

**REFORM OF THE PUBLIC PRIVATE PARTNERSHIPS REGULATORY  
FRAMEWORK IN KENYA: THE CASE OF PRIVATELY INITIATED  
INVESTMENT PROPOSALS**

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**REG.NO: G62/75279/2014**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE MASTER OF LAWS (LL.M) DEGREE  
OF THE UNIVERSITY OF NAIROBI**

**NOVEMBER, 2019**

**DECLARATION**

I, **BRENDA MWANGO KEMUNTO**, do declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

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## **ACKNOWLEDGEMENTS**

I wish to express my gratitude to my supervisor Mr. L. Obura Aloo, who despite his busy schedule found time to guide me. His tireless support, supervision and patience made me focus on this paper.

I wish to thank my mentor and colleague Dr. Duncan Hunda for showing me the right path and for inspiring me to strive and complete this paper. To all my Interviewees at State Department for Transport, Kenya Ferry Services Limited and Public Private Partnerships Unit, I must say I am grateful.

To my Colleague and friend Mrs. Beatrice Nyamoita thank you for reminding me every day to strive for the best. To my friends Mercy Olando and Josephine Oyombe thank you.

Above all, I wish to thank God without whose grace I would not have lived to see this day.

## **DEDICATION**

To my Mother, you are a source of great inspiration, even though you have been in pain, you still find the words to cheer me on.

To my son, Nolan, for the time we did not spend together, this is for us.

## TABLE OF CONTENTS

Declaration.....	i
Acknowledgements .....	ii
Dedication.....	iii
Abbreviations .....	vi
Constitution & Transnational Legal Instruments.....	vii
Kenyan Statutes & Regulations.....	viii
Abstract.....	ix
<b>CHAPTER ONE.....</b>	<b>1</b>
<b>BACKGROUND OF THE STUDY.....</b>	<b>1</b>
1.1 Introduction.....	1
1.2 Statement of the Problem .....	7
1.3 Objectives of the Research .....	8
1.4 Research Questions.....	8
1.5 Research Hypothesis.....	9
1.6 Theoretical Framework .....	9
1.6.1 Rational Choice Theory.....	9
1.6.2 The Resource Dependence Theory.....	11
1.6.3 Principal-Agent Agency theory.....	12
1.7 Literature Review.....	13
1.8 Research Methodology.....	19
1.9 Limitation of the Study.....	20
1.10 Chapter Breakdown.....	20
<b>CHAPTER TWO.....</b>	<b>22</b>
<b>LEGAL REGULATORY FRAMEWORK ON PRIVATELY INITIATED INVESTMENT PROPOSALS.....</b>	<b>22</b>
2.0 Introduction.....	22
2.1 Historical Background.....	22
2.1.2 The Principles of Public Private Partnerships.....	27
2.2 Legal Regulatory Framework for PPPs in Kenya.....	29
2.2.1 Policy Statement on PPPs.....	30
2.2.2 The Constitution of Kenya.....	30
2.2.3 Public Private Partnerships Act.....	31
2.2.4 PPP Regulations.....	35
2.2.2 Public Finance Management Act,(PFMA).....	36
2.2.6 PPPs (Amendment) Bill, 2017.....	37

2.3 Privately Initiated Investment Proposals.....	37
2.3.1 The “Swiss Challenge System”.....	44
2.3.1.1 Other Methods of introducing Competition .....	47
2.4 Conclusion.....	49
<b>CHAPTER 3 .....</b>	<b>52</b>
<b>COMPARATIVE ANALYSIS ON PRIVATELY INITIATED INVESTMENT PROPOSALS REGULATORY FRAMEWORK.....</b>	<b>52</b>
3.0 Introduction.....	50
3.1 India Experience.....	52
3.1.1 Unsolicited proposals in India.....	53
3.1.2 Swiss- Challenge in India.....	55
3.1.3 Example of Unsolicited Proposal in India.....	57
3.1.4 Example of Rejected Unsolicited Proposal in India.....	58
3.2 South Africa Experience .....	60
3.2.1 Bid process for Unsolicited Proposals in South Africa.....	62
3.3 Unsolicited Proposals in Road sector in South Africa .....	64
3.4 After Procurement of Unsolicited Proposal.....	65
3.5 Negative Experiences with Unsolicited proposals in South Africa, Leading to Contract Termination.....	66
3.4 Conclusion .....	67
<b>CHAPTER 4 .....</b>	<b>69</b>
<b>FINDINGS, RECOMMENDATIONS AND CONCLUSION.....</b>	<b>69</b>
4.0 INTRODUCTION .....	69
4.1 Findings .....	69
4.1.1 How to structure Swiss Challenge Legal Regulatory Framework.....	72
4.2 Recommendations .....	73
4.2.1 Legal reform.....	73
4.3 Conclusion .....	77
<b>REFERENCES.....</b>	<b>79</b>

## **ABBREVIATIONS**

AICD	Africa Infrastructure Country Diagnostic
BOO	Build Own and Operate
GTAC	Government Technical Advisory Center
ICRC	Infrastructure Concession Regulatory Commission
JKIA	Jomo Kenyatta International Airport
KAA	Kenya Airport Authority
LAPSSET	Lamu Port South Sudan Ethiopia Transport Authority
OECD	Convention on the Organization for Economic Co-operation and Development
PIIP	Privately Initiated Investment Proposal
PPIAF	Public Private Infrastructure Advisory Facility
PPP	Public Private Partnerships
PPP Act	Public Private Partnerships Act
RFP	Request for Proposals
RFQ	Request for Qualification
SANRAL	National Roads Agency- South Africa
UNICTRAL	United Nations Commission on International Trade Law

## **CONSTITUTION & TRANSNATIONAL LEGAL INSTRUMENTS**

- i) The Constitution of Kenya, 2010
- ii) Convention on the Organization for Economic Co-operation and Development (OECD)
- iii) United Nations Commission on International Trade Law (UNCITRAL), “Legislative Guide on Privately Financed Infrastructure Projects”, 2000



## **KENYAN STATUTES & REGULATIONS**

- 1) Public Private Partnerships Act No.15 of 2013 Laws of Kenya
- 2) Public Finance Management Act, No.18 of 2012 Laws of Kenya
- 3) Public Procurement &Asset Disposal (Public Private Partnerships) Regulations,2009
- 4) Public Private Partnerships (Public Private Partnerships) Regulations, Legal Notice 148 of 2014
- 5) Infrastructure Concession Regulatory Commission Act, No. 5 of 2015 Laws of Nigeria

## **ABSTRACT**

The use of Public Private Partnerships (PPP) has been increasing over the decades, more so the use of Privately Initiated Investment Proposals (PIIPs) for PPP project implementation. However, most PIIPs as compared to solicited proposals by the Public are often considered as contentious, offer poor value for money due to lack of competition and lack transparency and accountability. This paper explores the status of PIIPs in the PPP legal regulatory framework in Kenya and whether there are safeguards made to ensure there is value for money, transparency and accountability in PPP project implementation. The paper makes an analysis of the principles of PPPs as provided by World Bank and UNICTRAL and how the provisions of PPP Act comply with the set principles. The paper discusses the emerging approaches for management of PIIPs for PPP project implementation. In addition, suitable procurement methods for managing PIIPs are explored in this paper. It reveals that the PPP legal regulatory framework in the area of PIIPs is not in line with international provisions and that there are reforms required on the regulatory framework in the area of PIIPs. The critical approaches for managing proposals include providing clear policy guidelines for PIIPs by the Government valuation of value for money, innovation and cost of proposals and clear legal regulatory framework on PIIPs This paper makes proposals that will inform policymakers on significant measures essential in attaining value for money and public interest and benefits for PIIPs.

## CHAPTER ONE

### BACKGROUND TO THE STUDY

#### 1.1.Introduction

The public sector around the world, often lack the finances, experience and technical know-how to develop infrastructure particularly transport infrastructure including roads, railways, ports etc.<sup>1</sup>To cope with this challenge, governments are seeking private investor support with the planning, funding, construction, maintenance and operation of critical infrastructure facilities.<sup>2</sup>

Private sector involvement in infrastructure projects is mostly structured into planned and competitive solicited procurement processes.<sup>3</sup>Private sector participation projects generally are in tandem with the state's infrastructure plan and identified in government budgets through the assessment of the project's purpose and need.<sup>4</sup> Nonetheless, governments have also adopted privately initiated process often referred to as an unsolicited proposal as an alternative to solicited procurement process. In the case of privately initiated process, the private entity approaches the government with a proposal to develop the infrastructure project. Such proposals are often not identified within the government budgetary plan or policies and the project's need may not have been defined before the submission of the proposal.<sup>5</sup>These proposals are negotiated in the absence of a transparent or competitive procurement process, as it is the case in Kenya,

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<sup>1</sup> Okwaro, K. O., Chepkwony, J. & Boit, R. (2017), "Factors affecting adoption of public-private-partnership in county government of Uasin Gishu, Kenya" *International Academic Journal of Procurement and Supply Chain Management*, at 34

<sup>2</sup>Olantunji Samuel Olusola et al.(2016) "*Demisfying Issues regarding Public Private Partnerships (PPPs)*" *Journal Of Economics And Sustainable Development* Vol.7,No.11 21

<sup>3</sup> Public Private Infrastructure Advisory Facility (PPIAF), "Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs" 12 at <http://www.pppi.ru/sites/all/themes/pppi/img/zana7.pdf> (accessed 17/8/2019)

<sup>4</sup> PPIAF, Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs 12 at <http://www.pppi.ru/sites/all/themes/pppi/img/zana7.pdf> (accessed 17/8/2019)

<sup>5</sup> PPIAF, Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs, *ibid*

creating problems.<sup>6</sup>With Kenya's corruption rating in the world index at number 149/180<sup>7</sup>, the public private partnership regulatory framework should be robust to ensure approved projects are in tandem with the government's need and offer value for money hence eliminate influence of corrupt public officials.

Vision 2030 is the "long-term development blueprint set up by the Kenyan Government; it aspires for a better society by the year 2030".<sup>8</sup> Africa Infrastructure Country Diagnostic (AICD) report on Kenya, approximates that to address the state's infrastructure gap, the state will require constant budget of about USD 4 Billion over the next decade.<sup>9</sup>Bridging the infrastructure deficit forms part of the key agenda for Kenya Vision 2030. Under Vision 2030, the government recognizes that the key to achieving wide scale infrastructural development lies with the partnership of private and public bodies. This cooperation between the public and private sectors is referred to as Public-Private Partnership (PPP).<sup>10</sup>

As mentioned, PPPs are commonly initiated by the public sector by way of solicited proposals or may be initiated by the private sector termed as unsolicited proposals. The World Bank and Public-Private Infrastructure Advisory Facility (PPIAF),<sup>11</sup>has set policy guidelines for managing proposals initiated by private sector for implementation of infrastructure projects for

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<sup>6</sup> PPIAF, Unsolicited Proposals – An Exception to Public Initiation of Infrastructure PPPs, *ibid* at 12

<sup>7</sup>Transparency International Website, at <https://www.transparency.org/cpi2018> (accessed 18/8/2019). In 2018 experts measured public sector corruption in 180 states, the scores ranged from zero (highly corrupt) to 100 (very clean). Kenya scored 27.

<sup>8</sup> Kenya Vision 2030 Website at <https://vision2030.go.ke/about-vision-2030/> (accessed 26<sup>th</sup> March 2019)

<sup>9</sup> Vivien Foster & Cecilia Briceno-Garmendia , "*Africa's Infrastructure , A time for Transformation*", A world Bank publication

<sup>10</sup>Riham Shendy, Zachary Kaplan and Peter Mousley (2011), "Towards Better Infrastructure: Conditions, Constraints, and Opportunities in Financing Public-Private Partnerships" ix at "<https://ppp.worldbank.org/public-private-partnership/library/towards-better-infrastructure-conditions-constraints-and-opportunities-financing-public-priv>"(accessed 10/02/2019)

<sup>11</sup>PPIAF is a donor trust fund domiciled within World Bank Group, it is established to provide technical assistance to governments in developing countries. Its core goal is to create enabling environment that facilitates private investment in infrastructure.

governments to adopt.<sup>12</sup> The World Bank provides that the principles to guide policy development for unsolicited proposals include, firstly, that the policy on unsolicited proposals should be affiliated to public interest which meets national infrastructure priorities and meets the economic needs of the public.<sup>13</sup> Secondly, governments should accept unsolicited proposal projects as PPPs if they anticipate to generate greater value for money.<sup>14</sup> Thirdly, the understanding of the impact of unsolicited proposal on public resources and whether fiscal liabilities risks are manageable.<sup>15</sup> Fourthly, governments must ensure that unsolicited proposals contracts should mirror market prices.<sup>16</sup> Fifthly, governments should apply full disclosure on all relevant project information for accountability to stakeholders.<sup>17</sup> Lastly, governments should match PPP and unsolicited proposal policies for stakeholder support, to increase private party's interest and provide uniformity in decision-making by the public entities.<sup>18</sup>

The United Nations Council passed the Convention on the Organization for Economic Co-operation and Development<sup>19</sup> (OECD), it sets “Principles for Public Governance of Public-Private Partnerships”.<sup>20</sup> The underlying principles for PPPs set therein provide that states should: “create a clear, predictable and authentic institutional framework with the support of skilled and

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<sup>12</sup> World Bank Group/PPIAF, “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” Vol. 2 at [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals\\_Volume2\\_Guidelines\\_WEB%20%281%29.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals_Volume2_Guidelines_WEB%20%281%29.pdf) (accessed 19/8/2019)

<sup>13</sup> World Bank Group/PPIAF “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” Vol. 2 *ibid* at 12

<sup>14</sup> World Bank Group/PPIAF, *ibid*

<sup>15</sup> World Bank Group/PPIAF, *ibid* at 13

<sup>16</sup> World Bank Group/PPIAF, *ibid*

<sup>17</sup> World Bank Group/PPIAF, *ibid* at 14

<sup>18</sup> World Bank Group/PPIAF, *ibid* at 15

<sup>19</sup> Articles 1, 2 (a), 3 and 5 (b) of the Convention on the OECD of 14th December 1960- In which Kenya is a signatory

<sup>20</sup> Organisation for Economic Co-operation and Development, (2012), Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships at <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> (accessed 18/8/2019)

well-resourced institutions;<sup>21</sup>ground the choice of PPPs in value for money;<sup>22</sup> and utilize the budget transparently to abate fiscal risks and ensure probity in the procurement process”.<sup>23</sup> OECD provides that states should ensure PPPs are: “affordable, represent value for money and are transparently managed in the budget process”.<sup>24</sup>

The Public Private Partnerships Act, (PPP Act) was legislated to govern these partnerships in Kenya.<sup>25</sup>PPP is defined as “an agreement between a contracting authority and a private party, where the private party undertakes and takes significant risk of providing a public function and receives benefit in terms of compensation from a public fund or charges a fee from the users of the public function”.<sup>26</sup> This paper lays focus on privately initiated investment proposals (PIIP) under PPP framework in Kenya. PIIP has been defined under the Act as “a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables a complete evaluation of the proposal as if it were a bid”.<sup>27</sup>The Act sets the criteria for consideration of PIIPs (unsolicited bids) to *inter alia*: where the proposal is made for continuity of the project in construction and development; if there are costs related to the intellectual property; if the person is the only person capable of undertaking the project; or if the Cabinet Secretary National Treasury gives reasons for allowing the unsolicited bid.<sup>28</sup>

The PPP Act provides that the principles of PPP are value for money for the project to the contracting Authority, affordability of the project to the government and risk transfer to the

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<sup>21</sup>OECD, (2012) *ibid*, at 4

<sup>22</sup> OECD, (2012) *ibid*

<sup>23</sup> OECD, (2012) *ibid*, at 5

<sup>24</sup> Organisation for Economic Co-operation and Development, (2012) *ibid*

<sup>25</sup> Public Private Partnerships Act No.15 of 2013 Laws of Kenya

<sup>26</sup> Section 2 of the PPP Act

<sup>27</sup> Section 2 of the PPP Act

<sup>28</sup> Section 61 (1) (a-d) of the PPP Act

private party.<sup>29</sup>This provision adopts the guidelines provided under OECD. The PPP Act however, proceeds to provide that PIIPs do not require competitive bidding hence diminishing the chances of achieving value for money and creativity provided by competition.<sup>30</sup>

The PPP Act replicates the provisions of article 227 of the Constitution of Kenya which states that “when a state organ or other public entity contracts for goods and services it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost- effective”. The PPP Act states that “in procuring and awarding a contract to a private party under the Act, a contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity”.<sup>31</sup>The Act, however, provides an exception to this rule under Section 61 of the Act by allowing a contracting authority to consider a PIIP commonly known as unsolicited proposal, the section states that a contracting authority “to procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process”.<sup>32</sup>

Further, the procedure for processing PIIPs provided under the Act and the PPP regulations fall short on providing how contracting authorities can achieve value for money if the PIIPs are not subjected to competition or transparency in the processing of PIIPs.<sup>33</sup>This violates the policy guidelines by OECD and World Bank on unsolicited proposals.

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<sup>29</sup> Section 28, 33 and 61 of the PPP Act

<sup>30</sup> Section 61(1) of the PPP Act

<sup>31</sup> Section 29 (2) of the PPP Act

<sup>32</sup> Section 61(1) of the PPP Act

<sup>33</sup> PPP Regulations, 2014 Legal Notice 171/2014

The effective management of a PIIP entails in-depth valuation of the value for money, innovation, costs, and risks of the proposal.<sup>34</sup>The public agency is responsible to ensure the extensive assessment of the value for money and innovation is carried out after the investor submits their project concept. The Agency should especially examine the rationality of costs and risk transferred to the Private Party and the costs and risks retained by it.<sup>35</sup>

These difficulties for failure to subject the proposal to competition may be illustrated by the ongoing case, *Kenya Aviation Workers Union v. Cabinet Secretary, Ministry Of Transport, Infrastructure, Housing & Urban Development & 4 Others*,<sup>36</sup> The Petitioners moved the court to challenge the PIIP submitted by Kenya Airways (partly owned by the Government of Kenya) to Kenya Airports Authority (a State Corporation). The Petitioners challenged the PIIP and prayed for: a stay of the implementation of any decision concerning any arrangement under the PPP Act between Kenya Airways (KQ) or any of its subsidiary companies on one hand Kenya Airports Authority (KAA) on the other hand regarding the running of Jomo Kenyatta International Airport (JKIA) by KQ. The Petitioners cite illegality in the process faulting the Chairman of Board of Directors of KAA of pursuing his private interest. The Petitioners further state that KQ does not have the financial capability to undertake the PIIP as it is a loss-making institution. This case underpins the challenges likely to be faced in the implementation of PIIPs in Kenya.<sup>37</sup>

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<sup>34</sup> Robert Osei-Kye, *et. al* (2018) “Strategies for effective Management of Unsolicited Public-Private Proposals” *Journal of Management in Engineering* 3 at [https://www.researchgate.net/publication/320297691\\_Strategies\\_for\\_Effective\\_Management\\_of\\_Unsolicited\\_Public-Private\\_Partnership\\_Proposals/link/5a60d417aca2723281056ed0/download](https://www.researchgate.net/publication/320297691_Strategies_for_Effective_Management_of_Unsolicited_Public-Private_Partnership_Proposals/link/5a60d417aca2723281056ed0/download) (accessed 17/8/2019)

<sup>35</sup> Robert Osei-Kye, *et. al* (2018), *supra note 34*

<sup>36</sup> Nairobi H.C Const.Pet. No. 57 of 2019

<sup>37</sup> The National Assembly, 12<sup>th</sup> Parliament, 3<sup>rd</sup> Session, The Departmental Committee on Transport, Public Works & Housing, Report on inquiry on to the proposed privately initiated investment proposal to Kenya Airports Authority at <http://www.parliament.go.ke/sites/default/files/2019-06/Report%20on%20the%20inquiry%20into%20the%20proposed%20KQ%20PIIP%20to%20KAA.pdf> (accessed 19/8/2019)



This paper lays its focus on the status of PIIPs in the PPP regulatory framework. The PPP Act is silent on subjecting PIIP's to the market for competition. Many States including South Africa, India, Nigeria, and Australia have enacted laws requiring public authorities to subject PIIP's to the market with a view of ensuring the proposal meets the principles set by the OECD and World Bank. Subjecting PIIP's to the market introduces competition and transparency thereby enhancing value for money which is a core principle in PPPs.<sup>38</sup>

This paper will address the lacuna in the PPP Act in terms of subjecting the PIIP proposal to competition as well as suggesting recommendations including making amendments to the PPP Act and its Regulations to cater for a competitive process in the PIIP process so as to realize value for money as well as optimize creativity through design thinking of the PIIP proposals.

## **1.2 Statement of the Problem**

The PPP Act allows contracting authorities to accept privately initiated investments proposals (unsolicited proposals) in procuring PPP projects either for the construction or development of a project or the performance of a service by negotiation without any competitive procurement process.<sup>39</sup> It does not anticipate introduction of competition to the unsolicited proposals hence reducing chances of value for money, innovativeness or creativity of the PPP project. The failure to introduce competition to unsolicited proposals may result to political interference since decision makers may influence the outcome of the negotiations to suit their interests. There is need to subject the PIIP proposals to competition through bidding in order to increase innovativeness and creativity and ensure the project offers value for money.

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<sup>38</sup> John T. Hodges & Georgina Dellacha, (2007) "Unsolicited Infrastructure Proposals, How Some Countries introduce Competition and Transparency", *Public-Private Infrastructure Advisory Facility, Working Paper 1*, at 8 at [www.ppiaf.org](http://www.ppiaf.org) (accessed 13<sup>th</sup> January 2019)

<sup>39</sup> Section 61 (1) of PPP Act

The PPP legal framework lacks clear policy guidelines, manuals, standard documents on PIIPs /unsolicited proposals. This paper strives to address the gaps that exist in the PPP Act and Regulations that are meant to facilitate PPP processes and implementation with a focus on PIIPs. There are fundamental issues which raise genuine and compelling concerns which ought to be addressed in the legal framework for instance policy, the statute and the regulations on PIIPs. Currently, PPP Act is under review through PPP (Amendment) Bill, 2017 by the Legislature but still fails to fill in these gaps.<sup>40</sup>This study therefore intends to delve into critical issues and measures that can be taken to address them.

### **1.3 Objective of the Research**

The general objective of this research paper is to discuss the status of PIIPs in the PPP legal regulatory regime in Kenya. The following are the specific objectives which this paper seeks to achieve:

- 1.3.1 To understand PIIP (unsolicited proposals) procurement method under the PPP legal regime in Kenya;
- 1.3.2 To find out the status and enforceability of unsolicited proposals in PPPs in other jurisdictions; and
- 1.3.3 To make conclusion and viable recommendations about any reforms required under PPP law on PIIPs.

### **1.4 Research Questions**

The primary question this paper seeks to address the question as to whether the PPP legal

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<sup>40</sup> PPP (Amendment) Bill No. 52 of 2017 at <http://kenyalaw.org/kl/index.php?id=6819> (accessed 27<sup>th</sup> March 2019)

regulatory framework is robust to eliminate the inherent problems/challenges of unsolicited proposals. This study is also premised on the following research questions:

1.4.1 Does the current PPP legal regulatory framework provide proper safeguards on PIIPs?;

1.4.2 How does the PPP Act compare with other PPP regulatory frameworks from other jurisdictions such as South Africa and India on PIIPs? ; and

1.4.3 What conclusions and recommendations can be made on the legal regulatory framework in Kenya on PIIPs?

## **1.5 Research Hypothesis**

A research hypothesis is an assumption or theory set up as an explanation of facts that can be tested. This study proceeds on the hypothesis that the PPP legal regulatory framework on PIIP in Kenya is weak hence is not robust to avert the challenges inherent in PIIPs consequently does not meet the best practice. It is further premised on the hypothesis that there are lessons to learn from South Africa and India's legal regulatory framework on PIIPs. It is also premised on the hypothesis there is need for reform of the legal regulatory framework in area of PIIPs.

## **1.6 Theoretical Framework**

This study is centered on the application of the following theories: rational choice theory, resource dependence theory and principal-agent agency theory.

### **1.6.1 Rational Choice Theory**

Adam Smith founded this theory in 1700s.<sup>41</sup> This theory is a context for explaining societal and

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<sup>41</sup> Adam Smith,(1759) “The Theory of Moral Sentiments” (1759) printed for Andrew Millar, Edinburgh 2<sup>nd</sup> ed.

economic behavior. The core belief of rational choice theory is the collective societal actions of different actors, separately making autonomous decisions.<sup>42</sup>This is used to demystify the concept of PPP in justifying the preference of PPP procurement in public sector over the traditional procurement in development of infrastructure projects while aligning the project that would attain value for money with the most appropriate optimal PPP options.<sup>43</sup>The theory emphasizes on assessment of costs and benefits of each alternative choice to minimize utility or disutility.<sup>44</sup>The choice of the public sector to accept unsolicited proposal/bidding compared to solicited bidding is based on social and individual factors of the persons making the decision.

PPP projects are chosen based on appropriate decisions by the parties involved such as sharing risk through examination of options, the end result must be optimal.<sup>45</sup>In public procurement, all projects require to offer value for money to qualify as a PPP. The choice of one PPP option over another is based on the rational choice theory that elucidates the reason for adopting a method of procurement as opposed to a different method owing to it being the optimal choice.<sup>46</sup> This theory explains societal and economic behavior in selecting the most cost-effective method without disregarding the qualities by PPP parties.<sup>47</sup>This theory opines that in selecting a PPP

procurement, the projected benefits of the public sector and the profits generated by the private sector are taken into consideration to safeguard both parties successful achievement of their

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<sup>42</sup>Lawrence E. & Easley, D.(2008) ,"Rationality, The New Palgrave Dictionary of Economics", Abstract." by *Abstract] & pre-publication copy 2<sup>nd</sup> Edition.*

<sup>43</sup> Mohammad M.Gambo & Christy P.Gomes (2014) "*Rational Choice' PPP Procurement Selection Decision Tool for Delivering Project Specific VfM Objectives*" at [http://eprints.uthm.edu.my/6344/1/FINAL\\_PAPER\\_CHUSER\\_APRIL\\_2014.pdf](http://eprints.uthm.edu.my/6344/1/FINAL_PAPER_CHUSER_APRIL_2014.pdf) (accessed 17th February 2019)

<sup>44</sup> Mohammad M. Gambo et al, *ibid*

<sup>45</sup> Mohammad M. Gambo et al, *ibid*

<sup>46</sup>Green, S.L,(2002) "Rational Choice Theory: An Overview", Baylor University, Waco, TX at 4

<sup>47</sup> Green S.L. *ibid*

optimum choice from the PPP plan.<sup>48</sup>Value for money is one of the determinants for consideration of a PPP project.<sup>49</sup>This theory is valuable for this paper given that it is centered on the rationality of the government implementing PPP procurement approach making a shift from traditional public procurement approach in delivery of infrastructure projects including roads, railway, energy, fiber optic and ports.

Critics of this theory state that if entities make decisions on consideration of their gains, there would be no reason for the individual be concerned with another person's interest. The critics further state that where there is insufficient information and vagueness it would be difficult for individuals to make objective decisions.<sup>50</sup> Where a decision maker make decisions with regard to acceptance of unsolicited proposals, the PPP Act, fails to put safeguards for public sector to get value for money by subjecting the proposal to the market which would enable the entity receive different ideas on the project hence maximize value for money.

### 1.6.2 The Resource Dependence Theory

Hasenfield Yeheskel and James Thompson advance this theory.<sup>51</sup> It is the work of Thompson J. that demonstrates the initial efforts to study the use of externally founded resources into institutions and the consequences of uncertainty involving the flow for organizational-level action and behavior.<sup>52</sup>This theory states that no institution or entity can obtain the resources and

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<sup>48</sup>Green S.L. *ibid*

<sup>49</sup> Section 33(2) (d) of the PPP Act

<sup>50</sup>Micheal Agu (2013) Rational Choice Theory: Assumptions, Strengths and Greatest Weaknesses in Application Outside the Western Milieu Context at 97 at <[https://www.academia.edu/3197007/RATIONAL\\_CHOICE\\_THEORY\\_ASSUMPTIONS\\_STRENGTHS\\_AND\\_GREATEST\\_WEAKNESSES\\_IN\\_APPLICATION\\_OUTSIDE\\_THE\\_WESTERN\\_MILIEU\\_CONTEXT](https://www.academia.edu/3197007/RATIONAL_CHOICE_THEORY_ASSUMPTIONS_STRENGTHS_AND_GREATEST_WEAKNESSES_IN_APPLICATION_OUTSIDE_THE_WESTERN_MILIEU_CONTEXT)> (accessed 16th January 2019)

<sup>51</sup> Johnson Bob L.Jr.(1995) "Resource Dependency Theory: A political Economy Model of Organizations", *University of Utah* at 3 at <https://files.eric.ed.gov/fulltext/ED387871.pdf> (accessed 18th January 2019)

<sup>52</sup> John Bob L. Jr, *ibid*

competencies that are essential to survive without interrelating with other institutions, entities and individuals.<sup>53</sup> The theory suggests that the more dependent partners are, the more the need for their interaction.<sup>54</sup> Public entities depend on private entities to develop its infrastructure efficiently while the private entities depend on public entities for profit and investment. This theory shows the relevance of factors that aid the uptake of PPP projects, in this case the legal regulatory framework. This study relies on this theory as it explains the need to provide supportive conditions for private parties to venture into PPPs with public bodies, in this case effective legal framework.

### 1.6.3 Principal-Agent Agency theory

This study considers the Principal-Agent Agency theory which states that there is a relationship between the principal owner of an organization and the agent, this theory can be referred to the employer/employee relationship.<sup>55</sup> The Principal assigns work as the Agent who performs the work as assigned. Collaboration between parties in PPPs is based on the Principal-Agent Theory.<sup>56</sup> In comparison to the principal- agent theory the two contracting parties in PPP are named the principal (public entity) and the agent (the private entity).<sup>57</sup>

In PPP, the private entity is a consortium who possesses knowledge especially compared to the public entity, the private entity (agent) can utilize minimum funds than the public entity believes

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<sup>53</sup>J. Pfeffer and G. Salancik,(1978) “The External Control of Organizations”, *Harper & Row*, at 40

<sup>54</sup> Klijin,E.H. (2010) “Public Private Partnerships: Deciphering meaning, message and phenomenon in : G.Hodge and C.Greve” (2010) at 8 *International Handbook of PPP, Cheltenham: Edgar Elgar: 68-80* at [https://www.researchgate.net/publication/259000184\\_](https://www.researchgate.net/publication/259000184_) (accessed 17th January 2019)

<sup>55</sup>Leruth,L & Elizabeth,P (2006) “A Principal -Agent Theory Approach to Public Institution Performance”, *The Authorship book publishers*

<sup>56</sup>Leruth,L & Elizabeth,P, *ibid*

<sup>57</sup>Greiling, R. (2009). “Comparison of Indian PPP construction industry and European PPP construction industry: Process, thresholds and implementation”, *Paper presented at the proceedings of CIB world congress, 10-13 May 2010, Salford, UK.*

hence gains high profits, in all this the Principal is unable ascertain actions the agent executes. There are key assumptions underlying this theory, that there is information asymmetry between the parties whereby the agent (private party) is privy to own action as compared to the Principal (Public party) and also there is an assumption that the agent will pursue its own interest which may be contrary to those of the Principal.<sup>58</sup> Unsolicited proposals are developed by the Private Party, having the technical know-how on developing, constructing, designing the project, the Private Party is likely to withhold certain aspects of the project especially where the proposal is not subjected to competition to elicit the views of other investors in the industry.

## **1.7 Literature Review**

In 2008, the President of Kenya launched “Kenya Vision 2030”, “a long-term national development blue-print that aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by the year 2030 in a clean and secure environment”.<sup>59</sup>The policy states that PPPs will be adopted to bridge the financing gaps for infrastructure projects. In this policy document transport infrastructure projects are LAPSSET transport corridor<sup>60</sup>, airports, roads, railway, ports among others.<sup>61</sup>This document forms the basis for the Government, Ministries and State Corporations to use PPPs as a mode for project delivery. The World Bank and PPIAF provides for “Guidelines for the Development of a Policy for Managing Unsolicited Proposals in Infrastructure Projects”.<sup>62</sup>These guidelines provide “guidance and recommendations for governments that are considering the development and

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<sup>58</sup> Palma, Luc Leruth & Guillaume Prunier, (2009) “Towards a Principal- Agent Based Typology of Risks in Public Private Partnerships” International Monetary Fund (IMF) 13 at (<https://www.imf.org/external/pubs/ft/wp09177.pdf>) (accessed 15th February 2019)

<sup>59</sup> Kenya Vision 2030 Website at <http://vision2030.go.ke/> (accessed 27<sup>th</sup> March 2019)

<sup>60</sup> A state corporation formed to coordinate the implementation seven key infrastructure projects that include 32 berth port at Lamu County, Kenya, highways, pipeline, railways, airports, resort cities and high-power dam.

<sup>61</sup> Kenya Vision 2030 Website at <http://vision2030.go.ke/> (accessed 27<sup>th</sup> March 2019)

<sup>62</sup> World Bank and Public Private Infrastructure Advisory Facility (2017)

realization of an unsolicited proposal policy”. The guidelines provide that public agency should prepare and undertake procurement of unsolicited proposals.<sup>63</sup> The guidelines provide that a PPP contract should represent fair market price, public interest, as well as risk allocation and that a transparent and accountable procurement process is key for stakeholder support and reduces the potential for legal or political challenges. The guidelines are used in this study as a benchmark on whether the legal regulatory framework in Kenya matches the guidelines sent by World Bank.

The Government of Kenya Policy Statement on PPPs,<sup>64</sup> issued by the Cabinet Secretary, National Treasury pronounced that PPP shall be one of Kenya’s procurement methods. The policy provided the leeway for the enactment of the PPP Act. It provides for PPP project processes including project identification, selection and prioritization, project preparation and appraisal, project tendering, project negotiation, project approvals and project monitoring and evaluation.<sup>65</sup> This study also makes its arguments largely from the policy. The policy however fails to provide directions on Privately Initiated Investment Proposals (PIIPs).

Following the pronouncement of the PPP Government Policy, the PPP Act was enacted to: “provide for the framework for involvement of the private sector in the financing, construction, operation, development or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements”.

The Act provides the criteria for Privately Initiated Investment Projects (unsolicited proposals/bids).<sup>66</sup> This criterion fails to give guidance on how the public entity will ensure that

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<sup>63</sup> World Bank Group/PPIAF “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” Vol. II supra at 55 (accessed 19/8/2019)

<sup>64</sup> National Treasury, Government of Kenya PPP Policy Statement (2011) at 8 at <https://pppunit.go.ke/wp-> (accessed 27th March 2019)

<sup>65</sup> National Treasury, Government of Kenya PPP Policy Statement, *ibid* at 8

<sup>66</sup> Section 61(1) (a-d) of the PPP Act



the proposal is the best in the market, inferably it fails to facilitate PPP projects in many aspects.<sup>67</sup> The Act does not have any guidance notes other than the provisions of section 61 of the Act and Regulations 51-53 of the PPP Regulations, 2014 on the implementation of PIIPs. The study is based primarily on the PPP Act, PPP regulations and PPP Policy as they are core in the formulation and implementation of PPPs.

Bruno Werneck *et al.*<sup>68</sup> , review legal framework of several countries across the several continents namely France, Austria, Ireland, India and Nigeria. They discuss on the effect of the contracts entered between the public and private institutions in PPP projects. Nigeria has been shown to have a facilitating legal provision for PPP unsolicited bids, as compared to the Kenyan PPP Act, its PPP Act is dubbed the Infrastructure Concession Regulatory Commission Act (ICRC Act).<sup>69</sup>The ICRC Act provides that for a PPP proposal to be considered as unsolicited bid it has to either have the following criteria:

- a) *“whether the unsolicited bid supports public interest?”*
- b) *Is the project in line with the national development goal in the relevant Ministry Department or Agency?*
- c) *Does the project fall under the category of critical infrastructure?*
- d) *Is the project viable without the need for viability gap funding from the Government?*
- e) *Whether the project proponent hold the required skill and profile to develop the project?”*<sup>70</sup>

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<sup>67</sup> Article 227 of the Constitution,2010.

<sup>68</sup> Bruno Werneck and Mario Saadi (2017) “The Public- Private Partnership Law Review” 3<sup>rd</sup> edition

<sup>69</sup> Infrastructure Concession Regulatory Commission Act (ICRC), 2005 Nigeria Laws

<sup>70</sup> Paragraph 3.2.1 ICRC’S guidance notes on unsolicited proposals

This criterion is different to that provided for under the PPP Act. The ICRC Act differs greatly from the provisions of PPP Act. The provisions of the ICRC Act are not complex but have facilitated the development of infrastructure in Nigeria. Nigeria has fifty-one post contract PPP Projects while seventy-seven projects are in the pipeline for PPP.<sup>71</sup> These authors, however, fail to provide for the ideal PPP law provisions that should be legislated to facilitate PPP projects.

Riham Shendy *et al.*,<sup>72</sup> make analysis of PPPs in Cameroon, Kenya, Nigeria, Senegal Cote d'Ivoire and Ghana. They note that in these countries, there is a poor enabling environment for PPPs. They state that statutes and policies regulating PPPs remain uncertain and prevent private sector investors from being involved in the infrastructure development.<sup>73</sup> They further state that; private parties lack confidence because of lack of competitive and transparent tendering procedures, indeterminate price rules, and unpredictable approaches for engaging with the private parties in all sectors. They conclude that this is often an indication ambiguous government commitment to a PPP transaction.

Riham Shendy *et al.* recommend in order to mobilize deeper financing markets for PPPs there is need for reforms and institutional developmental actions , including structuring a clear PPP Policy, legislative, regulatory on procurement, and institutional framework.<sup>74</sup> The authors, however, fail to address the specific gaps in the Kenyan Law. The paper fails to provide specific reforms that should be embedded in the PPP Act and regulations to create a facilitative

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<sup>71</sup> Infrastructure Concession regulatory Commission at <<http://www.icrc.gov.ng/projects/ppp-projects-pipeline/>> (accessed 17<sup>th</sup> February 2019)

<sup>72</sup> Riham Shendy, Zachary Kaplan and Peter Mousley (2011), "Towards Better Infrastructure: Conditions, Constraints, and Opportunities in Financing Public-Private Partnerships" at <https://ppp.worldbank.org/public-private-partnership/library/towards-better-infrastructure-conditions-constraints-and-opportunities-financing-public-priv> (accessed 10/02/2019)

<sup>73</sup> Riham Shendy, Zachary Kaplan and Peter Mousley, *ibid* at 12

<sup>74</sup> Riham Shendy, Zachary Kaplan and Peter Mousley. *ibid* at 13

environment. This study seeks to address gaps in the PPP Act and Regulations, with a view to enhance competition and transparency in PIIP processes.

Pedo, M.O *et al.*,<sup>75</sup> found that good, friendly government policies promote successful PPP road projects.<sup>76</sup> The determinant factors include, among others, government policies, nature of projects, budget deficits and institutional factors such as politics. In Kenya, the National Government is mandated to put in place policies and legislation. Where there is weak regulatory framework, the efficacy of PPP projects is impeded.<sup>77</sup> In their study, Pedo. M. O. *et al.*<sup>78</sup> examine “The Effect of Regulatory Framework on the Performance of PPP Road Projects in Kenya”, and their findings established that legal framework has influence in the performance of PPPs, they make a conclusion that there is need to amend the legal framework to give contracting authorities more flexible legal provisions to facilitate financing of PPP projects.

The Authors further recommend that government should formulate a proper procedure of investor selection and market sounding which is transparent, fair and competitive. This will enable the Government to choose the right partner as well as create investor certainty and confidence.<sup>79</sup> This paper adopts the recommendations made by these authors, a review of government policy that meets the necessities of PPP projects is key.<sup>80</sup> Dr. Venkateswararao Podile *et al.*,<sup>81</sup> these authors discuss the concept of Swiss Challenge in India. The Swiss

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<sup>75</sup> Pedo M.O, Kabare K., Makori M. (2017) “ Effect of regulatory framework on the performance of Public Private partnerships, road projects in Kenya” *5 strategic journals* at 850

<sup>76</sup> Pedo M.O, Kabare K., Makori M., *ibid* at 861

<sup>77</sup> PPP Unit Website, at [http://5.196.68.29/framework/DisclosureKenya\\_final.pdf](http://5.196.68.29/framework/DisclosureKenya_final.pdf) (accessed 26/3/2019)

<sup>78</sup> Pedo M.O, Kabare K., Makori M., *supra* note 75 at 861

<sup>79</sup> Pedo M.O, Kabare K., Makori M. (2017) “ Effect of Regulatory Framework on the Performance of Public Private partnerships, road projects in Kenya” *5 strategic journals*

<sup>80</sup> Pedo M.O, Kabare K., Makori M. *ibid* at 78

<sup>81</sup> Dr. Venkateswararao Podile & N. Janardhana Rao, (2017) “Swiss Challenge Method – An Innovative Public Private Partnership Model in India” *Asian Journal Of Research In Business Economics And Management* Vol.7

Challenge is where the unsolicited bid is tendered to the market to provide transparency and mobilizing capital for infrastructure and social sectors where innovative proposals are received.

<sup>82</sup>They state that swiss challenge leads to innovation in project ideas and designs and reduction of transaction cost. <sup>83</sup>The Swiss Challenge System has enabled Indian States promote innovation and incentives by proposing new ideas. This study borrows heavily from these Authors in propagating the idea of Swiss Challenge to the Kenya PPP legal framework. Robert Osei-Kye, *et. al* <sup>84</sup>, discuss on the “Strategies for Effective Management of Unsolicited Proposals for PPP implementation”. They explore the approaches for effective management of

unsolicited PPP proposals.<sup>85</sup>From their analysis the critical approaches for managing unsolicited PPP proposals include clear policies, valuation of value for money, innovation, expenditure and risks of proposals and competitive, impartial, and transparent binding procedure; public and stakeholder engagement; and safeguarding the rights of intellectual property of the initial proponent”.<sup>86</sup> This paper borrows heavily from these authors’ analysis in making its recommendations and conclusions on unsolicited proposals.

In June 2019, the 12<sup>th</sup> Parliament of Kenya’s Departmental Committee on Transport, Public Works and Housing deliberated on a PIIP by KQ made to KAA to operate JKIA.<sup>87</sup>The

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pp.384-390 at 7 at [https://www.researchgate.net/publication/318484093\\_Swiss\\_challenge\\_method-An\\_innovative\\_public\\_private\\_partnership\\_model\\_in\\_India/download](https://www.researchgate.net/publication/318484093_Swiss_challenge_method-An_innovative_public_private_partnership_model_in_India/download) (accessed 27th March 2019)

<sup>82</sup> Dr. Venkateswararao Podile & N. Janardhana Rao, *supra note* 81 at 389

<sup>83</sup> Dr. Venkateswararao Podile & N. Janardhana Rao, *supra note* 81 at 388

<sup>84</sup> Robert Osei-Kye, *et. al* (2018) “Strategies for effective Management of Unsolicited Public-Private Proposals” *Journal of Management in Engineering* at [https://www.researchgate.net/publication/320297691\\_Strategies\\_for\\_Effective\\_Management\\_of\\_Unsolicited\\_Public-Private\\_Partnership\\_Proposals/link/5a60d417aca2723281056ed0/download](https://www.researchgate.net/publication/320297691_Strategies_for_Effective_Management_of_Unsolicited_Public-Private_Partnership_Proposals/link/5a60d417aca2723281056ed0/download) (accessed 17/8/2019)

<sup>85</sup> Robert Osei-Kye, *et. al* (2018) *ibid*, at 1

<sup>86</sup> Robert Osei-Kye, *et. al* (2018) *ibid*

<sup>87</sup>12<sup>th</sup> Parliament of Kenya’s Departmental Committee on Transport, Public Works and Housing, Report on the Inquiry into the proposed Kenya Airways Privately Initiated Investment Proposal to Kenya Airports Authority available at <http://www.parliament.go.ke/sites/default/files/2019-06/Report%20on%20the%20inquiry%20into%20the%20proposed%20KQ%20PIIP%20to%20KAA.pdf> at p.52

assessment made by Parliament noted that the PIIP did not present a viable option for restoring Nairobi as the civil aviation hub in Africa that it sought to achieve. The Committee further noted that owing to KQ's financial status and current lack of competitiveness of Kenya's civil aviation industry, the People of the Republic of Kenya stand to lose the most if the trend remains. The Committee recommended that KQ be nationalized.<sup>88</sup> This discussion clearly indicates that PIIPs may lack objectivity; the lack of proper safeguards on PIIPs in the PPP Act leaves the Nation at a disadvantage as some of these PIIPs may be approved and end up not offering value for money. This paper seeks to address the limitations in the PPP Act as it fails to provide for competition to increase value for money in PPP infrastructure project delivery.

### **1.8 Research Methodology**

The study will rely on primary and secondary sources of information. The primary data will comprise information collected from One on One Interviews of eight Senior Officials of the Ministry of Transport and Infrastructure, Kenya National Highways Authority, Kenya Ferry Services Limited and Public Private Partnerships Unit of the National Treasury in Kenya. These Officials have been confirmed to be directly responsible for PPP Projects in their respectful institutions. Conducting interviews will be necessary to collect firsthand information from the Officers involved PPP projects hence assist in filling in the gaps in the PPP legal framework. Interviews will enable the focus of this study to be maintained and accurate conclusions and recommendations to be generated.

The primary source of data will also include the Constitution of Kenya, 2010, PPP Act, 2013 and Regulations 2014 and Public Finance Management Act, No.18 of 2012. The paper will also rely

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<sup>88</sup> 12<sup>th</sup> Parliament of Kenya's Departmental Committee on Transport, Public Works and Housing, Report, *supra note* 87

on case law from Kenya and other relevant jurisdictions. Gathering of secondary information will be effected through desk research, that will either be from internal or external sources. This will allow expanded in-depth of this study hence solidify the findings, conclusions and recommendations.

This paper will conduct a comparative study on South Africa and India's legal regulatory framework, these two jurisdictions are favorable due to the maturity of their PPP legal and institutional frameworks, their PPP market readiness and availability of information provided on online websites.

### **1.9 Limitation of the Study**

This study is limited to public private partnerships arrangements only with a focus on PIIPs. The information available on PIIP projects in Kenya is mostly confidential hence inaccessible, frustrating proper analysis of the discussion. The study will discuss on the internationally accepted principles of accepting PIIPs.

### **1.10 Chapter Breakdown**

This paper is arranged in four chapters as stated below:

The First Chapter is the Introduction. The introduction gives a general background of the research topic, area of study and the aims of the research and explains what the paper is all about, the statement of the problem, the objectives, and hypothesis of the research, the theoretical framework, literature review, the methodology and limitations of the study. This chapter will give a synopsis of the study.

The Second Chapter discusses the PPP legal framework in Kenya. It gives a critical analysis of the PPP Act, regulations and policy. It will outline the historical development of PPPs in Kenya

and discuss on the current status of PIIP infrastructure projects in the pipeline. The paper will discuss on the role of PPP legal regulation and other supporting laws and how the same affects the implementation of projects. It will further discuss the experiences of the public and private sectors in implementing PPP's through PIIPs. This chapter will demonstrate that there is significant relationship between legal regulatory framework and the performance of PPP infrastructure projects in Kenya and that PPP Act and Government PPP policy, 2011 have clear gaps on use of PIIPs hence do not meet the best practice.

The Third Chapter gives a comparative analysis of PPP legal framework in other jurisdictions that have regulatory frameworks that are compliant to the principles set by OECD and World Bank on PIIPs i.e. South Africa and India. This chapter will focus on how PIIPs commonly known as unsolicited proposals have been used to facilitate infrastructure projects quite innovatively and creatively in these countries. The chapter will demonstrate that there are lessons to learn from South Africa and India on PIIPs.

The Fourth Chapter will give recommendations, some of which have been borrowed from other jurisdictions, demonstrating the hypothesis that there is need for reform of the legal regulatory framework in area of PIIPs. The recommendations will be geared to amendments of the current PPP Act and regulations. It will give the Researcher's conclusion and summary of the findings.

## CHAPTER TWO

### LEGAL REGULATORY FRAMEWORK ON PRIVATELY INITIATED INVESTMENT PROPOSALS

#### 2.0 Introduction

This Chapter discusses the legal regulatory framework of PPP's in Kenya. It gives the historical background of PPP's in Kenya. It gives a critical analysis of the PPP policy, PPP Act and regulations and the Constitution of Kenya, 2010 and their relevance to the study. The discussion is premised and will lay focus on PIIPs in PPPs.

This chapter will address the question on whether the current PPP legal regulatory framework on PIIPs in PPP infrastructure projects provides proper safeguards against challenges inherent in PIIPs. This chapter seeks to discuss the hypothesis that the PPP legal framework on PIIPs is weak hence not watertight to prevent the challenges inherent in PIIPs consequently does meet the best practice.

#### 2.1 Historical Background

In 2008, the Government of Kenya initiated Vision 2030, the nation's blueprint based on years between 2008 to 2030.<sup>89</sup> Vision 2030 strives towards the transformation of Kenya into "a newly industrialized middle-income nation with efficient services and facilities with investment in infrastructure being key".<sup>90</sup> The Government realized that to achieve this it required the combine efforts of private sector that have the efficiency, know-how, innovation and finances. In 2009 the Minister in charge of National Treasury enacted Public Procurement Disposal (Public Private

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<sup>89</sup> National Treasury, Government of Kenya PPP Policy Statement, 2011 *supra* note 64 (accessed 22nd February 2019)

<sup>90</sup> Vision 2030 website, *supra* note 59 (accessed 22nd February 2019)



Partnerships) Regulations, 2009.<sup>91</sup>These regulations provided basis for both public and private parties to engage in PPPs. Regulation 4(1) established PPP Steering Committee, the Committee had the mandate of reviewing the challenges constraining involvement in PPPs and to formulate solutions to addressing the challenges and create facilitative environment.<sup>92</sup>The Committee also had the function of developing guidelines, standards and procedures guiding PPP processes.<sup>93</sup>Regulation 7 established PPP Secretariat which had the mandate to serve as a resource center for PPPs in Kenya. However, these regulations did not provide for the structure of the Secretariat and its mode of operations. Regulation 16 provided that where a public entity intends to engage in a PPP transaction, the entity shall invite the private sector by newspaper advertisement to tender its bid by submitting its technical bids and to demonstrate the ability to access finances. Unsolicited proposals were not provided for.

The Government soon realized that these regulations had glaring gaps as the institutional framework was vaguely provided for, the regulations did not provide an elaborate PPP processes.<sup>94</sup>It did not establish the viability gap fund which was necessary to support PPP projects, nor did it provide for the need to have a feasibility study to show the viability of a project before inception.<sup>95</sup>

In 2010, the Government sought to investigate the country's legal and regulatory framework on PPPs. The inquiry suggested the enactment of a PPP law to bridge the gaps in existing laws with

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<sup>91</sup> Public Procurement and Disposal (Public Private Partnerships) Regulations, 2009 Legal Notice No. 38 Dated 10<sup>th</sup> March 2009, established under Public procurement & Asset Disposal Act. No. 3 of 2005

<sup>92</sup> Regulation 5(b) of the Regulations, 2009

<sup>93</sup> Regulation 5(c) of the Regulations, 2009

<sup>94</sup> Government of Kenya PPP Policy Statement, supra note 64 at 6 (accessed on 13/08/2019)

<sup>95</sup> Public Procurement and Disposal (Public Private Partnerships) Regulations, 2009

regard to PPPs.<sup>96</sup>The PPP policy statement was therefore passed in December 2011 by the Government.<sup>97</sup>The policy provided the foundation for the formation of organizations to steer the PPP programs, to mobilize private sector investors and to provide for government backing for PPP projects, as well as to provide a clear and transparent procedure for project development.<sup>98</sup>

Before the enactment of the 2009 Regulations and the enactment of the current PPP Act, Kenya had implemented several PPP projects which experienced various legal challenges. These projects include 1<sup>st</sup> Nyali Bridge, 1930, Grain Terminal, Port of Mombasa, 1998, Kenya Power and Lighting Company Limited (KPLC) Management Contract, 2005, Malindi Water Utility, 2002 and Rift Valley Concession, 2005. The projects are discussed below:

**a) First Nyali Bridge in 1930's**

The Nyali Bridge Concession was operative from 1931 to 1980. There were toll charge on the charged on the users of the bridge with pedestrians paying ten cents, cattle head twenty cents, motorcycle fifty cents, a saloon car two shillings among others.<sup>99</sup>The tolls collected by the Private Party were for the sole purpose of maintaining the bridge.<sup>100</sup>This project faced operational challenges leading to the famous civil suit, *Nyali Limited v. Attorney General*.<sup>101</sup>By an agreement dated 9<sup>th</sup> October 1929 made between the Kenya Colony and Protectorate and the Plaintiff company, the Plaintiff was allowed to levy tolls for use of its bridge except for use of the bridge by the police or military on duty or their equipment, baggage or transport. The

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<sup>96</sup> PPP Unit website, available at < <http://pppunit.go.ke/index.php/legal-regulatory-framework>> (accessed 13 January 2019)

<sup>97</sup>PPP Unit website, *ibid*

<sup>98</sup> Reality of Aid Africa, "ODA and Private Sector Development in Kenya", (2014) 6 at <https://www.africaportal.org/publications/oda-and-private-sector-development-in-kenya/> (accessed 15<sup>th</sup> January 2019)

<sup>99</sup> National Treasury, PPP Unit Website at <https://pppunit.go.ke/ppp-pipeline/> (accessed 24<sup>th</sup> February 2019)

<sup>100</sup> National Treasury, PPP Unit Website, *ibid*

<sup>101</sup> [1955] All ER 646

Company subsequently commenced levying the tolls during the 1939-45 war on the Military as the tolls collected from other users were so small to maintain the bridge, the Military opposed the decision. The High Court ruled for the Military, Nyali Limited appealed against this decision, the Court of Appeal allowed the appeal. The court ruled that the exemption ought to have been provided in an ordinance or an act of parliament. From the analysis made to this case, the toll fees levied could not meet the business case for the Plaintiffs. The Government later constructed the Second Nyali bridge which was not tolled and no road in Kenya has since been tolled. The lesson learnt from the suit is that for tolling to be successful under PPP, the same must be established by law.

**b) Grain Bulk Terminal at the Port of Mombasa in 1998**

This project was arranged as a Build Own and Operate (BOO) for bulk grain handling terminal. The project was at a cost of US dollars 35 Million in 1998. Development of the terminal was completed in 2000, culminating into a contemporary dry bulk freight handling facility that addressed low container discharge rates, leakage during operations and lack of accountability of freight volumes among other challenges.<sup>102</sup>The project was successful as it offered the efficiency required to improve operations at the port.

**c) Kenya Power and Lighting Company Limited (KPLC) , Management Contract, 2005**

In June 2006, KPLC executed a management contract with Manitoba Hydro International (MHI) for a period of two years. The execution of the contact was a condition precedent for

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<sup>102</sup> PPP Unit Website, available at <https://pppunit.go.ke/about/> / accessed 10th February 2019

disbursement of the US dollars 153 million donor for energy sector recovery project.<sup>103</sup>

**d) Malindi Water Utility, 2002**

This project for operation and maintenance of water services for five years. It was largely effective with substantial enhancements across various service level outputs among them, the amount of water being supplied to residents, reduction of un-counted water, number of connected customers and overall revenue collection.<sup>104</sup>

**e) Rift Valley Railways Concession, 2005**

The World Bank Study in 1998 recommended that a concession would be effective in the running of the 2,350 km meter gauge railway line for Kenya- Uganda Railways. The concession was awarded to Rift Valley Railways in 2005 with attainment of financial close in December 2006.<sup>105</sup> The Rift Valley Railways failed to meet performance standards hence the concession was terminated in July, 2017 by Kenya Railways and the assets handed back to Kenya Railways Corporation. Failure of the concession has been attributed to a host of challenges including a lightly capitalized consortium, frequent change of control of the consortium etc.<sup>106</sup> Termination of the concession was contested in the ongoing case, *Rift Valley Railways (RVR) v. Kenya Railways Corporation (KRC) & Government of Kenya*.<sup>107</sup> Upon issuance of termination notice by the Public entity, KRC, RVR moved the court to stop the termination seeking indulgence from KRC to make good the default events as RVR was negotiating with financiers to invest in the project. The court upheld KRC arguments that RVR had defaulted and that default hand back

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<sup>103</sup> PPP Unit Website, *ibid*

<sup>104</sup> PPP Unit Website, *supra* n.102

<sup>105</sup> PPP Unit Website, *supra* n.102

<sup>106</sup> PPP Unit Website, *supra* n.102

<sup>107</sup> Milimani H.C.C. No. 136 of 2017

process should commence. KRC took over the conceded assets and now operates the meter gauge railway.

Even when the PPP a concession was seen to be the most commendable method to save the mega railway project from dilapidating it faced challenges from inception of the concession, the operations of the railway services did not improve, there were constant delays on passenger trains services and freight services.

The Public Procurement and Disposal (Public Private Partnerships) Regulations, 2009 did not provide the private investor the confidence it required to invest through a PPP framework. It is for this reason that the Government sought intermediate solutions. It is therefore important that we discuss the principles that steer the formulation of PPP law and in the implementation of projects, before we discuss on the PPP Act.

### **2.1.2 The Principles of Public Private Partnerships**

Kenya, like most governments has deliberately turned to PPP to cover infrastructure gap.<sup>108</sup> These partnerships may be initiated by the public entity (solicited proposals) or a by the private entity PIIPs (unsolicited proposals).

PPP processes are mostly commenced by the public entity which conceptualizes a project, undertakes feasibility studies and procures the project through a competitive bidding process.<sup>109</sup> Competitive bidding is known to aid in the attainment of value for money and ensure

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<sup>108</sup> Hussein N. Ndonye *et.al* (2014) “Evaluation of Public Private Partnership Strategies on Concession Performance: Case of Rift Valley Railways Concession, Kenya” *European Journal of Business and Management* Vol.6, No.39 at 145

<sup>109</sup> World Bank Group/PPIAF “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” Review of Experiences With Unsolicited Proposals In Infrastructure Projects Vol. III at 5 at <https://ppp.worldbank.org/public-private->

the public interest is met.<sup>110</sup>The difference between solicited and unsolicited projects is that the latter permits private entities to commence and develop the project idea which is a public entity responsibility.<sup>111</sup> As stated earlier, this paper focuses its discussion on PIIPs.

With advent of PPPs, UNICTRAL passed “Model Legislative Provisions on Privately Financed Infrastructure Projects” in 2004. These model provisions were passed to guide member states which include Kenya in developing legislation on PPPs. UNICTRAL recommend that the constitutional, statutory and institutional framework for the execution of infrastructure projects funded by private parties should ensure transparency, impartiality and the long-term sustainability of projects.

Additionally, The United Nations Assembly passed the Convention on the Organisation for Economic Co-operation and Development<sup>112</sup> (OECD), it sets “Principles for Public Governance of Public-Private Partnerships”.<sup>113</sup> These principles have been replicated by the World Bank in its advice to governments when developing PPP policy on PIIPs (unsolicited proposals). These principles are as follows:

- a) “Public interest: When Governments accept unsolicited proposals, the projected project must support national infrastructure priorities to meet public interest. Sustainable-development goals (SDGs) is also considered when assessing what the public would

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partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals\_Volume 3\_Guidelines\_WEB%20%281%29.pdf (accessed 19/8/2019)

<sup>110</sup> World Bank Group/PPIAF “Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects” Vol. III *ibid* at 5

<sup>111</sup> World Bank Group/PPIAF, *supra* note 109 at 55 (accessed 19/8/2019)

<sup>112</sup> Articles 1, 2 (a), 3 and 5 (b) of the Convention on the Organisation for Economic Co-operation and Development of 14<sup>th</sup> December 1960- In which Kenya is a signatory

<sup>113</sup> OECD, (2012), Recommendation of the Council on “Principles for Public Governance of Public-Private Partnerships” at <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> (accessed 18/8/2019)

require.<sup>114</sup>

- b) Value for money: Unsolicited proposal projects should be adopted as PPPs if they generate higher value for money as a PPP than when solicited by the public with its own resources.<sup>115</sup>
- c) Fiscal affordability: Governments must comprehend each unsolicited proposal's impact on public budget and assess whether the legal responsibilities are affordable and risks sufficiently shared and can be borne by either party.<sup>116</sup>
- d) Market pricing should be reasonable: Provision of PPP resources or services should be provided at market rates or less and should eliminate excessive private-sector gains.<sup>117</sup>
- e) Transparency and accountability: Parties to unsolicited proposal deliberations should reveal all crucial project details to alleviate stakeholder concerns and ensure that the public sector is accountable".<sup>118</sup>
- f) PPP and unsolicited proposals processes should be aligned: Principles and procedures used for solicited and unsolicited PPPs should be well aligned.<sup>119</sup>

This paper makes an analysis of how the PIIP legal framework in Kenya mirror the PPP principles set by UNICTRAL and the World Bank. The paper shall now give a synopsis of the PPP legal regulatory framework in Kenya generally before discussing on PIIPs specifically.

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<sup>114</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects" Vol. I at 5 at [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals\\_Volume3\\_Guidelines\\_WEB%20%281%29.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/UnsolicitedProposals_Volume3_Guidelines_WEB%20%281%29.pdf) (accessed 19/8/2019)

<sup>115</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects", *ibid*

<sup>116</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects", *ibid*

<sup>117</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects", *ibid*

<sup>118</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects", *ibid*

<sup>119</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects", *ibid*

## **2.2 Legal Regulatory Framework for PPPs in Kenya**

The legal regulatory framework for PPPs in Kenya includes policy statement by Government, Constitution of Kenya, Statutes, regulations, guidelines and standards. This paper shall commence this discussion with an analysis of the PPP policy statement in Kenya.

### **2.2.1 Policy Statement on PPPs**

As earlier stated, in 2011 the Government pronounced PPP policy statement aimed at pronouncing the government's commitment on PPPs and to provide foundation for the establishment of PPP law to empower the existing legal and regulatory framework.<sup>120</sup>

The rationale for the establishment of the policy included the provision of adequate and high-quality infrastructure services as there was an increasing gap between public investment requirements and existing resources. More importantly, the policy was established to address the challenges in mobilizing necessary investment to raise the number and quality of key public services and to accelerate development in Kenya.<sup>121</sup> The policy provides that the Government shall use PPPs as a mode of delivering key infrastructure projects. In accordance, to the policy PPP projects shall be obtained in open and transparent manner in line with national and relevant international standards and procurement rules while ensuring competitiveness.<sup>122</sup> The policy embodies the spirit of the principles of PPPs discussed earlier in this paper.

Having addressed the policy framework, it is important that we understand the provisions of the Constitution of Kenya.

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<sup>120</sup> Government of Kenya PPP Policy Statement, 2011, *supra* note 64 (accessed on 7<sup>th</sup> February 2019)

<sup>121</sup> Government of Kenya PPP Policy Statement, *ibid* at ii

<sup>122</sup> Government of Kenya PPP Policy Statement, *ibid* section 3.9 at 9



### **2.2.2 The Constitution of Kenya**

The Constitution being the supreme law of the land; it provides that; “where a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”.<sup>123</sup>The PPP Act that is the subject matter of this paper states that; “all projects shall be procured through a competitive bidding process except otherwise provided for”.<sup>124</sup>It further provides that, “in awarding the private party a contract, the contracting authority shall be guided by the principles of transparency, free and fair competition and equal opportunity”.<sup>125</sup> This study however revolves around non-competitive process for PPPs provided for under the PPP Act.<sup>126</sup> The provisions of the PPP Act are discussed below.

### **2.2.3 Public Private Partnerships Act**

The National Treasury having pronounced the Policy on PPP which commended the enactment of a PPP Law, there was need to review of Kenya’s legal and regulatory framework to address identified gaps identified in the 2009 PPP Regulations under Public Procurement and Disposal Act, 2015.<sup>127</sup>

The President of Kenya assented the PPP Act on January, 14<sup>th</sup> 2013, the same commenced on February, 8<sup>th</sup> 2013.<sup>128</sup>As earlier stated in Chapter one, the PPP Act provides for “the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other

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<sup>123</sup> Article 227(1) of the Constitution

<sup>124</sup> Section 29 (1) of the PPP Act

<sup>125</sup> Section 29(2) of the PPP Act

<sup>126</sup> Section 61 of the PPP Act

<sup>127</sup>Government of Kenya PPP Policy Statement, *supra* note 64 at 3 3

<sup>128</sup> No.15 of 2013 Laws of Kenya

contractual arrangements”.

### **2.2.3.1 PPP Institutions established by the PPP Act**

The formal institutions that manage the provisions of the PPP Act include PPP Committee, PPP unit and PPP nodes etc. The same will be discussed below:

#### **a) PPP Committee**

PPP Committee is created under section 4 of the Act, it comprises of senior government officials. The Committee has the mandate to “formulate policy guidelines on PPPs, to consider project proposals submitted to it by a contracting authority”; “to supervise the monitoring and evaluation by contracting authorities of a PPP from the commencement to the post completion stage”, among other functions.<sup>129</sup>

#### **b) PPP Unit**

The PPP Act establishes the PPP Unit to serve mainly as the secretariat and technical arm of the PPP Committee and to “offer expertise in technical, financial and legal to the PPP Committee and any node established under the Act”.<sup>130</sup>The PPP Unit is mandated to; “assist contracting authorities, where the unit considers it necessary, to design, identify, select, prioritize, appraise, evaluate and negotiate projects”.<sup>131</sup>The PPP Unit sits at the center of implementation of PPP’s in Kenya.

#### **c) PPP Nodes**

The Act further provides that a contracting authority that intends to engage a private party in a PPP arrangement shall establish a PPP node.<sup>132</sup>The node shall be supervised by the accounting

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<sup>129</sup> Section 7 of the PPP Act

<sup>130</sup> Section 14 of the PPP Act

<sup>131</sup> Section 14 (2 (i) of the PPP Act

<sup>132</sup> Section 16 (1) of the PPP Act

officer of the contracting authority and its membership shall comprise of such “financial, technical, procurement and legal personnel as that authority shall, in consultation with the unit, consider necessary for the performance of its functions”.<sup>133</sup>The node is mandated to *inter alia*, “identify, screen and prioritize projects based on guidelines issued by the Committee, monitor the implementation of a project agreement entered into with the contracting authority”, supervise the administration of a project within the project agreement terms entered into by the public agency.

Having defined and explained the role of the PPP institutions, the paper shall now discuss on the PPP processes as provided for under the Act.

### **2.2.3.2 Overview of PPP Processes under the Act**

The Act provides for the PPP processes from project identification, selection and prioritization by the Contracting Authority. The Authority must identify the projects it intends to deliver by way of PPPs and justify the need for the same and the gains the project will have on the public.<sup>134</sup>A contracting authority then constitutes a project appraisal team for project preparation and appraisal.<sup>135</sup>

The Contracting Authority in conjunction with the PPP Unit should conduct a feasibility study to assess the viability of the project. Where the project is found to be feasible then the feasibility report is submitted to the Debt Management Unit at the National Treasury by the PPP Unit for approval of the financial risk and contingent liabilities of the project.<sup>136</sup>Where the project is found viable and approval is granted by the Debt Management Unit, the PPP Unit makes a report to the PPP Committee for approval of the project. Where the project is approved by the PPP

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<sup>133</sup> Section 16(2) of the PPP Act

<sup>134</sup> Section 31 of the PPP Act

<sup>135</sup> Section 32 of the PPP Act

<sup>136</sup> Section 35 of the PPP Act

Committee, the Contracting Authority then commences the bidding process by publicizing on at least two newspapers of nationwide rotation on competitive bidding process for solicited proposals<sup>137</sup> and for unsolicited proposals, the Contracting Authority is notified of the approval made by the PPP Committee and then prepares for negotiations without conducting a feasibility study.<sup>138</sup>The Contracting Authority then constitutes a Negotiating Committee that negotiates with the successful tenderer/PIIP proponent on technical and financial terms.<sup>139</sup> If the negotiations are successful both parties negotiate a project agreement which forms the basis of engagement between the parties. The Act provides that the Cabinet Secretary responsible for finance matters may by regulations, stipulate the manner in which a project contract is drafted, it is crucial to note that the Cabinet Secretary has not enacted such regulations.

The Act also provides for project management after the project agreement has been executed by the PPP Node.<sup>140</sup> Project management entails monitoring the execution of the project, overseeing the management of the project agreement, measuring the output of the project, submitting reports on the project agreement implementation to the PPP Committee.<sup>141</sup>The Act provides that “a private party shall, upon being requested to do so by a contracting authority, grant to an agent or employee of the authority, access to the project premises, site and storage facilities for the purpose of carrying out an inspection in accordance with the terms of the project agreement”.<sup>142</sup>

Most importantly, the Act provides that PPP Unit should publish in the electronic and print media, the country’s significant list of projects that have been approved by the PPP Committee

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<sup>137</sup> Section 37 of the PPP Act, Part VII of the PPP Act

<sup>138</sup> Part VIII of the PPP Act

<sup>139</sup> Section 52 of the PPP Act as read together with Regulation 54 of the PPP Regulations, 2014

<sup>140</sup> Section 65 of the PPP Act

<sup>141</sup> PPP Act, *ibid*

<sup>142</sup> Section 70 of the PPP Act

and the Cabinet.<sup>143</sup>

More so, the Contracting Authority is required, upon the signing of a project contract by the parties, publish in at least two newspapers of countrywide circulation and in the electronic media, the results of the tender together with information on: the nature of the project; the scope of the project, the successful bidder, the project cost, the project value and charge; and the period the project will be undertaken.<sup>144</sup> It is for this reason that the PPP Unit has published all the PPP projects in the pipeline in its website and it updates all the steps taken towards implementation of the projects.<sup>145</sup>

The PPP Act further provides that the Cabinet Secretary may pass regulations generally to facilitate the execution of the functions under the Act.<sup>146</sup> The regulations are briefly discussed below.

#### **2.2.4 PPP Regulations<sup>147</sup>**

In 2014, the Cabinet Secretary, National Treasury published PPP Regulations pursuant to section 71 of the PPP Act for better functionality of the PPP Act. These regulations apply to; “every contract for the design, financing, construction, operation, equipping or maintenance of a project for the provision of public services undertaken under the Act”.<sup>148</sup> However, the Regulations do not apply if the project:

- a) “is a national project that has a capital expenditure component with a contract value of more than eighty-five million shillings”;<sup>149</sup>

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<sup>143</sup> Section 25 of the PPP Act

<sup>144</sup> Section 60 of the PPP Act

<sup>145</sup> PPP Unit Website, at <http://www.pppunit.go.ke/> (accessed 21/7/2019)

<sup>146</sup> Section 71 of the PPP Act

<sup>147</sup> Public Private Partnerships, Regulations, 2014, Legal Notice 148

<sup>148</sup> Regulation 2 of the PPP, Regulations, 2014

<sup>149</sup> Regulation 2(2)(a) of the PPP Regulations, 2014

- b) “is a county government project that has a capital expenditure component with a contract value of more than five million shillings”;<sup>150</sup> or
- c) “is either a national government project or a county government project that does not have a capital expenditure component but a contract value of more than five million shillings being life cycle costs.”

The regulations expound on the provisions of the PPP Act. The Regulations provide that where contracting authority considers and accepts a PIIP, it shall develop criteria for the negotiation of the PIIP and submit the criteria to the PPP Unit for appraisal and recommendation where — “the PIIP is affordable; the PIIP provides value for money; and the PIIP provides for the transfer of risk from the contracting authority”.<sup>151</sup>

The regulations further provide that a contracting authority may grant a bid to the investor who submits a PIIP where they negotiate the proposal and the negotiations conclude successfully. The bid is only granted after the PPP Committee approves of the award.<sup>152</sup> The regulations further provide that a person who submits a PIIP is not reimbursed the costs of the proposal where a contracting authority terminates negotiations on the proposal.<sup>153</sup>

The regulations do not require a contracting authority to subject the PIIP to any competition. Upon submission of the proposal and approval for negotiations by PPP Committee, the contracting authority and the private party commence negotiations of the PIIP.

This paper also considers Public Finance Management Act relevant to this study, the same is discussed below.

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<sup>150</sup> Regulation 2(2)(a) of the PPP Regulations, 2014

<sup>151</sup> Regulation 52(1) of the PPP Regulations, 2014

<sup>152</sup> Regulation 53(7) of the PPP Regulations, 2014

<sup>153</sup> Regulation 53(7) of the PPP Regulations, 2014

### **2.2.5 Public Finance Management Act (PFMA)<sup>154</sup>**

The PFMA was enacted to “provide for effective use of public finances by both National and County Governments”.<sup>155</sup>The requirement for the approval of the Debt Management Office of the National Treasury of PPP projects for assessment of the financial risk of the project is provided under the Act.<sup>156</sup>

Currently the National Assembly is debating on the amendment of PPP Act to introduce PPP process by County Governments in Kenya. The Amendment Bill is relevant to this study as it also demonstrates that the legislature has not yet consider addressing all the gaps existing in the Act.

### **2.2.6 PPPs (Amendment) Bill, 2017**

Even though a Bill is not a source of law in Kenya, the PPP’s (Amendment) Bill, 2017 is relevant to this study as it demonstrates the position of the PPP legal regulatory framework in Kenya. The PPP’s (Amendment) Bill, 2017 is to amend the PPP Act, 2013, to recognize county governments as independent contracting authorities for PPP projects. The current PPP Act fails to distinctively provide the procedure to adhere to by county governments. The amendments provide for the processes to be adhered to by the county government in PPP procurement, this process is lengthy than that provided for by National Government and other state agencies.

The Amendment Bill fails to address the gap in law that forms the focus of this study. It fails to address the non-competitiveness and complexity of the PIIP provisions under the Act. Currently there are no PPP Projects by any county government in Kenya post – procurement stage.

This paper shall now discuss on the legal regulatory framework on PIIPs and mirror the principles of PPP in the PIIP provisions.

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<sup>154</sup> Public Finance Management Act No. 18 of 2015 Laws of Kenya

<sup>155</sup> Preamble of the PFM Act

<sup>156</sup> Section 35(2) of the PPP Act

### 2.3 Privately Initiated Investment Proposals

PIIPs are “proposals initiated by a private party to undertake a PPP project submitted at the its own motion rather than in response to an invitation by the government”.<sup>157</sup>Section 61 of the PPP Act states that: “ a contracting authority may consider a PIIP for a project and procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process”.

The PPP Act provides that a PIIP qualifies if :

- a) “There is urgent need for continuity in the construction, development, maintenance or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical;
- b) The cost relating to the intellectual property of the design of the project is substantial;
- c) There is only one firm capable of undertaking the project; and
- d) There exist circumstances as the Cabinet Secretary -National Treasury may prescribe.”<sup>158</sup>

The PPP Regulations 2014 lays procedure for contracting authorities to follow when negotiating PIIPs.<sup>159</sup>Regulation 51 provides that a contracting authority may consider a PIIP if it meets the criteria provided for under Section 61(1) (a-d) of the Act stated above. It further provides that the PIIP must be in the contracting authority’s development programme. Regulation 52 requires that the authority develops parameters for the negotiation of a PIIP and submit to the PPP Unit where the PIIP is affordable, provides value for money and provides effective transfer of risks from the

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<sup>157</sup> World Bank, at <https://ppp.worldbank.org/public-private-partnership/ppp-overview/ppp-procurement-bidding/unsolicited-proposals/unsolicited-proposals> accessed on 24th February 2019

<sup>158</sup> Section 61 (1) (a-d) of the PPP Act

<sup>159</sup> Legal Notice No. 148 of 2014 , Regulations 51-53 of PPP Regulations 2014



contracting authority.<sup>160</sup>

All in all, the provisions set out in section 61 (1) (a-d) of the PPP Act is the determinant for considering unsolicited PPP project. These requirements are restrictive, the PPP Unit indicates that seventy-two transport infrastructure projects have been approved by the PPP Unit most of which are in the pre-procurement stage.<sup>161</sup> Out of the said projects only three are by way of PIIPs i.e Likoni crossing aerial cable car by Kenya Ferry Services Limited (KFS), Lamu-Garissa-Isiolo Highway by KeNHA and Operations and Maintenance of Lamu Port by Kenya Ports Authority.<sup>162</sup> The negotiations of these projects are ongoing.

The criteria for considering PIIPs as foretasted does not allow for innovation that is commonly associated with private firms, as the criterion provided is narrow and restrictive. Universally, the criteria for approval of unsolicited bids vary from one State to another. The UNICTRAL legislative “Guide on Privately Financed Infrastructure Projects”, 2000 recommends that model laws should adopt the criteria for approving on unsolicited proposals.<sup>163</sup> Firstly, “when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures on bidding would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part”.

Secondly, unsolicited proposals may be considered where the time required to conclude the project is short and the expected initial investment value does not exceed the amount set by the enacting atate as monetary ceiling. The monetary ceiling should be indicated in the provisions of

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<sup>160</sup> Regulation 51(1) of the PPP regulations, 2014

<sup>161</sup> PPP Unit Website <http://5.196.68.29/project-info/sector/Transport%20and%20Infrastructure> accessed on 24<sup>th</sup> February 2019

<sup>162</sup> PPP Unit Website, *ibid*

<sup>163</sup> Model provision 18 of the UNICTRAL “Legislative Guide on Privately Financed Infrastructure Projects”, 2000

the state's laws that specify the monetary threshold below which a PPP may be granted without competitive procedures". Thirdly, unsolicited proposal may be considered where the project entails national defence or national security. Fourthly, "where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons".

Fifthly, "where the unsolicited proposals fall under intellectual property, trade secrets or other exclusive rights. Sixthly, when an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted, or all proposals failed to meet the evaluation criteria set forth in the request for proposals". Seventhly, "if, in the judgment of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award within a required time frame".

Lastly, unsolicited proposals may be considered in cases where the enacting state indicates the public authority permits such an exception for compelling reasons of public interest."

The criteria set forth above by UNICTRAL is facilitative, it offers a wide spectrum of criteria which the Public entity would use in considering a PIIP. The Investors will find avenues of presenting their proposals easily, the government on the other hand is able to benefit with project proposal for a feasible PPP project and will benefit for the innovative and creative ideas of the private sector. On this basis, this paper opines that the provisions of section 61 (1) (a-d) of the PPP Act does not facilitate PPP projects as it has set restrictive provisions preventing private sector from harnessing innovation and creativity. This calls for amendments to provide for a

facilitative criterion.

In the implementation of infrastructure projects, governments initiate the process of identifying and developing a project.<sup>164</sup> Over the years, governments across the globe have opted for unsolicited proposals mainly due to the challenges governments encounter due to their lack of skills to identify and develop projects.<sup>165</sup> Nonetheless, unsolicited proposals have been found to divert public assets away from government strategic plans, lack of transparency and provide poor value for money.<sup>166</sup>

PIIPs may allow the Government of Kenya to identify and prioritize projects; they may also assist in the initial stages of project identification and valuation and generate innovative ideas to infrastructure challenges.<sup>167</sup> In a government planning process, public authorities identify projects match infrastructure plans and previously identified economic needs.<sup>168</sup> The private party is driven by its own interests which may not be in tandem with those of the public entity. Without clear guidelines and safeguard embedded in the law on unsolicited proposals, Kenya is likely to face challenges rendering the PPP project unaffordable and one that fails to accord the public value for money.

PIIPs address the lack technical know-how on how to develop and implement projects through the solicited method by government. Additionally, it is the believe of most governments around the world that unsolicited proposals are efficient and offer a simpler form of project development

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<sup>164</sup> World bank Group/ PPIAF , *Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects* at 9 at file:///C:/Users/user/Downloads/UnsolicitedProposals\_V2Guidelines\_WEB.pdf (accessed 27th February 2019)

<sup>165</sup> World bank Group/ PPIAF Website, *ibid*

<sup>166</sup> World bank Group/ PPIAF Website, *ibid*

<sup>167</sup> Public - Private Partnership Reference Guide – Version 3 (2017) 190 at [https://library.pppknowledgelab.org/documents/4699?ref\\_site=kl](https://library.pppknowledgelab.org/documents/4699?ref_site=kl) (accessed 18/8/2019)

<sup>168</sup> Public - Private Partnership Reference Guide – Version 3 (2017) , *ibid*

of infrastructure assets.<sup>169</sup> However, it must be acknowledged that unsolicited proposals often face even more obstacles than the solicited process. These include undue political influence, lack of a transparent and competitive procedure among others. Moreover, in the case of unsolicited proposals, there are allegations of bribery, fraud and low quality of the infrastructure or services involved.<sup>170</sup>

It is worthwhile however to note that even though it is beneficial to provide facilitative provisions in the PPP law, the promoters of these proposals often offer limited engineering, cost, and also demand data to calculate financial viability.<sup>171</sup> Furthermore, unsolicited bids prevent the public sector from participating in decision making on how to steer the sector. This prohibits the government from analyzing financial pre-feasibility to assess the magnitude, if any, of government financial support required ensuring the project is successful.

Much debate on unsolicited proposals stems from the public entity surrendering exclusive rights to private parties without transparent bidding processes.<sup>172</sup> The emerging trends all over the world are that for governments to achieve value for money, affordable and a project where risk is transferred, then the governments introduce competition through bidding of the unsolicited proposals.

Unsolicited proposals often circumvent regular procurement procedures or are directly negotiated.<sup>173</sup> Direct negotiation should be discouraged as it creates loopholes for bribery, discrimination and misuse of power.<sup>174</sup> One Respondent Interviewee to this study, stated that

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<sup>169</sup> World Bank Group/PPIAF, Policy, *supra* note 164 (accessed 19/8/2019)

<sup>170</sup> World Bank Group/PPIAF, Policy, *supra* n.164

<sup>171</sup> John T. Hodges & Georgina Dellacha (2007), *supra* note 38 at vi

<sup>172</sup> John T. Hodges & Georgina Dellacha (2007), *supra* note. 38

<sup>173</sup> John T. Hodges & Georgina Dellacha (2007), *supra* note 38

<sup>174</sup> Robert Osei-Kye, *et. al* (2018), *supra* note 34 at 10 (accessed 17/8/2019)

most PIIPs favor corrupt or nepotistic practices. He further stated that the Institution he works for receives an average of twelve PIIPs a year, most of the PIIPs are still in consideration by the Contracting Authority's PPP Node. The Interviewee stated that most of the proposals have innovative and creative ideas however the Institution believes that the market would offer better ideas but the lack of provisions in the law requiring that PIIPs should be subjected to the market, prevents the Public entity from subjecting them to competition.

It has been said that single sourcing aids parties disguise corruption and nepotism, making unsolicited proposals projects susceptible to such allegations.<sup>175</sup> In Kenya, the ongoing case, *Kenya Civil Aviation Workers Union v Cabinet Secretary of Transport, Infrastructure, Housing, Urban Development & 2 Others*,<sup>176</sup> the Petitioners moved the court to challenge the PIIP made by Kenya Airways (KQ) which is partly owned by the Government of Kenya to Kenya Airports Authority (KAA), a State Corporation, to operate and maintain JKIA. The Petitioners accuse the Chairman of the Board, KAA for pursuing selfish interest, they allege the Chairman is colluding with KQ to grant a concession without following due procedure and that the Chairman has avoided to involve the public in processing of the PIIP. The Petitioners further allege that KQ is loss making company hence not capable of running a profitable institution like JKIA. The National Assembly through the Departmental committee on Transport, Housing and Public Works, analyzed the matter and ordered that the PIIP be stayed and plans be made to nationalize the airline.

The proceedings of this case are a clear demonstration that PIIPs require to be subjected to the market rather than to be negotiated directly. The results yielded from my one on one interviews

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<sup>175</sup> John Hodges and Georgina Dellacha (2007), supra note 381, at 81.

<sup>176</sup> Milimani H.C ELC. No.57 of 2019

with Officials of PPP unit, Kenya Ferry Services Limited and Ministry of Transport officials include: on Likoni cable car project PIIP project by Kenya Ferry Service Limited (KFS) - KFS Officials stated that they were motivated by the PIIP as Kenya lacks the technology and capacity to develop the concept required for cable car. There are no cable cars in Kenya hence the project uniqueness and intellectual property in the technology involved made the project qualify as a PIIP. For the KFS officials, the proposal by the private entity offered solutions to the congestion at the ferry in terms of transporting passengers to cross the deep waters from the Island of Mombasa to Kwale County.<sup>177</sup> For KFS, the private party offered solutions they would not have offered.

Secondly, the Kenya National Highways Authority officials stated that they considered the PIIP for the construction of Lamu- Isiolo 563 kilometre road as they urgently required to complete the road to transport cargo and freight in and out of Lamu port that is under construction. The Interviewees further stated that developing the design and develop the project concept under solicited proposal would have taken a long time and finances yet there is urgent need for the road and there are not finances for the same.<sup>178</sup> The negotiations are still ongoing, the financial terms of the intended concession are proving to provide a hard bargain.

Thirdly, the interviewees believed that many projects that originate as unsolicited proposals divert public resources from the fundamental plans of the government, providing poor value for money and lack of transparency.

Fourthly, the PPP Unit stated PIIPs aid the Contracting Authorities in the formulation of a

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<sup>177</sup> Likoni Cable Express Limited Website available at <http://likonicableexpress.co.ke/> accessed on 13<sup>th</sup> October 2019

<sup>178</sup> PPP Unit website available at <https://pppunit.go.ke/about/> accessed 10th February 2019

project concept because most lack capacity and creativity to develop concepts. Most of the Interviewees stated they would prefer that PIIPs are subjected to competition to enhance the achievement of value for money.

It is for this reason that this paper posits that the PPP Act should introduce competition to unsolicited proposals as discussed below.

### **2.3.1 The “Swiss Challenge System”**

Subjecting unsolicited proposals to competition has been branded as “swiss challenge system”.<sup>179</sup> “Swiss challenge” is a PPP principle used by most governments all over the globe to boost transparency of a bid process for the implementation of a public project.<sup>180</sup> As per the swiss challenge method. The proposal presented to the public entity is subjected to the market for other interested parties to bid. The private entity (original proponent) that submits original proposal has the opportunity for first right of refusal. However, project proponent must submit a bid that is commensurate to the highest bid tendered.<sup>181</sup> In the event the original proponent declines to accept the project on the highest bid, then the highest tenderer has the right to implement the project. This system acknowledges the investments of the original proponent utilized in preparation of the unsolicited bid hence the original proponent is afforded the right of first refusal to match the highest offer.

A competitive tender is seen to be vital in achieving a reasonable market price, it is also an efficient manner for distribution of assets and value for money.<sup>182</sup> The purpose of the “swiss challenge” is to have a competitive and transparent procedure as opposed to issuing exclusive

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<sup>179</sup> Dr. Venkateswararao Podile, *et al.*,(2017),supra note 81 at 386

<sup>180</sup> Dr. Venkateswararao Podile, *et al.*,(2017),*ibid*

<sup>181</sup> Dr. Venkateswararao Podile, *et al.*,(2017),*ibid*

<sup>182</sup> Cesar Queiroz (2005), “Launching Public Private Partnerships for Highways in Transition Economies”, Transport Papers 9, *Transport Sector Board*, The World Bank Group (WBG).

development rights to the original proponent's unsolicited proposal without a transparent and all-inclusive bidding process.<sup>183</sup>

The current PPP Act fails to introduce competition in PIIP arrangements to increase the chances of entering PPP relationships that: offer value for money; a PPP relationship that is affordable; and a PPP relationship where the contracting authority transfers most risks.

In the Indian case of *Ravi Development vs. Shree Krishna Prathisthan & Ors S.C* <sup>184</sup>, Ravi Developers submitted a proposal to the "Maharashtra Housing and Area Development Authority (MHADA)" to develop and build on certain pieces of land in Maharashtra. MHADA elected to use the swiss challenge method of tendering with all its guidelines. Ravi Development exercised its "right of first refusal" and matched the highest bid and was awarded the contract. The award of the project was contested by some of the other competing bidders on the basis that the tendering process was unfair, arbitrary and ambiguous, Bombay High Court struck down the tender process. Ravi developers appealed against this decision to the Indian Supreme Court. Supreme Court analyzed the facts of the case and found that the process was impartial and upheld the decision of MHADA in awarding Ravi Developers the tender.

The Indian Supreme court's *obiter dictum* was;

*"Lastly, we conclude that the impugned pilot project or initiation taken by the Government of Maharashtra along with MHADA to encourage public-private participation is in accordance with the need of the time as well as a laudable effort. But to make it an effective approach Swiss Challenge Method or any other encouraging concept should be duly publicized first..... also in the scheme of availing a new system*

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<sup>183</sup> John T. Hodges & Georgina Dellacha (2007), *supra* note 38 at 5

<sup>184</sup> [2009] INSC 1026



*thorough rules and regulations are needed to be followed otherwise unfairness, arbitrariness or ambiguity may creep in.” “In order to avoid such ill-effects the State Government is suggested to consider the following aspects:-*

- 1. “The State/Authority shall publish in advance the nature of Swiss Challenge Method and particulars”;*
- 2. “Publish the nature of projects that can come under such method”;*
- 3. “Mention/notify the authorities to be approached with respect to the project plans”;*
- 4. “Mention/notify the various fields of the projects that can be considered under the method”;*
- 5. “Set rules regarding time limits on the approval of the project and respective bidding”.*
- 6. “The rules are to be followed a project has been approved by the respective authorities to be considered under the method.”*
- 7. “All persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture and there should be healthy inter se competition amongst such developers.”*

This paper adopts the lessons learnt from this suit. Lack of competition in the procurement of a PPP offends the principles of PPP set by the World Bank and OECD. This paper recommends therefore that the criteria for acceptance of PIIP’s be amended to the criteria accepted internationally and that the PPP law on PIIPs should be premised on the principles set by OECD

and World Bank to avoid the inherent problems faced by Public Authorities in implementing PIIPs. Further that, the swiss challenge be introduced into the PPP Act to introduce competition and transparency and increase creativity and innovativeness.

### **2.3.1.1 Other Methods of Introducing Competition**

Other than Swiss challenge, Robert Osei-Kye, *et. al*, and World Bank's PPIAF state that there are several other methods of introducing competition to PIIP PPP process, these are:

- a) Bonus system – In this system, the public entity subjects the unsolicited bid to the market by way of an open tendering process and during evaluation of the original proponent is awarded bonus points as a lead over the competing bidders.<sup>185</sup> This tendering system is regularly used in the governments of Chile and South Korea.<sup>186</sup>
- b) Best and final offer – The Contracting Authority subjects the unsolicited proposal to two stages in the tender process. The original proponent qualifies for final stage which is the last phase to contest with other interested bidders. At the last phase, bidders are expected to issue their best and final offer. This method is regularly used in South Africa, Chile and Argentina.<sup>187</sup> In South Africa and Chile, if the original proponent is not successful at the final round, the successful bidder reimburses the original proponent for the development expenditure of the proposal.<sup>188</sup>
- c) Regular procurement – this method entails, an open tender process being conducted just like in solicited tendering process, and the original proponent competes with other

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<sup>185</sup> World Bank Group/PPIAF, *supra* note 109 at 46 (accessed 19/8/2019)

<sup>186</sup> Robert Osei-Kye, *et. al* (2018), *supra* note 34 at 2

<sup>187</sup> Robert Osei-Kye, *et. al* (2018) *supra* note 34 at 2

<sup>188</sup> Robert Osei-Kye, *et. al* (2018) *supra* note 34 at 3

interested parties without any advantage.”<sup>189</sup>This method is not common as it discourages Original Proponents to initiate proposals.

Even when this paper makes suggests that a PIIP be subjected to the market, it is imperative to note that the intellectual property rights of the Private proponent should be safeguarded.<sup>190</sup>It is therefore necessary for legislators in Kenya to ensure that public agencies are well established and coordinated to encourage the effective use of unsolicited proposals. <sup>191</sup>In addition, the prevailing laws on intellectual property rights should be reviewed and employed to boost the confidence of investors interested in PPP implementation by way of PIIPs.

## 2.4 Conclusion

This chapter has analyzed the historical development of PPPs in Kenya. It has given an overview of the legislative instruments that regulate PPPs in Kenya. The chapter makes an analysis of UNICTRAL, World Bank and OECD provisions on drafting of PPP laws. The principles by UNICTRAL and OECD are used to mirror the provisions of the PPP Act in the implementation of PIIPs. The paper makes an analysis of PIIPs and how they can be used innovatively to increase the uptake of infrastructure projects. This chapter has answered the question as to whether the current PPP legal regulatory framework provides proper safeguards on PIIPs, it has revealed that the PPP Act has gaps hence does not offer proper safeguards for PPP transactions.

This chapter has demonstrated that the hypothesis that the PPP legal framework on PIIP in Kenya is weak hence is not robust to avert the challenges inherent in PIIPs consequently does not meet the best practice, is true. This chapter makes a conclusion that there is need for a robust

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<sup>189</sup> Robert Osei-Kye, *et. al* (2018) *supra* note 34 at 9 (accessed 17/8/2019)

<sup>190</sup> Nwokocha, U. (2009). “Nigeria: Sub-Sahara Africa: Intellectual property rights development.” at <http://www.mondaq.com/Nigeria/x/70872/Trademark/SubSaharaAfricaIntellectualPropertyRightsDevelopment> (accessed 23/8/2019)

<sup>191</sup> Robert Osei-Kye, *et. al* (2018) *supra* note 34 at 9

PPP legal regulatory framework and has made recommendations on the same.

The next chapter gives a comparative study of on unsolicited proposals in South Africa and India. It will give the experiences of these States and draw recommendations on what the Kenyan regulatory framework should borrow.

## CHAPTER 3

### COMPARATIVE ANALYSIS ON PRIVATELY INITIATED INVESTMENT PROPOSALS REGULATORY FRAMEWORK

#### 3.0 Introduction

Chapter two of this study revealed that the PPP legal regulatory framework in Kenya does not have proper safeguards in ensuring PIIPs offer value for money. It is crucial that this study makes a comparative study of Kenya and other States on PIIPs. This third Chapter therefore gives a comparative analysis of PPP legal framework in other jurisdictions that allow PIIPs this include South Africa and India. This chapter will focus on how PIIPs have been used to facilitate infrastructure PPP projects innovatively in these jurisdictions. It will examine the impact of secure and accommodative PIIPs legal regulatory framework on infrastructure projects.

The chapter also entails discussions on how these regimes regulate PIIPs to meet the principles set by World Bank, OECD and UNICTRAL on PIIPs successfully. The chapter will demonstrate that there are lessons to learn from South Africa and India on PIIPs in implementation of infrastructure PPP projects.

This study makes the comparative study of South Africa and India regimes based on the maturity of their PPP legal regulatory and institutional frameworks, their PPP market readiness and accessibility of information provided on online websites. There are many other Governments that consider unsolicited proposals and invoke swiss challenge or other forms of competition. These include Nigeria, Australia (New South Whales), Australia (Victoria), Chile, Ghana, Colombia,

Italy, USA (Virginia), Tanzania etc.<sup>192</sup>

It is also important to note that there are Governments that do not consider unsolicited proposals for instance United Kingdom (UK). The UK Government issued a policy document titled “*A New Approach to Public Private Partnerships*”, on reform of Private Finance Initiatives (PFI, a form of PPP in the UK). The policy document provides for PPP relations in the UK.<sup>193</sup>

The Government of Nigeria accepts unsolicited proposals. The Infrastructure Concession Regulatory Commission(ICRC), the body charged with the implementation of PPPs in Nigeria established a guideline for unsolicited proposals.<sup>194</sup>The guideline provides that ICRC came to the realization that unsolicited proposals may contribute to the general infrastructure goals of Nigeria by identifying and implementing critical projects in alignment with the strategic objectives of Ministries, Departments and State Agencies.<sup>195</sup>To ICRC unsolicited proposals assist Ministries, Departments and State agencies in identifying and implementing critical projects. The guidelines provide that the unsolicited proposals should be procured competitively.

The guidelines state that the over-arching principle is that:

*“ALL unsolicited proposals are channelled into a transparent, competitive process where challengers have a fair chance of winning the tender.”<sup>196</sup>*

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<sup>192</sup> World Bank Group/PPIAF, *supra* note 109 at 66

<sup>193</sup> Her Majesty’s, “*A New Approach to Public Private Partnerships*” at 11 available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/205112/pf2\\_infrastructure\\_new\\_approach\\_to\\_public\\_private\\_partnerships\\_051212.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_partnerships_051212.pdf)>(accessed 31/7/2019)

<sup>194</sup> 2005, Laws of Nigeria, 10th November, 2005 enacted by the National Assembly of the Federal Republic of Nigeria.

<sup>195</sup>ICRC Website available at <http://www.icrc.gov.ng/assets/uploads/2019/05/UN-Solicited-PPP-Process-2018.pdf> (accessed 24/06/ 2019)

<sup>196</sup>“Guide for Implementing Unsolicited Proposals for PPPs in Nigeria” at 5 available at ><https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Guide%20for%20Implementing%20Unsolicited%20Proposals.pdf>> (accessed 15/08/2019)

This paper however focuses on comparative study on India and South Africa. First, the paper discusses on the experience of India and the recommendations Kenya should adopt therefrom.

### 3.1 India Experience

All over the world, PPP's have become common in implementing projects by Governments. India has embraced PPP's in delivering public services and infrastructure over decades now.<sup>197</sup>The Government of India defines a PPP as “a partnership between a public sector entity (sponsoring authority) and a private sector entity (a legal entity in which 51% or more of equity is with the private partner/s) for the creation and/or management of infrastructure for public purpose for a specified period of time on commercial terms and in which the private partner has been procured through a transparent and open procurement system”.<sup>198</sup>

India recognized that infrastructure deficit in roads, ports, inadequate hospitals and water treatment facilities was imposing huge costs to the Government.<sup>199</sup>Further, low efficiency, poor competitiveness, high costs, and the slow pace of urbanization were some of the consequences of the infrastructure deficit.<sup>200</sup> India sought to continue adopting PPPs as mode to bridging some of these infrastructure gaps.<sup>201</sup>

Government of India's “Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects” allow for the submission of unsolicited proposals. India's

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<sup>197</sup> Podile & Rao (2017) *supra* note 81 at 385

<sup>198</sup> Government of India, Planning Commission “PPP request for Proposals – Model RFP Document”, 2014 at v at <https://pppknowledgelab.org/countries> (accessed 27/08/2019)

<sup>199</sup> Government of India Department of Economic Affairs, Ministry of Finance Report (2015) at 20 Available at <<https://www.pppinindia.gov.in/documents/20181/33749/Report+of+the+Committee+on+Revisiting+%26+Revitalizing+the+Public+Private+Partnership+Model+of+Infrastructure+%28Kelkar+Committee+Report%29/>> (accessed 8/8/2019)

<sup>200</sup> Government of India Department of Economic Affairs, Ministry of Finance Report (2015) *ibid*, (accessed 8/8/2019)

<sup>201</sup> Government of India Department of Economic Affairs, *ibid*

administration is divided into states. Indian states have their own procurement procedures most of which that allow PPP, allow for adoption of the unsolicited proposals for processing such projects.<sup>202</sup>The discussion below provides the status of unsolicited proposals in India.

### **3.1.1 Unsolicited proposals in India**

The Governments of Andhra Pradesh, Kerala, Karnataka, Rajasthan, Gujarat and Punjab in India allow unsolicited proposals in implementing different infrastructure projects such as Roads, Bridges and Bypasses, Health, Land reclamation.<sup>203</sup> For purposes of this study, the Government of Karnataka's regulatory framework will form the basis of the discussion.

The Government of Karnataka's PPP policy<sup>204</sup> provides that the core principles of the PPP policy in considering unsolicited proposal include: "equitable contractual structures, efficient use of present Government assets and ideal allocation of resources; payment for services ; transparent process of procurement ; fair regulatory framework and enabling institutional framework ; and sustainable incentives and concessions".<sup>205</sup>

The policy provides that:

*"All contracts would be awarded on the basis of a transparent process, under the ambit of the Karnataka Transparency in Public Procurement Act (Act 29 of 2000), or under a "Swiss Challenge" <sup>206</sup>*

The Policy provides that the criteria used for consideration and approval of the unsolicited

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<sup>202</sup> Sandeep Verma (2010), "Government Obligations In Public-Private Partnership Contracts", *Journal Of Public Procurement, Volume 10, Issue 4* at 11

<sup>203</sup> World Bank Group/PPIAF, *supra* note 109 at 72

<sup>204</sup> Government of Karnataka, (2018) "PPP Policy for Infrastructure Projects-2018", Annexure to the Government Order No. IDD 14 ITS 2018 at (v)

<sup>205</sup> Government of Karnataka, (2018) "PPP Policy for Infrastructure Projects-2018,*ibid*

<sup>206</sup> Paragraph 32 of the Government of Karnataka PPP Policy for Infrastructure Projects, 2018



proposal would *inter-alia* include technical and financial parameters.<sup>207</sup> These parameters are also considered under Kenya’s PPP Act.

Paragraph 34 of the policy provides for “swiss challenge or *suo-moto* proposals to promote innovative projects by taking full advantage of competition and transparency”. The policy states that a “Private Sector Participant (Proposal Initiator) may submit a *suo-moto* and innovative proposal (Original Proposal) to Government/Agency for setting up an Infrastructure Project” The proposal should contain the following:

- a) Demonstration of the need the project by the public; <sup>208</sup>
- b) Essential technical details, i.e., particulars of the design and how to perform or develop the product or service, estimates of cost of the project, etc.;<sup>209</sup>
- c) Expenses accrued by the proponent for the development experiments associated to the project.”<sup>210</sup>

The Government of Karnataka states that the only proposal that can be accepted are those that have innovation in technology, the proposal should be unique and the property of or certified to be utilized by the Proposal proponent that could in effect increased value addition for the Government. The proposal should not only be on the motion of the proponent but also innovative.<sup>211</sup>The policy further provides that the projects to be considered shall not require government support for finances.<sup>212</sup>The projects which would result in monopoly or domination

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<sup>207</sup> Paragraph 33 of the Government of Karnataka PPP Policy for Infrastructure Projects, 2018

<sup>208</sup> Paragraph 34(a) of the Policy 2018

<sup>209</sup> Paragraph 34 (b) of the Policy 2018

<sup>210</sup> Paragraph 34(c) of the Policy ,2018

<sup>211</sup> Paragraph 34 (1) of the Policy, 2018

<sup>212</sup> Paragraph 34 (2) of the Policy, 2018

and exclusive rights to the Private party are not accepted.<sup>213</sup>

The criteria by the Government of Karnataka focuses on achieving value for money, the requirement for competitive bidding or swiss challenge means that all procurement processes must be by competition. In introducing competition to unsolicited bids, various Indian states including Andhra Pradesh, Kerala, Karnataka, Rajasthan, Gujarat and Punjab use swiss challenge system in different sectors such as Roads, Bridges and Bypasses, Health, Land reclamation etc.<sup>214</sup> The discussion on swiss challenge in India is made below.

### **3.1.2 Swiss- Challenge in India**

The Government of Karnataka a State in India has put in place, Policy for Infrastructure Projects, 2018 which provides for Swiss Challenge.<sup>215</sup> After submission of the unsolicited proposal, a maximum of four months is granted to the project proponent from the acceptance day for the State Level Single Window Agency to submit final proposals together with a feasibility report to facilitate invitation of competitive bidding for counter proposals by the Government.<sup>216</sup>

Government of Karnataka then assesses the public interest for the infrastructure project in question. Where the infrastructure project is found to satisfy a public need, the government then assesses the technical feasibility of the original proposal and if necessary, modifies it. The policy provides that government may conduct further studies for the proposed project, if necessary.<sup>217</sup>

The Government then conducts evaluation of the proposal and if it considers the proposal suitable, it would invoke “Swiss Challenge”. The original proposal except proprietary data and

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<sup>213</sup> Paragraph 34 (3) of the Policy, 2018

<sup>214</sup> Podile & Rao (2017), *supra* note 81 at 389

<sup>215</sup> Government of Karnataka, (2018), *supra* note, 204 at (v)

<sup>216</sup> Paragraph 34 (7) of the Government of Karnataka PPP Policy 2018

<sup>217</sup> Paragraph 34 (7)(ii) of the Government of Karnataka PPP Policy 2018

particulars of the financial terms and contract terms of the original proposal would be availed to any interested bidders. Where the results of the “swiss challenge” lead to a superior proposal, the original proponent is permitted to match the competing counter proposal within a set period. The original proponent is selected as the project concessionaire only his offer ranges within fifteen percent of the greater bid value. If the original proponent fails to match the counter proposal, then the bidder who made the greater proposal would be granted the bid. <sup>218</sup>

Where the original proponent does not match the superior proposal the government or government agency concerned shall compensate the original proponent partly or wholly the project preparation costs, as set in the tender document and same may be paid by the winning bidder. In the event the Government does not offer the project to the superior bidder and in order to encourage competition in the bidding, it would be reimbursed an amount not exceeding 0.10% of the cost of the project in order to encourage competition.<sup>219</sup>

Government of Andhra Pradesh in India similarly allows the use of the “Swiss Challenge” approach in projects,<sup>220</sup> *inter alia*, where:

- a) “the Government is required to provide asset support for the actualization of the project;
- b) “direct financial support or financial incentives in the form of contingent liabilities are to be provided”; and/ or
- c) exclusive rights are conferred on the developer.’”

Private sector participants are authorized to initiate unsolicited proposal for such projects; where a capability assessment of the proposal together with technical, commercial and financial aspects of the unsolicited proposals is made. In Government of Andhra Pradesh, the Contracting

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<sup>218</sup> Paragraph 34 (7)(iii) of the Government of Karnataka PPP Policy 2018

<sup>219</sup> Paragraph 34 (7)(iii) of the Government of Karnataka PPP Policy 2018

<sup>220</sup> The Andhra Pradesh Infrastructure Development Enabling Act, 2001

Authority then invites competing counter-offers, and the Originating Proponent is given an opportunity to match offers that may be superior to its proposal.

The Government of Gujarat also in India, also allows unsolicited proposals to be submitted to any Government Department however the proposals are processed by the central PPP unit. In the Government of Gujarat, departments receive the proposals however they are supported by the Gujarat Industrial Development Board (GIDB) during evaluation and procurement processes.<sup>221</sup>

For the Government of Andhra Pradesh, it follows a one-step evaluation process for unsolicited proposals, in which the proposal proponent is required to provide: “particulars of technical, managerial and financial capacity of the Project proponent; all relevant technical, commercial and financial details of the proposal; and terms of the concession agreement for the project”.

Upon receipt of the proposals by the relevant state departments and public agencies, the agencies then conducts preliminary evaluation and submits the unsolicited proposal to the Infrastructure Corporation of Andhra Pradesh Ltd (INCAP). Timelines have not been prescribed for this process. INCAP may require adjustments to the proposal or determine that the proposal has value.<sup>222</sup>

### **3.1.3 Example of Unsolicited Proposal in India**

SWAN Energy Limited (SEL), a company in India, approached the Gujarat Maritime Board (GMB) in the Government of Gujarat, to develop a liquefied natural gas (LNG) terminal with a “floating storage and re-gasification unit” (FSRU) in India.<sup>223</sup> If equated to traditional on-shore LNG terminals, FSRUs offer cost effective, time and environmental benefit as they are

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<sup>221</sup> World Bank Group/PPIAF, *supra* note at 109 at 20

<sup>222</sup> Section 19, Andhra Pradesh Infrastructure Development Enabling Act, 2001

<sup>223</sup> World Bank Group/PPIAF, *supra* note 109 at 80 (accessed 19/8/2019)

environment friendly to the coastlines.

India did not use FSRUs until SEL's unsolicited proposal was made to Gujarat Maritime Board. The units also presented a new technology on a universal level as the inaugural FSRU were used in Mexico in 2005,<sup>224</sup> and approximately ten FSRUs are said to have been in operations in 2012 when the proposal was made.<sup>225</sup> GMB did not have experience with the technology hence was challenged in assessing the technical feasibility of the proposal.

This project was considered based on being innovative and was still subjected to competition.<sup>226</sup> In examining the evidence about the harnessing of private-sector innovation and creativity, encouraging unsolicited proposals is one of the methods that may be used to tap into private-sector innovation. Harnessing innovation can also be achieved in consistent consultations with the private investors.<sup>227</sup>

### **3.1.4 Example of Rejected Unsolicited Proposal in India**

The Government of Andhra Pradesh signed a concession agreement with a private investor to develop a greenfield airport near Hyderabad as a PPP in 2005.<sup>228</sup> The contract required the government to develop a road, about eleven and half kilometers long, linking Hyderabad to the greenfield airport. Considering the importance of the road which was an expressway, the private party proposed to a public entity of Government of Andhra Pradesh with the mandate of developing the infrastructure, that it would develop the road using its own funds at about \$125

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<sup>224</sup> Victoria Zaretskaya, (2015) "Floating LNG Regasification Is Used to Meet Rising Natural Gas Demand in Smaller Markets", *World LNG Report*, 2014 edition

<sup>225</sup> Keith Schaefer, "FSRUs: The Leading Edge of the LNG Market", 2012.

<sup>226</sup> World Bank Group/PPIAF *supra* note 109 at 15 (accessed 19/8/2019)

<sup>227</sup> World Bank Group/PPIAF, *supra* note 109 at 15 (accessed 19/8/2019)

<sup>228</sup> World Bank Group/PPIAF, *supra* note 109 at 84 (accessed 19/8/2019)

million.<sup>229</sup> Andhra Pradesh Infrastructure Development Enabling Act, 2001, required that unsolicited proposals are subjected to the swiss-challenge mechanism. The Private entity proposed to “finance, design and construct” the expressway and required the Authority to provide land for the construction of the expressway. The construction cost of the road and the value of the land was estimated to be equivalent if not more than. Initially, the Government considered accepting the unsolicited proposal and granting the requested land for faster implementation. It was however not clear on economic justification for the unsolicited proposal, given the value of the land and the implications for public resources. The Government did not find validation to use unsolicited proposal to construct the expressway.<sup>230</sup>

According to the Andhra Pradesh Government, it had the capability to design and construct the road as the roads authority had successfully completed several such projects. The government rejected GMR’s unsolicited proposal and developed the expressway under “Engineering-Procurement Construction” method, at a cost of 93 million US dollars, the same was completed and commissioned in October, 2009.

The Indian Supreme Court’s decision in *Ravi Development v Shree Krishna Prathistan & Others*<sup>231</sup> strengthened the Indian jurisprudence on unsolicited proposals. In that case, the Appellant, Ravi Developers presented a *suo motu* proposal to MHADA to develop housing units on land owned by the Government of Maharashtra. MHADA exercised the use of “swiss challenge method”, details of the case have been discussed in Chapter two. The Ravi Developers was allowed match up the bid and was awarded the bid.

The PPP Act, PPP regulations and PPP policy fails to provide for swiss challenge that introduces

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<sup>229</sup> World Bank Group/PPIAF, *supra* note 109 at 84

<sup>230</sup> World Bank Group/PPIAF *supra* note 109 at 84 (accessed 19/8/2019)

<sup>231</sup> 1 2009(8)SCALE 96

competition in the PIIP procurement process. This paper recommends that PPP unit commences the amendment process of the PPP Act.

The paper also makes a comparative study of the South Africa legal regulatory framework on PIIPs.

### **3.2 South Africa Experience**

In 1999, South Africa enacted statutory basis for cooperation between the public and private sectors through the enactment of the Public Finance Management Act.<sup>232</sup> After the inaugural democratic elections in South Africa in 1994, a change from “government” to “governance” took place, leading to an increasing use of mechanisms such as concessions, PPPs and privatizations. Since then 108 projects have reached financial close, out of which 100 projects are in construction.<sup>233</sup> These projects amount to \$ 25,531 M worth of investment.<sup>234</sup> The famous railway project in South Africa is dubbed as “Gautrain”. The “Gautrain Rapid Rail Link Project” is one of the biggest PPP transport infrastructure projects undertaken in Africa.<sup>235</sup>

Unsolicited proposals in South Africa are governed by subsidiary legislation. The National Treasury Practice Note is a subsidiary regulation under the Public Finance Management Act, it provides the state with “a framework within which unsolicited proposals relating to both PPP and

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<sup>232</sup> South Africa, Act No. 1 of 1999 (as amended by Act No. 29 of 1999)

<sup>233</sup> South Africa Knowledge Hub Website, available at <https://pppknowledgelab.org/countries/south-africa> (accessed 9/7/2019)

<sup>234</sup> South Africa Knowledge Hub Website, *ibid*

<sup>235</sup> Hainnietjie Sapire et al. (2017) “Gautrain Management Agency Case Study- PPP Contract Management” *ISBN 978-0-620-77635-6* at 2

non-PPP projects may be considered”.<sup>236</sup> Government institutions are required to consider unsolicited proposals that meets certain criteria.<sup>237</sup>

South Africa has a unique structure when it comes to approval and processing PPP projects. Other than the PPP Unit, South Africa has within the National Treasury, the Government Technical Advisory Center (GTAC) which provides support for major infrastructure procurement projects, PPPs and service delivery development plans, including originating with the project and registration, transaction process support and legal and financial advice.<sup>238</sup>The PPP Unit provides specialised transaction advisory services with regards to PPPs.

The government has enacted legislation and policies which enable the use of PPPs in all spheres of government. The legislation and policies spell out the steps to be followed in the procurement of PPPs. Legislation and policy for PPPs in South Africa stresses affordability; value for money; substantial risk transfer and empowerment of black South Africans as pillars for PPP projects.<sup>239</sup>

On the same breath, South Africa’s National Treasury unsolicited proposals framework accepts unsolicited proposals for projects on government’s plans and that are considered key with innovation being fundamental element in its evaluation criteria for consideration of the unsolicited proposals. The proposal can be considered where it involves innovative design and project management or it contains a novel and cost-effective method of service delivery.<sup>240</sup>

Where the proposal that has been submitted to the government or its agency observes the prerequisite of prevailing unsolicited bid provisions namely the product or service is unique and

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<sup>236</sup> The National Treasury Practice Note No. 11 of 2008/2009

<sup>237</sup> Paragraph 2 National Treasury Practice Notes

<sup>238</sup>Government Technical Advisory Centre, South Africa National Treasury Website available at <https://www.gtac.gov.za/> (accessed 10/7/2019)

<sup>239</sup> National Treasury, PPP Unit, 2007 at <http://www.ppp.gov.za/> (accessed 16/08/2019)

<sup>240</sup> Paragraph 2 of the Notes 2008/2009



innovative the Government Agency may enter into direct negotiation with the proponent, outside the normal competitive bidding process.<sup>241</sup> Only actual innovative or unique proposals receive this special treatment.

If the unsolicited proposal does not provide a product or service that is unique, innovative and provided by a sole provider then the proposal is referred to competitive tender process as provided in the process below.

### **3.2.1 Bid process for Unsolicited Proposals in South Africa**

The framework on unsolicited proposals provided by the National Treasury in South Africa provides that the public agency and the unsolicited proposal proponent are required to enter into unsolicited proposal agreement to provide for the procedure for project development, including the preparation of bid documentation.<sup>242</sup>The preparation of these documentation must in the control of the public agency.

The National Treasury has placed minimum tender requirements, which enhance the quality of proposals to be submitted. These requirements include details about the unsolicited proponent; “confidential or proprietary data not to be released to the public; anticipated benefits that will accrue to the Public and proposed project cost; information of other public agencies where the unsolicited proposal has been presented by the Project proponent; details of the project scope and approach; innovation that the project promotes, as well as supportive evidence; and information

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<sup>241</sup> Paragraph 4 .2.1.1 of the Notes

<sup>242</sup> Paragraph 4 .2.4 of the Notes

on how the project aligns with the government’s strategic progress and plan; and the period the proposal presented shall be valid” .<sup>243</sup>

The framework further provides for following procurement process for the service provider:

(a) “The preparation of a Request for Qualification (RFQ) to test the market for any other private entities willing to providing the product or service in question”;

(b) “The preparation of a draft contract for the provision of the product or service where the market does not provide adequate response to the RFQ”;

(d) “Conducting a competitive bidding process in terms of the Public entity’s procurement system among the firms qualified in the RFQ and the Original proponent”;

(e) “Where the Original proponent is not awarded the contract for provision of the product and service then the Public entity reimburses the costs at the conclusion of the competitive bidding process. The quantum of reimbursement is calculated using the audited costs of the proponent from the point in time where the proponent presented the proposal to the Public entity to the conclusion of the competitive process, in terms of the unsolicited proposal agreement” .<sup>244</sup>

The framework provides that : “the bid processes must be prepared by the public entity; state that the bid initiated from an unsolicited proposal; and provide the agreed costs and terms of payment to the proponent, and require that all bidders, excluding the proponent, make provision for the costs and pay such costs to the proponent directly, if they succeed in the bid” .<sup>245</sup> The National Treasury’s unsolicited proposal framework requires that the unsolicited proposal should be in

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<sup>243</sup> Paragraph 2.2 of the Notes, *ibid*

<sup>244</sup> Paragraph 5 of the Notes

<sup>245</sup> Paragraph 5.2 of the Notes

force for six months.<sup>246</sup>The Practice notes prohibits the public agencies from utilizing an unsolicited proposal proponent's intellectual property or proprietary data if the unsolicited proposal is unsuccessful.<sup>247</sup>The use of the any information of the unsolicited proposal is prohibited if the public agency proceeds to the procurement stage and such use as the basis, or as part of the basis, for a procurement and negotiation with bidders is only allowed where the unsolicited proposal proponent agrees.

Where a different competing bidder succeeds in the tender process, the public entity may purchase the intellectual property held by the Original Proponent in order to implement the unsolicited proposal project without the participation of the unsolicited proposal proponent. The unsolicited proposal agreement executed by public entity and unsolicited proposal proponent shall provide the terms of the purchase of intellectual-property rights.<sup>248</sup>

Although framework applies to all sectors, there are sector specific frameworks on unsolicited proposals in South Africa. This paper will discuss on unsolicited proposals framework on road projects.

### **3.3 Unsolicited Proposals in Road sector in South Africa**

In South Africa, the National Roads Agency (SANRAL) is sanctioned to put in place its own procurement regulations for its practice. Consequently, SANRAL created a separate unsolicited proposal framework applicable to national road projects under its mandate. SANRAL is governed by its own set of procurement laws and issued its own unsolicited proposals policy in enacted in 1999. The first PPP projects in South Africa took place earlier under the responsibility

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<sup>246</sup> World Bank Group/PPIAF "Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects" supra note 109 at 72 (accessed 19/8/2019)

<sup>247</sup> Paragraph 3.2 (b) National Treasury Practice Note No 11 of 2008/2009

<sup>248</sup> National Treasury Practice Note No 11 of 2008/2009, paragraphs 4.2.4 and 7

of SANRAL with the construction of two toll roads. SANRAL has two unsolicited proposals accepted for further review, including the “N1 N2 Winelands Toll Highway” and the “N2 Wild Coast Toll Highway”. However, one of the N1 N2 Winelands Toll Highway unsolicited proposal project was later abandoned.<sup>249</sup>

The Road Agency is required to publicize its decision to appoint the unsolicited proposal proponent as the project originator. This requirement to make the tendering process public is also provided for under the PPP Act as earlier stated. SANRAL’s unsolicited proposal framework includes no other public-disclosure requirements. However, the applicability of the general transparency and disclosure regulations that exist in its general procurement legislation is required.<sup>250</sup> South Africa, National Treasury does not prefer the unsolicited proposal proponent any incentive over competing bidders.<sup>251</sup>

### **3.4 After Procurement of Unsolicited Proposal**

In South Africa, compensation of project preparation expenditure is allowed only if the successful bidder is different from the unsolicited proposal proponent. The cost of compensation is borne by the successful bidder, this declaration is made by the bidder as to the agreed-upon costs in its proposal.<sup>252</sup>

There are circumstances where some contractual terms in PPPs arising from unsolicited proposals would result to fresh negotiations which may premature termination of PPP contracts.

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<sup>249</sup> World Bank Group/PPIAF, *supra* note 109 at 67 (accessed 19/8/2019)

<sup>250</sup> World Bank Group/PPIAF, *supra* note 109 at 80

<sup>251</sup> World Bank Group/PPIAF, *supra* note 109 at 50

<sup>252</sup> World Bank Group/PPIAF, *supra* note 109 at 38

In South Africa, the government of Johannesburg terminated a PPP contract that started as an unsolicited proposal and was directly negotiated.<sup>253</sup> The same is discussed below.

### **3.5 Negative Experiences with Unsolicited proposals in South Africa, Leading to Contract Termination**

In 1998, the Government of Johannesburg in South Africa made a decision acquire a central information-technology (IT) system to be utilized by its constituents.<sup>254</sup> The Government discovered it had an existing IT system acquired through an unsolicited bid, without a competitive bidding process.<sup>255</sup> The Government attempted to terminate the existing contract, the contract had no defined contract term and the IT equipment could only be substituted by the procurement of an equipment that was costly than the existing equipment, the private party threatened to sue.<sup>256</sup> The Private party agreed to the termination on the requirement that the government accepts them to take part in the new contract competitively. The tender process was concluded, and a different bidder was successful.<sup>257</sup> Under the contract, the yearly price of the expanded system was less than the previous yearly price of the system that existed. From the experience, the Government officials believed that unsolicited proposal contracts do not offer value for money and if not competitively procured they are often detrimental to the Government.<sup>258</sup>

The lessons to learn from South Africa which this study recommends for adoption include:

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<sup>253</sup> World Bank Group/PPIAF, *supra* note 109 at 40 (accessed 19/8/2019)

<sup>254</sup> World Bank Group/PPIAF, *supra* note 109 at 40 (accessed 19/8/2019)

<sup>255</sup> World Bank Group/PPIAF, *supra* note 109 at 40 (accessed 19/8/2019)

<sup>256</sup> World Bank Group/PPIAF, *supra* note 109 at 40 (accessed 19/8/2019)

<sup>257</sup> World Bank Group/PPIAF, *supra* note 109 at 38 (accessed 19/8/2019)

<sup>258</sup> World Bank Group/PPIAF, *supra* note 109 at 40 accessed 19/8/2019)

- a) The unsolicited proposal should be aligned with “Government’s goals and development Plans”;
- b) Unsolicited proposal should contain an innovative concept which Government officials are unable to develop;
- c) Unsolicited proposal should involve a quick and cost-effective solution;
- d) Unsolicited proposal is feasible;
- e) There has to be financial and technical and economic feasibility (Benefit-Cost Assessment) to assess the feasibility of the proposal;
- f) The unsolicited proposal should be socially sustainable;
- g) The unsolicited proposal should be competitively procured; and
- h) No Government support is needed or should be provided for the unsolicited proposal

This study has made the comparative study on PIIPs in South Africa as it offers unique insights and jurisprudence on how to manage PIIPs. The procedures used in managing PIIPs fits well to the Kenyan economy. The framework provided by South Africa framework adopts the principles of PPP set by UNICTRAL,OECD and the World Bank by ensuring that competition is introduced to achieve value for money and ensure there is transparency and accountability.

### **3.6 Conclusion**

This comparative study has given a clear indication that the Kenyan PPP legal regulatory framework has gaps. The experiences by the two jurisdictions India and South Africa demonstrate that there are lessons to learn from South Africa and India on PIIPs .This Chapter has demonstrated that the hypothesis that there is need for reform of the PPP regulatory framework to improve the PPPs in Kenya in the area of PIIPs is true. There are areas of reform that could be borrowed from South Africa and India for purposes of law reform and

improvement in implementation of PPPs in Kenya. The next chapter will discuss on the findings, recommendation and conclusions of the study.

## **CHAPTER 4**

### **FINDINGS, RECOMMENDATIONS AND CONCLUSION**

#### **4.0 INTRODUCTION**

This is the last chapter of the study. This chapter will give findings, recommendations and conclusion of the study. The study will contain the findings made on PIIPs / unsolicited proposals and recommendations thereof some of which have been borrowed from other jurisdictions that Kenya should adopt to facilitate the increase of PIIP infrastructure projects that meet the core principles of PPP which include, value for money, public interest, transparency and fairness, fiscal affordability, fair market pricing etc. The recommendations will be geared to amendment of the current Government PPP policy, PPP Act and enactment of new PPP regulations. This Chapter will answer the question as to what conclusions and recommendations can be made on the legal regulatory framework in Kenya on PIIPs. It is also premised on the hypothesis there is need for reform of the PPP legal regulatory framework in area of PIIPs.

The recommendations shall clearly identify areas of reform that need to bolster the confidence of all stakeholders in PPP relationships especially the People of the Republic of Kenya. The recommendations are aimed at balancing the interests of every stakeholder as the focus is to have a stable legal environment for investment and economic growth.

The paper shall first discuss on the findings made in this study.

#### **4.1 Findings**

This study made an analysis on PIIP regulatory framework in Kenya. The basis of the study was to assess the compliance of the regulatory framework on PIIPs with the principles of PPPs and



/or PIIPs set by World Bank, OECD and UNICTRAL that is, value for money, transparency and fairness, assessing project need, affordability of the project among others.

The study made a finding that international approaches on managing unsolicited proposals vary widely. There are some countries like UK that have avoided the intake of PIIPs, all PPP projects in the UK are by solicited proposals, where the Government identifies the need for the project and solicits the market for provision of construction or development or operation of the project either by availing the funds or by user pays method.

In developing countries, the use of unsolicited proposal elicited concerns about transparency, governance and lack of competition. Most States and regional agencies have sought best practices for: ensuring value for money from unsolicited proposal projects; appropriately appraising and incorporating unsolicited proposals into infrastructure plans; and improving the policy environment for unsolicited proposals, regarding transparency, fairness and enhancing value for money.

The study revealed that PPP policy is crucial in facilitating PPP Projects. It revealed that the purpose of PIIP policy is to outline processes for the preparation and implementation of PPP projects originated as unsolicited proposals. The policy should aim at harnessing private-sector innovation in the delivery of infrastructure projects, while protecting public-policy objectives, encouraging competition and ensuring openness and accountability.

This study has revealed that PIIPs assist contracting authorities (Ministries, State Agencies, Government Departments) identify infrastructure needs that the government has not identified, but which adopt with the government's stated infrastructure policy or plans. PIIPs also assist the

Government acquire innovative solutions to government needs that have been previously identified by the Government in its infrastructure plans.

The literature review found that open tender procurement method is commonly used in managing unsolicited proposals. Interviewees to this study, who work in the Public sector indicated that swiss-challenge would be the best bidding method for overseeing unsolicited PPP proposals. This study revealed that even though it propagates the adoption of swiss challenge there are other methods like the use of direct competitive tender, automatic shortlisting, bonus mechanism, right to match a PIIP.

This study found that the PPP Act allows approval of PIIP projects without competition. These provisions are subject to abuse as the core principles of PPPs on provision of value for money, transparency and fairness and ensuring there is need for the project for through PPP cannot be achieved without subjecting the unsolicited proposal to competition. Assessing public interest of the project cannot be achieved without competition. In the case of *Kenya Civil Aviation Workers Union*,<sup>259</sup> allegations were made against KAA board of management Chairperson for pursuing his personal interest by failing to involve the Civil Aviation Workers and the public at large when considering a PIIP made by KQ to operate and maintain JKIA. KQ has been cited to be loss making hence being allowed to run the terminal will be contrary to the principles of PPP set by UNICTRAL and World Bank mentioned in this study.

This study found that most jurisdictions accept PIIPs as most public institutions have limited technical and financial capacity to develop projects and that mostly PIIPs promote innovation and propose new ideas. Even though PIIPs have been seen to be beneficial, most government have realized that these PIIPs also have demerits. To achieve the principles of PIIPs and PPPs in

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<sup>259</sup> Milimani H.C.Consti.Pet. No.57 of 2019

general, this study found that most jurisdictions have introduced the use of swiss challenge in implementing PIIPs to achieve value for money, transparency and accountability in implementing public projects. The study found that for unsolicited proposals to be accepted it is important that the legal regulatory framework should follow the structure provided below.

#### **4.1.1 How to structure Swiss Challenge Legal Regulatory Framework**

While the submission of unsolicited proposals is permissible in Kenya, there is a need to fulfill certain crucial criteria of transparency and competition by ensuring that: “the nature of the “Swiss Challenge Method” is published in advance; publication of the project is done; the public entities to be approached informed; the projects areas that can be considered are notified; guidelines are put in place on time-limits for the approval of the project and the tender process; rules are enacted for procedures to be followed following project acceptance; and all interested entities and or persons are given equal opportunity to compete inter-se.”

Kenya has not reviewed its PIIP policies to bring them in conformity with UNICTRAL,OECD and World Bank principles on transparency and competition in the award of PPP projects. This paper makes suitable recommendations for the improvement of PPP environment in Kenya through legislative reforms and review of PPP policy. The paper therefore makes recommendations on how to amend the PPP Policy, PPP Act, 2013 and PPP regulations, 2014 laws of Kenya.

#### **4.2 Recommendations**

This paper makes the following recommendations which are made in respect to chapter two and three of this paper. The recommendations contain possible directions for reform in PPP

Government Policy, PPP Act and PPP regulations related to award of contracts based on submission of PIIPs.

#### **4.2.1 Legal reform**

This paper makes recommendations for reform of PPP legal regulatory framework in the following aspects.

Firstly, in order to eliminate corruption practices and to ensure that public interest is achieved there is need for the overall PPP legal regime to reflect the provisions of Article 227 of the Constitution of Kenya which clearly provides that: “procurement of public goods and services shall be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”. The PPP Act bestows the implementation of the PPP Act upon the Cabinet Secretary responsible for matters related to finance. Section 71 (2) (b) of the PPP Act allows the Cabinet Secretary to: “provide policy guidelines to the PPP Committee on the financing, construction, operation, equipping and maintenance of infrastructure or development projects”.

This paper recommends that the Cabinet Secretary should issue a policy directive on the criteria of accepting unsolicited proposals by enhancing the criteria provided under section 61 of the PPP Act, this criteria should be amended to include the criteria as provided by UNICTRAL in chapter two of this paper under clause 2.3. This will increase the number of unsolicited proposals that identify the Government’s need and provide innovative and creative ideas on how to implement infrastructure projects. This will assist the Government save on the transaction costs that are incurred in developing project ideas.

The policy statement should provide for a clear criteria and conditions for the implementation of the competitive dialogue on all PPP projects. Uncertainty in the law may lead to corruption,

unnecessary delay of projects, approval of unnecessary projects postulated through PIIPs by officials who propagate their personal agendas and unnecessary litigation like in the case of *Kenya Civil Aviation Workers Union* referred to in this paper. This paper recommends that the policy directive should provide that all PIIPs should undergo competitive bidding by way of swiss challenge as discussed in Chapter 2 of this paper.

Secondly, there is a need to have public participation in approval of PIIP projects that impact on public livelihood directly and require user pay charges in accordance to Article 10 of the Constitution of Kenya. Public participation should be invoked in the approval of the PIIP project. The new PPP Policy should stipulate the same.

Thirdly, section 61 of the PPP Act should be amended to provide for a wider criteria scope like that provided for by UNICTRAL under provision 18.

Fourthly, section 61 of the PPP Act should contain details of clear and detailed information of procurement guidelines on number of rounds of negotiations, procedural aspects such as quantum of preference and so on.

Fifthly, section 61 of the PPP Act should provide instances where contracting officers can decide that tendering method is unsuitable in particular projects for instance where the cost of tendering outweighs the cost of the project, which, in addition, details of such determination is published for competitors to be aware, and procedures should be put in place for any of the competitors to contest such a determination before a judicial body. For instance, if the public urgency has advertised for bidding and only one bidder has tendered or where completion the project requires a short period of time and requires a less amount of investment than that stated by the contracting authority. Other than for continuation of a project or where intellectual property is involved, the

law should be amended to provide that unsolicited proposals may not be accepted except if they relate to innovative projects: in cases where the proposals would be “apparent” to a rationally sensible person engaged in the related sector, the same should not be approved.

The amendment should provide that Government participation should be discouraged from project development for unsolicited proposals, or, where such involvement is considered essential to project development, the government must provide support to all interested bidders equally in the preparation of their responses.

Section 61 of the PPP Act should be amended to state that a PIIP that requires government support for finances should not be accepted. Where it is necessary during the tender process where a Swiss challenge has been invoked that the Government provides support in financing and that the same is available through public resources, details of such assets and any other resources that the government provides shall be available to all bidders equally.

Sixthly, the PPP Unit should immediately initiate formulation of guidelines and standard documentation on PIIPs to guide the public and possible investors on how to implement and invest by way of PIIPs respectively. The PPP Committee on the other hand ought to prepare or approve standards, guidelines and procedures for awarding contracts and standardized bid documents .

Seventhly, on the amendment of PPP Regulations, 2014 Regulation 51 to 53 which provides for PIIPs should be amended through enactment of a new set of regulations to cater for a Swiss challenge in the approval of a PIIP. The regulation should provide for the tender procedure like that provided by South Africa’s National Treasury as provided in Chapter three clause 3.2.1. Regulation 2 of the PPP Regulations to be amended to cover all PPP projects without any

monetary limit as currently the regulations place monetary limit. The capping of the value of the capital expenditure should be removed or should be enhance to higher amount as most of the PPP projects are expensive and will ultimately be paid by the Kenyan taxpayers hence require tight safeguards.

The regulations should provide that unsolicited proposal should not be entertained when a Request for Proposals (RFP) to a solicited PPP tender process (under part VII of the PPP Act) has been advertised or when the idea is in response to known contracting authority requirements. More specifically, no approval of PIIPs should be made for projects that are under consideration by Government, PIIPs should not be submitted in relation to projects in the pipeline as from time to time declared by the PPP Unit in its website.

The PPP Regulations should provide that a contracting authority should provide a certain number of days or weeks or months being reasonable time for competitors to prepare counter-proposals where swiss challenge has been invoked, the time should be practical in comparison the time taken by the original proponent to prepare the project, the time should be determined by the complexity of the project.

The regulations should provide that the requirements placed in the RFP inviting bids in the case of a PIIP must be commensurate to that in a normal RFP under Part VII of the PPP Act, so that potential competitors are able to submit meaningful offers.

The regulations should further provide that trading of an original proponent's rights to vary the price is not allowed, with strict provision on the original proponent to conclude the project within proposed duration, so as to eliminate all possibility of deceitful originating proponents and

contracting officers conniving with the proponent or otherwise to derive undue paybacks out of granting such rights.

These recommendations may be important to avoiding non-transparency and non-competitive abuses of the unsolicited proposal mechanism for the grant of PPP contracts; and they are probable to adequately address identified areas of concern in order to maximise transparency and competition aspects of PIIP-based PPP contracts.

The discussions in this paper will thus significantly contribute to improving contractual frameworks by way of PIIPs in infrastructure PPP projects. The PPP Unit and the Cabinet Secretary-National Treasury should initiate these amendments through the PPP Committee that is responsible for PPP Policy formulation as provide for under Sect 7 (b) of the PPP Act.

This paper therefore concludes the discussion as provided below.

#### **4.3 Conclusion**

The primary question that this paper sought to answer was, does the current PPP legal regulatory framework provide proper safeguards on PIIPs? The answer is no. This paper has explored on the reform of the PPP regulatory framework on PIIPs to safeguard the PPP infrastructure projects. The analysis made revealed that the safeguards provided for by the PPP legal regulatory framework are not adequate hence sought to explore the strategies for effective management of PIIPs so as to achieve the principles of PPPs which include transparency and fairness, value for money and public interest. The assessment of the strategies to achieve effective management of PIIPs has been done through a comprehensive literature review and interviews of PPP experts at PPP Unit, KFS, Ministry of Transport and KENHA and through a comparative study of South Africa and India. The commonly used strategy for effective management of PIIPs identified was



swiss challenge, where the PIIP is subjected to the market for competition and the original proponent is given the first opportunity to accept the bid.

This paper set to examine the hypothesis that the legal regulatory framework on PIIPs in Kenya is weak hence not watertight to prevent the challenges inherent in PIIPs consequently does not meet the best practice. This paper concludes that the hypothesis is true. The paper was further premised on the hypothesis that there are lessons to learn from South Africa and India's legal regulatory framework on PIIPs, indeed the paper found that there are lessons to be learnt from South Africa and India on PIIPs. It is also premised on the hypothesis there is need for reform of the legal regulatory framework in area of PIIPs, this paper proved that this hypothesis is true and has made recommendations on reforms to the law.

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