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BILL SUPPLEMENT

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THE PUBLIC PRIVATE PARTNERSHIP (AMENDMENT) ACT, 2023

ARRANGEMENT OF SECTIONS

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NOTICE

This Bill to be submitted to the National Assembly is published for general information to the public together with a statement of its objects and reasons.

Dodoma,
20th January, 2023

MOSES M. KUSILUKA,
Secretary to the Cabinet

A Bill
for

An Act to amend the Public Private Partnership Act.

ENACTED by the Parliament of the United Republic of Tanzania.

PART I
PRELIMINARY PROVISIONS

Short title
Cap. 103

1. This Act may be cited as the Public Private Partnership (Amendment) Act, 2023 and shall be read as one with the Public Private Partnership Act, hereinafter referred to as the “principal Act”.

PART II
AMENDMENT OF VARIOUS PROVISIONS

Amendment
of section 3

2. The principal Act is amended in section 3-
(a) by inserting in their appropriate alphabetical order the following new definitions:
““special purpose vehicle” means a project company established by a successful private party for the purpose of implementing a specific PPP project in accordance with PPP agreement executed by the parties;

“standard document” includes standard request for qualification, standard request for proposal and standard PPP agreement;”;

- (b) in the definition of the term “public sector”, by deleting the words “and any other person acting on behalf of the government ministry, department, agency or local government authority” and substituting for them the words “or regional secretariat and any other person acting on behalf of the government ministry, department, agency, local government authority or regional secretariat”; and
- (c) in the definition of the term “request for proposals”, by deleting the words “a model agreement” and substituting for them the words “standard documents”.

Amendment
of section 4

- 3. The principal Act is amended in section 4-
 - (a) in subsection (3)(a), by adding the words “and immovable” between the words “movable” and “property”;
 - (b) by deleting subsection (6) and substituting for it the following:
 - “(6) Every contracting authority shall, at the beginning of every budget cycle, submit to the Minister a prefeasibility study of potential public private partnership projects for consideration in the National Development Plan:
 - Provided that-
 - (a) the potential public private partnership project complies with the national development priorities; and
 - (b) the prefeasibility study of potential public private partnership project is approved by the respective Minister.”;
 - (c) by deleting subsection (6A) and substituting

for it the following:

“(6A) The Minister shall, within seven working days, upon receipt of prefeasibility study of potential public private partnership project from the contracting authority, cause such study to be forwarded to the PPP Centre for analysis.”.

(d) by adding immediately after subsection (6A) the following:

“(6B) The PPP Centre shall, within twenty-one working days, analyse the prefeasibility study of potential public private partnership project received in terms of subsection (6A) and forward it to the Public Private Partnership Steering Committee for notification.”;

(e) by deleting subsection (7); and

(f) by renumbering subsection (8) as subsection (7).

Amendment
of section 5

4. The principal Act is amended in section 5 by deleting subsection (2) and substituting for it the following:

“(2) Without prejudice to the generality of subsection (1), the PPP Centre shall, within thirty working days from the date of receiving the prefeasibility study of potential public private partnership project, request for proposal, evaluation reports for selection of preferred bidder and PPP agreements submitted by contracting authorities, analyse them.”

Amendment
of section 7

5. The principal Act is amended in section 7(6) by adding the word “Private” immediately after the word “Public”.

Amendment
of section

6. The principal Act is amended in section 7B by adding immediately after subsection (3) the following:

- 7B “(4) For the purpose of this section, “public funding” means government financial support that constitutes fiscal commitment or contingent liabilities in relation to a PPP project.”.
- Amendment of section 9 7. The principal Act is amended in section 9(1) by adding immediately after paragraph (c) the following:
“(d) submit after every three months to the PPP Centre implementation report of the recommendations issued by the PPP Centre.”.
- Amendment of section 13 8. The principal Act is amended in section 13(1) by deleting the words “Co-ordination Unit or” appearing in paragraph (b).
- Amendment of section 15 9. The principal Act is amended in section 15, by-
(a) adding immediately after subsection (2) the following:
“(3) The Minister may exempt procurement of solicited project from competitive bidding process where the project meets criteria prescribed under subsection (2) and any of the following conditions are satisfied-
(a) the project deliverable is of an urgent need, and any other procurement method is impracticable:
Provided that, the circumstances giving rise to the urgency were not foreseeable by the contracting authority;
(b) the private party possesses the intellectual property rights to the key approaches or technologies required for the project; or
(c) a particular private party has

exclusive rights in respect of the project, and no reasonable alternative or substitute is available.”;

- (b) deleting subsections (3) and (4); and
- (c) renumbering subsections (5) and (6) as subsections (4) and (5) respectively.

Addition of section 18A

10. The principal Act is amended by adding immediately after section 18 the following:

“Establishment of special purpose vehicle Cap. 212

18A.-(1) The private party shall, before the signing of the PPP agreement, establish a special purpose vehicle in accordance with the Companies Act for the purpose of undertaking the project.

(2) A special purpose vehicle established under subsection (1) may include a public entity as a minority shareholder provided that the public entity shall-

- (a) hold shares not exceeding 25 percent of equity contribution in the special purpose vehicle;
- (b) demonstrate financial capacity on the contribution of equity in the special purpose vehicle; and
- (c) demonstrate capacity to bear and mitigate risk associated with the implementation of the project.”.

Amendment of section 21

11. The principal Act is amended in section 21, by-

- (a) deleting subsection (2); and
- (b) designating the contents of subsection (1) as section 21.

Repeal and
replacement
of section 22

12. The principal Act is amended by repealing section 22 and replacing for it the following:

“Settlement
of disputes

22.-(1) Where the dispute arises during the implementation of the PPP agreement, efforts shall be made to amicably settle the dispute through negotiations.

(2) A dispute which is not amicably settled through negotiations may, by mutual agreement between the parties, be submitted for arbitration-

(a) in accordance with arbitration laws of Tanzania;

(b) in accordance with the rules of procedure for arbitration of the International Centre for Settlement of Investment Disputes; or

(c) within the framework of any bilateral or multilateral agreement on investment protection entered into by the Government of the United Republic and the Government of the country where the investor originates.”.

Amendment
of section 23

13. The principal Act is amended in section 23, by-

(a) adding the words “and evaluated” immediately after the word “monitored” appearing in subsection (1); and

(b) adding the words “and evaluation” immediately after the word “monitoring” appearing in subsection (2).

- Amendment of section 23A by-
14. The principal Act is amended in section 23A,
- (a) adding the words “and annual” immediately after the word “mid-year” appearing in subsections (1) and (2); and
- (b) adding the words “to the PPP Steering Committee before being submitted” between the words “report” and “to the Minister” appearing in subsection (2).
- Amendment of section 28
15. The principal Act is amended in section 28(2)(b) by adding the word “PPP” before the word “investment”.
- Addition of section 28A
16. The principal Act is amended by adding immediately after section 28 the following:
- “Inconsistency with other laws 28A. Where there is any inconsistency between the provisions of this Act and the provisions of any other written law in relation to development, procurement and implementation of public private partnerships, the provisions of this Act shall prevail.”.

OBJECTS AND REASONS

This Bill proposes to amend the Public Private Partnership Act, Cap. 103 in order to address the challenges encountered in the implementation of the Act which has been causing lower participation of private sector in the implementation of development projects through partnership.

The Bill is divided into two Parts whereby Part I provides for preliminary provisions and Part II proposes to amend various provisions of the Act as follows:

Section 3 is proposed to be amended to provide definition of various terms used in the Act and were not defined. It is also proposed to amend the definition of the terms “public sector” and “request for proposals” for clarification purpose.

Section 4 of the Act is amended in order to remove the obligation of the contracting authority to submit concept note and to enhance submission procedure relating to the prefeasibility study to the PPP Centre. The proposed amendments intend to shorten the preparatory procedure of PPP projects and to overcome challenges relating to the submission of PPP projects so as to be in line with the substantive procedures prescribed under the Budget Act.

The Bill proposes to amend sections 5, 7, 9, 13, 23, 23A and 28 in order to rectify clerical errors. The aim of the proposed amendment is to enable the provisions to be clearly understandable and reflect the intended meaning.

Section 7B is proposed to be amended in order to prescribe the definition of the term “public funding”. The aim of this amendment is to clearly specify financial support that will facilitate implementation of the PPP projects.

Section 15 is amended in order to allow contracting authority with solicited projects to procure private party directly. The amendment seeks to remove obligation to the private party to deposit a refundable amount of not exceeding 3 percent of the estimated cost of the project to be conducted. The aim of these amendments is to enhance project preparation in procurement stage, easing the availability of private party and attracting the participation of the private sector.

A new section 18A is proposed in order to set a condition for the preferred bidders who shall implement the PPP project to establish project company (special purpose vehicle). This amendment intends to ring-fence the new project against other duties and obligation of the private party in other projects not related to PPP project to be undertaken.

Section 21 is amended by deleting subsection (2) which disallows the provision of tax incentives to PPP investors. The aim of this amendment is to enable the PPP investors who are eligible to receive tax incentives to receive such incentives like other investors.

It is proposed to repeal and replace section 22 in order to modify the dispute resolution mechanism so as to enable the resolution of disputes to take place based on the agreement of the parties to the PPP agreement. This amendment aims at giving parties the right to determine dispute resolution mechanism.

The Bill also proposes to add new section 28A for the purpose of enabling the Act to take precedence over any other law where there is inconsistency in matters relating to public private partnerships. The aim of this amendment is to eliminate legal conflict when interpreting the provisions related to partnership projects between public and private sectors.

MADHUMUNI NA SABABU

Muswada huu unapendekeza kufanya marekebisho katika Sheria ya Ubia baina ya Sekta ya Umma na Sekta Binafsi, Sura ya 103 ili kutatua changamoto mbalimbali zilizojitokeza wakati wa utekelezaji wa Sheria ambazo zimekuwa zikisababisha kuwepo kwa ushiriki hafifu wa sekta binafsi katika utekelezaji wa miradi ya maendeleo kwa utaratibu wa ubia.

Muswada huu umegawanyika katika Sehemu mbili ambapo Sehemu ya Kwanza imeweka masharti ya utangulizi na Sehemu ya Pili inapendekeza kurekebisha masharti mbalimbali ya Sheria kama ifuatavyo:

Kifungu cha 3 kinapendekezwa kurekebisha ili kutoa tafsiri ya baadhi ya maneno ambayo yametumika kwenye Sheria lakini hayakuwa yamepewa tafsiri. Vilevile inapendekezwa kurekebisha tafsiri ya maneno “*pubic sector*” na “*request for proposals*” kwa lengo la kutoa ufafanuzi.

Kifungu cha 4 cha Sheria kinarekebisha ili kuondoa sharti kwa mamlaka za serikali kuwasilisha andiko dhana pamoja na kuboresha utaratibu wa uwasilishaji wa taarifa ya upembuzi yakinifu wa awali kwenye Kituo cha Ubia. Lengo la marekebisho haya ni kupunguza muda wa maandalizi ya miradi ya ubia baina ya sekta ya umma na sekta binafsi na kuondoa changamoto mbalimbali zilizokuwa zikijitokeza wakati wa uwasilishaji wa maandiko ya miradi ya ubia kwa kuzingatia utaratibu uliobainishwa kwenye Sheria ya Bajeti.

Muswada unapendekeza kurekebisha vifungu vya 5, 7, 9, 13, 23, 23A na 28 ili kuondoa mapungufu ya kiuandishi. Lengo la marekebisho haya ni kuvifanya vifungu husika viweze kutafsiriwa kwa urahisi na kuleta maana iliyokusudiwa.

Kifungu cha 7B kinapendekezwa kurekebisha ili kutoa tafsiri ya maneno “*public funding*”. Lengo la marekebisho haya ni kuainisha misaada ya kifedha itakayosaidia utekelezaji wa miradi ya ubia.

Kifungu cha 15 kinarekebisha kwa lengo la kuzipa mamlaka za serikali uwezo wa kisheria wa kufanya ununuzi wa moja kwa moja kwa ubia kwa miradi inayoibuliwa na mamlaka za serikali. Aidha, marekebisho hayo yameondoa sharti kwa mwekezaji wa sekta binafsi kutoa dhamana ya kiwango kisichozidi asilimia 3 ya gharama za mradi. Lengo la marekebisho haya ni kurahisisha maandalizi ya mradi katika hatua ya ununuzi, upatikanaji wa wabia wa miradi ya ubia na kuvutia ushiriki wa sekta binafsi.

Kifungu kipya cha 18A kinapendekezwa kwa lengo la kuweka sharti kwa wawekezaji kutoka sekta binafsi wanaoshinda zabuni za kutekeleza mradi wa ubia kuanzisha kampuni maalum ya mradi. Marekebisho haya yanakusudia kutenganisha majukumu ya mbia aliyeshinda zabuni ambayo hayahusiani na mradi ikiwemo mali na madeni au miradi mingine dhidi ya mradi unaokusudiwa kutekelezwa.

Kifungu cha 21 kinarekebisha kwa kufuta kifungu kidogo cha (2) kinachozuia utoaji wa vivutio vya kikodi ili kuweka usawa kwa wawekezaji wanaotekeleza miradi ya ubia baina ya sekta ya umma na sekta binafsi. Lengo la marekebisho haya ni kuruhusu vivutio vinavyotolewa kwa wawekezaji wengine kutolewa kwa wawekezaji wanaokusudia kutekeleza miradi ya ubia baina ya sekta ya umma na sekta binafsi.

Inapendekezwa kufuta na kuandika upya kifungu cha 22 kwa lengo la kurekebisha utaratibu wa utatuzi wa migogoro ili kuwezesha utatuzi wa migogoro kufanyika kwa kuzingatia makubaliano ya pande za mkataba. Lengo la marekebisho haya ni kutoa haki kwa wabia kuamua utaratibu wa kufuata wakati wa utatuzi wa migogoro inayoweza kutokea wakati wa utekelezaji wa mradi wa ubia baina ya sekta ya umma na sekta binafsi.

Muswada unapendekeza kifungu kipya cha 28A kwa lengo la kuifanya Sheria kuwa na nguvu endapo utatokea ukinzani na Sheria nyingine katika

masuala ya ubia baina ya sekta ya umma na sekta binafsi. Lengo la marekebisho haya ni kuondoa mgongano wa kisheria wakati wa kutafsiri masharti yanayohusiana na miradi ya ubia baina ya sekta ya umma na sekta binafsi.

Dodoma,
19 Januari, 2023

MWIGULU LAMECK NCHEMBA MADELU,
Minister for Finance and Planning