXT</b>	21 WORDS
<p>Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI), UK Experience, Iraq Institute for Economic Reforms (IIER), 2009</p>		<p>CONCEPT AND BACKGROUND TO PUBLIC PRIVATE PARTNERSHIP (PPP) / PRIVATE FINANCE INITIATIVE (PFI) UK EXPERIENCE Professor Mustafa Alshawi 11/20/2009 Iraq Institute for Economic Reforms (IIER)</p>		
<p><b>W</b> <a href="https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-f...">https://docplayer.net/20773528-Concept-and-background-to-public-private-partnership-ppp-private-f...</a></p>				

<b>147/148</b>	<b>SUBMITTED TEXT</b>	24 WORDS	<b>100% MATCHING TEXT</b>	24 WORDS
<p>Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web', European Procurement &amp; Public Private Partnership Law Review, 7</p> <p><b>SA</b> Essay 1305130.pdf (D27838589)</p>				
<b>148/148</b>	<b>SUBMITTED TEXT</b>	27 WORDS	<b>60% MATCHING TEXT</b>	27 WORDS
<p>Public-Private Partnerships', 11 European Procurement &amp; Public Private Partnership Law Review, 4 (2016). 92</p> <p>Odame H and Kangai E, 'Agribusiness public-private partnerships –</p> <p><b>SA</b> Essay 1305130.pdf (D27838589)</p>				
<b>141/148</b>	<b>SUBMITTED TEXT</b>	12 WORDS	<b>100% MATCHING TEXT</b>	12 WORDS
<p>Prunier G, 'Towards a Principal-Agent Based Typology of Risks in Public-Private</p> <p>Prunier, G. (2009), Towards a principal-agent based typology of risks in public-private</p> <p><b>W</b> <a href="https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf">https://www.oecd.org/dac/evaluation/IOBstudy378publicprivatepartnershipsindevelopingcountries.pdf</a></p>				
<b>143/148</b>	<b>SUBMITTED TEXT</b>	16 WORDS	<b>73% MATCHING TEXT</b>	16 WORDS
<p>Yescombe R, Public-Private Partnerships: Principles of Policy and Finance, Butterworth- Heinemann, (2007)</p> <p>Yong K, Public-Private Partnerships</p> <p>Yescombe, E.R. 2007. Public-Private Partnerships: Principles of Policy and Finance. Oxford: Butterworth-Heinemann. Chapter 1: "What are Public-Private Partnerships"</p> <p><b>W</b> <a href="https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership">https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership</a></p>				
<b>144/148</b>	<b>SUBMITTED TEXT</b>	22 WORDS	<b>83% MATCHING TEXT</b>	22 WORDS
<p>Diba. H, 'Critical success factors for public private partnership projects in the Kenyan road sub-sector', Published LLM, University of Nairobi, 2012.</p> <p>Diba, H. R. (2012). Critical success factors for public private partnership projects in the Kenyan road sub-sector. Nairobi: University of Nairobi.</p> <p><b>SA</b> 124370.docx (D111642785)</p>				

145/148	SUBMITTED TEXT	3 WORDS	90% MATCHING TEXT	3 WORDS
	<a href="http://demo.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf">http://demo.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf</a>		<a href="http://www.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf">http://www.pppunit.go.ke/wp-content/uploads/2020/02/Kenya-PPP-Pipeline-Status-Report-January-2020.pdf</a>	
	<b>SA</b> 124370.docx (D111642785)			

146/148	SUBMITTED TEXT	2 WORDS	100% MATCHING TEXT	2 WORDS
	d1d1835b-849e-4ded-87a6-fd79b0fc6d54		d1d1835b-849e-4ded-87a6-fd79b0fc6d54	
	<b>W</b> <a href="https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54">https://www.lexology.com/library/detail.aspx?g=d1d1835b-849e-4ded-87a6-fd79b0fc6d54</a>			

# Final Decision

This document certifies that the study:

## \\\"A REVIEW OF KENYA'S PUBLIC PRIVATE PARTNERSHIPS LEGAL FRAMEWORK FOR IMPLEMENTING INFRASTRUCTURE PROJECTS BY COUNTY GOVERNMENTS\\\"

**Principal Investigator:** Professor Sitati, Jacob

**Reference number:** SU-IERC0717/20

Was reviewed and received the following status:

**\\\"done\\\"**

**Additional Comments:** Final decision: **approved-minor-mod-req**

Comments sent:

-----

Reviewer #1:

*'Clarification is needed on the comparative studies. Two different groups of c  
On the form, complete the investigator section for Ms Kaburu. '*

