REPUBLIC OF KENYA

OFFICE OF THE DEPUTY PRIME MINISTER AND MINISTRY OF FINANCE

POLICY STATEMENT ON PUBLIC PRIVATE PARTNERSHIPS

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FOREWORD

The Government of Kenya (GOK) is currently implementing Vision 2030, the country's development blueprint covering the period 2008 to 2030. The aim of Vision 2030 is to transform Kenya into a newly industrialized middle-income country, providing high quality of life to all its citizens by the year 2030. This Vision 2030 aspires for a country with high quality services and facilities with investment in infrastructure facilities given the highest priority. The Government recognizes that the required funds to fully support the country's development agenda and to meet the infrastructure deficit will require involvement of the private sector, hence Public Private Partnerships (PPP). PPP arrangements, therefore, offer an opportunity for the country to attract enhanced private sector participation in financing, building and operating infrastructure services and facilities.

The Government of Kenya is, therefore, committed to providing an enabling environment for public private partnerships by having a strong political will, robust legal and institutional framework, as well as strengthening public sector capabilities to effectively and successfully implement PPP projects.

Since 1996, Kenya has attracted private investments into the country's economic infrastructure sectors including telecommunications, energy, transport, water and sewerage. These investments have demonstrated both the commitments of GOK to PPPs and the interest in these sectors by private investors, lenders and operators.

These infrastructure investments however, occurred without a specific policy, legal and regulatory framework for PPP. As a result, most of these transactions, have taken longer time to be prepared and approved, while key analyses regarding affordability and the value for money that GOK and consumers would receive were not adequately conducted. In addition, there has also been uncertainty about the legal process by which contracts should be tendered, procured and awarded. With increased momentum of delivering Vision 2030 flagship projects, there is renewed interest in using the PPP model by various sectors within Government. The success of these projects will depend on the certainty about the framework by which the projects are to be prepared, procured and implemented.

This policy is, therefore, expected to articulate and underscore the Government's commitment and lay the foundation for an enabling environment for attracting private sector partners in financing and managing infrastructure services. The establishment and operation of an appropriate public private partnership framework to guide public and private sector will greatly enhance the attainment of Kenya Vision 2030 development goals.

The development and implementation of this policy is seen as the first step by Government in addressing constraints and challenges in mobilizing the necessary capital to increase the quantity and quality of key public services and to accelerate the socio-economic development of Kenya. Successful implementation of the policy and the public private partnership program will require the support of all stakeholders and actors. The Kenya Government, therefore, looks forward to closer collaboration between the private sector and public sector and the Kenyan public in general to realize this very noble objective.

HON NJERU GITHAE, EGH, MP
MINISTER FOR FINANCE

ACRONYMS

GOK	Government of Kenya
GDP	Gross Domestic Product
GHG	Greenhouse Gasses
CG	County Governments
LG	Local Governments
MDA	Ministries, Departments, Agencies, State Corporations, County and Local Governments
PPP	Public Private Partnership
PS	Permanent Secretary/Principal Secretary
PSP	Private Sector Participation
SOE	State Owned Enterprises
VfM	Value for Money

1. INTRODUCTION

1.1 Purpose and Key Elements of Policy

The purpose of this policy is to articulate the Government commitment to Public Private Partnerships (PPP) and to provide a basis for the enactment of a PPP Law to strengthen the existing legal and regulatory framework. The policy is also expected to provide a foundation for the establishment of institutions to champion the PPP agenda, facilitate mobilization of domestic and international private sector investments, and to provide for Government support for PPP projects, as well as providing a clear and a transparent process for project development.

The key elements of the policy are:

(i) Establishment of central institutions to champion the PPP agenda, with

- the PPP Steering Committee, consisting of senior officials to guide policy and promote awareness and
- the PPP Secretariat, housed within the Ministry of Finance, as a resource centre of expertise and best practice;

(ii) Mobilization of domestic and international private sector investment - creating a level playing field and clear rules of the game, by

- establishing a clear process for project selection, preparation, procurement and implementation with project evaluation at each stage with clear objectives and criteria for selection and evaluation;
- strengthening of the existing legal and regulatory framework established under sector laws and policies as well as the PPP Implementing Regulations; and
- implementing a clear, transparent process for allocating Government support, including guarantees

(iii) Support for MDAs to encourage the development of PPP projects that provide value for money for Kenya, through

- project preparation funding,
- viability gap grants,
- easier access to Government support, and
- technical assistance from the PPP Secretariat to assist MDAs in selection, development, procurement and implementation of PPPs.

1.2 National Policy Framework

PPP arrangements are consistent with the Kenya's Vision 2030 which is the country's long term plan for social and economic development in Kenya covering the period from 2008 to 2030. Vision 2030 sets forth the broad national objective of transforming Kenya into a globally competitive, middle-income country through substantially higher growth rates and more balanced development. Underpinning this broad objective are certain key principles and aspirations, namely:

i). To build a just and cohesive society with social equity for all citizens;

ii). To strengthen Kenya's democratic and political system, founded on issue-based politics, with respect for the rule of law and protection of the right of freedom of every individual in Kenya; and

iii). To eliminate the deficit in core infrastructure that currently persists in Kenya so as to provide high quality services to the citizenry and serve as a basis for improving the attractiveness of Kenya as a touristic and investment destination.

The Vision 2030 seeks to realize average annual GDP growth rates of 10%, through investments in priority infrastructure sectors including specific national flagship development projects to be financed and implemented through public private partnership arrangements.

1.3 Recent Initiatives by the Government

The Government of Kenya has taken a number of specific steps to design and adopt an official framework of policies, laws, regulations, institutions and procedures of public private partnerships, including;

i) The enactment of the Water Act [2002] which provides for systematic improvement of water services and new investments through commercialization and private sector participation arrangements;

ii) The enactment of the Privatization Act, 2005 which allows "concessions" as a form of privatization.

iii) The enactment of the Energy Act, 2006 creating the Energy Regulatory Commission, the energy sector regulatory agency, with responsibility for economic and technical regulation of electric power, renewable energy, and downstream petroleum sub-sectors, including projects implemented through the PPP mechanism;

iv) The amendment of Public Road and Tolls Act (Cap 407) in 2007 to allow the Minister responsible for roads to enter into an agreement with a private party to toll a road;

v) The amendment of the Kenya Communications Act in 2009 to enhance the regulatory scope and jurisdiction of Communications Commission of Kenya (CCK), CCK was transformed into a converged regulator responsible for the development of the information and communications sectors including broadcasting, multimedia, telecommunications, postal services as well as electronic commerce. All projects in these sectors, including PPP projects, fall under its tariff setting purview;

vi) The Public Procurement and Disposal Regulations were issued in 2006 under the Public Procurement and Disposal Act, 2005 providing for regulatory procedures for procurement of public private partnerships;

vii) The Government undertook a study in 2007 on Consolidation, Strengthening, and Harmonization of Policy, Legal and Institutional Frameworks for Public Private Partnerships in Kenya;

viii) The Government issued the Public Procurement and Disposal (Public Private Partnership) Regulations [March 2009] outlining the regulatory and institutional framework for implementation of PPPs;

ix) The Government established in 2010, PPP Steering Committee and a PPP Secretariat within the Ministry of Finance as the institutional focal points for Kenya's emerging PPP framework;

x) In 2010, the Government undertook a review of the Kenya's legal and regulatory framework, the outcome of which was the recommendation of the enactment of a PPP law to address the identified gaps, inconsistencies, conflicts and overlaps in the legal and regulatory framework;

xi) Legislation has been passed that specifically allows private sector participation in provision of public services in the transport, water, sanitation, housing and environment sectors; and

xii) The promulgation of the Constitution of Kenya in August 2010, further increased pressure on public bodies to provide adequate and quality public services. It promotes creation of more transparent governance structures within government and permits National Assembly to legislate on any matter.

1.4 Status of Public Private Partnerships in Kenya

The Government already has a track record of implementing successful PPP projects and these include:

- Mtwapa and Nyali Bridges Concessions signed in 1959;
- The 75 MW Tsavo Independent Power Project tendered in 1995, Olkaria III (48MW Geothermal Plant), Iberafrica (56MW thermal power plant), Mumias (34MW power plant);
- Port of Mombasa Grain Terminal on a Built Own and Operate awarded in 1998;
- Mobile Telephone licenses to Safaricom and Celtel in 1999 and to Econet in 2004;
- Concession of Kenya Railways Corporations freight services for 25 years and passenger services for 5 years in 2006;
- The 90 MW Rabai Independent Power Project in 2006;
- Proposed Nairobi Urban Toll Road Project approved by Government in 2009; and
- Proposes Lake Turkana Wind 300MW Independent Power Project, 2010 and several other Independent Power Producers in the pipeline.

Whilst these projects have been implemented without a specific PPP law or regulations being in place, investor feedback is that greater clarity in the legal and institutional enabling environment of Kenya would be likely to make Kenya's PPP program more successful and sustainable.

2. Rationale, Scope, Principles, Goals and Benefits

2.1 Rationale

The provision of adequate and high quality infrastructure services remains the biggest challenge to development of the country. Currently, the Government faces a growing gap between public investment needs and available resources. Indeed, the Government and development partners have in the past been the main financiers of public infrastructure and services. The level of investment that can be mobilized from these sources is however, far below the requirements needed to support the accelerated economic growth as set forth in Vision 2030. There is need, therefore, for a paradigm shift in the way Government mobilizes capital to develop and modernize infrastructure for delivery of adequate and quality service. To address this, the Government intends to engage the private sector through PPP arrangements, thereby closing the gap in investment capital, technology and know-how needed to improve the efficiency and delivery of public services.

The main objective of this PPP policy is, therefore, to articulate the Government commitment to be able to attract both domestic and international private sector investment, where appropriate, to help address the deficit in productive and social infrastructure and, in this way, improve delivery of public sector services.

2.2 Scope of PPP

A Public Private Partnership is defined as being an agreement between a public entity and a private party under which –

a) The private party undertakes to perform a public function or provide a service on behalf of the public entity;

b) The private party receives a benefit for performing the function, either by way of

   i. Compensation from a public fund

   ii. Charges or fees collected by a private party from users or customers of a service provided to them; or

   iii. Combination of such compensation and such charges or fees.

c) The private party is generally liable for risks arising from the performance depending on the terms of the agreement.

The definition of private party includes a public entity where it is contracted to perform a public function by another public entity.

A public entity may enter into a contract with or grant concession to any qualified private party for the financing, construction, operation, equipping or maintenance of any infrastructure or any development facility of the Government.

The Government is committed to encouraging PPP in as many areas as possible including, but not limited to, power generation, water and sanitation, irrigation, transport, solid waste management, health, education, housing, sports facilities, information communications technology, tourism, land reclamation projects, land swaps, industrial estates, business process outsourcing, wholesale and retail markets, abattoirs, mining and other infrastructure and development projects.

The types of PPP arrangements, as provided in annex 1 of this policy, shall include, but not limited to, management contracts, leases, concessions, Build-Own-Operate-Transfer (BOOT), Build-Own-Operate (BOO), Build-Operate-and-Transfer (BOT), Build-Lease-and-Transfer (BLT), Build-Lease-Maintain-Transfer (BLMT), Build-Transfer-and-Operate (BTO), Develop-Operate-and-Transfer (DOT), Rehabilitate-Operate-and-Transfer (ROT), Rehabilitate-Own-and-Operate (ROO), Land Swap and output based maintenance contracts.

The PPP framework will cover State Departments and public institutions, including, County Governments (CG), Local Authorities and State Corporations that express intention to use the PPP mechanism in delivery of public services.

2.3 Statement of Principles of PPPs

PPP should yield value for money for the Government and its citizens. The key characteristics of PPP projects will include:

- Maximizing the benefits of private sector efficiency, expertise, flexibility and innovations;
- Achieving long-term affordability within the constraints of budgetary sustainability, potential for returns for the private party and affordability by the users;
- Increasing efficiency and access to quality public services for all members of society and enhancing balanced regional development;
- Allocating risks to the party best able to control them;
- Enhancing the health, safety, and wellbeing of the public;
- Achieving value for money particularly as compared to the conventional procurement;
- Ensuring social and environmental safeguards;
- Ascertaining prior to tender the willingness of the private party to participate in the project on account of its financial viability;
- Managing fiscal risks created under PPP contracts within the Government's overall fiscal management framework;
- Respecting the employment rights and opportunities of employees;
- Promoting participation of small- and medium-sized enterprises in PPP projects;
- Ensuring good governance, transparency and accountability in the whole process of PPP development;

2.4 Goals and Benefits

Identification of goals for PPPs and the prospective benefits from individual projects is expected to provide more certainty in particular, for those local communities whom PPP projects are expected to serve.

These goals and benefits include the following:

- Speedy, efficient and cost effective delivery of projects;
- Value for money for the tax payer, thorough optimal risk transfer and risk management;
- Efficiencies from the integrated design and construction of public infrastructure;

  Creation of added value through synergies built between the public entities and private sector companies, in particular through integration and cross-transfer of public and private sector skills, knowledge and expertise;
- Alleviation of capacity constraints and bottlenecks in economy through higher productivity of labor and capital resources in the delivery of projects;
- Competition and increased construction capacity including participation of local investors through joint venture or partnerships with foreign companies;

- Innovation and diversity in the provision of public services; and
- Effective utilization of state assets to the benefit of all users of public services.

3. POLICY STATEMENTS FOR IMPROVING THE ENABLING FRAMEWORK

3.1 Legal Framework

Kenya already has many of the elements necessary for a successful PPP programme. The Constitution of Kenya provides a firm foundation for the development of strong institutions and governance structures to promote the socio economic well being of the citizens. However, lack of clear requisite legal and institutional framework for PPPs remains a potential barrier to effective PPP implementation and thus presents investment risks. The Public Procurement and Disposal (Public Private Partnership) Regulations, 2009 provide for the current institutional and regulatory framework for PPPs in Kenya and are anchored on the Public Procurement and Disposal Act (PPDA), 2005. The object of PPDA is "to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities". The PPP Regulations, therefore, do not fit well within this Act since it does not provide for PPPs, except where it allows for the use of "concessions and design competition". The current legal framework is also not comprehensive enough in providing legal certainty to investors while the framework to deal with the entire PPP project life cycle is unclear. This Policy is therefore a key step in creating certainty to investors and to provide clarity in PPP development'.

In line with this policy, a Public Private Partnerships Act shall be enacted in order to address the gaps and remove any overlaps, conflicts and impediments in the existing legal framework. The main objective of the Act shall be to facilitate the participation of private sector in financing the construction, development, operation, or maintenance of public infrastructure or development projects through concession or contractual arrangements. In addition, the Act shall establish a set of general principles and rules for PPPs based on best practices. All public entities will be expected to comply with these principles and rules, thereby ensuring high degree of consistency in approach across sectors.

3.2 Institutional Framework

The Government will establish an institutional framework for Implementing PPPs, consisting of the PPP Committee, responsible for developing and implementing PPP policy initiatives; the PPP Unit, domiciled at the State Department responsible for Finance, to act as a national centre for PPP expertise; PPP Nodes in the public entities responsible for the development and management of PPP projects; and a Project Facilitation Fund to provide an avenue for government support to PPP projects.

The PPP Committee shall consist of:

i). Principal Secretary for the state department responsible for Finance, as Chairman of Committee;
ii). Attorney General, or his representative;
iii). Principal Secretary in the state department responsible for Government Coordination;
iv). Principal Secretary in the state department responsible for of National Planning;
v). Principal Secretary in the state department responsible for Lands;
vi). Principal Secretary in the state department responsible for coordinating County and Local Government; and
vii). Four members from the private sector.

3.3 GOVERNMENT SUPPORT FOR PPP PROJECTS

The Government shall facilitate as much as possible the mobilization by private parties of international and domestic finance by deploying a wide range of instruments to support project preparation and financial viability of projects.

The Government shall establish a Project Facilitation Fund to:

i). Enable public entities to prepare the projects for tender including the conduct of project appraisals to ensure that projects are bankable and attractive to potential bidders;

ii). In selected cases where public financial resources are available, extend Viability Gap Finance to projects that are socially desirable but, either, cannot be implemented in the absence of a Government grant because they are not bankable or are only bankable with unaffordable tariffs; and

iii). Provide a source of liquidity to meet in particular, calls on contingent liabilities extended to PPP Projects that materialize unexpectedly during operations.

Annual budgetary allocations will be made into the Facilitation Fund to create a 'guarantee fund,' capable of meeting Government contingent liabilities arising from PPP projects.

To be successful and sustainable, PPPs require fixed rate long-term financing, preferably, in local currency. The Government will ensure seamless interactions between Security Markets and the PPP implementation programme, (i) to include the continued enhancement of the institutional capacity of market intermediaries and other licensees of the capital markets; and (ii) the issuance of new regulations which may ease the challenges for sponsors and their lenders to mobilize financial resources including regulations related to collective investment schemes and asset based securitization.

The Government will facilitate issuance of guarantees for PPP contracts with International Development Finance Institutions or other institutions involved in insuring country and project risks.

The Government will provide, where needed, binding letters of comfort/ support to the investors and their lenders in order to reduce the premiums factored on political risks.

The Government, where appropriate may enter into direct agreement with the lenders or provide the lenders with step-in-rights in a contract or a Concession agreement

In order to reduce the overall cost of the project the Government may, in special circumstance, with the approval of Parliament issue a Guarantee to the private party to cover some of the country or project risks.

To attract the best quality at least direct costs, the Government may provide some incentives to the project company such as tax benefits, assistance in acquiring land, relaxation of certain legal requirements such as licensing, new or improved infrastructure, use of project resources for no-profit related purposes or being allowed to bid for other projects.

3.4 The Project Process

The Government shall issue an operating framework that will assign roles and responsibilities of key Public entities in the preparation and implementation of PPP projects during their life cycle. It is essential to ensure a standardized approach to the development of the overall PPP programme, while recognizing the need for sectoral flexibility to accommodate diversity at project level.

i) ***Project Identification, Selection and Prioritization***: the first step in determining the technical profile, operations, service delivery targets, and future income and costs of the project, the MDAs shall perform a needs analysis through a survey. For those PPP projects that require the collection of user fees directly from consumers, it will be necessary to confirm through such surveys that revenues paid by customers will be sufficient to make the project financially viable;

ii) ***Project Preparation and Appraisal***: the MDA will recruitment a transaction advisor, where applicable, to assist conduct a social cost benefit analysis, a full investment appraisal that determines the commercial sustainability of the project, project description, and any requirements for land acquisition or other Government support, the affordability of the project's proposed tariff path for users, the bankability of the project based on optimal risk sharing and consultations with stakeholders to ensure their interests are considered;

iii) ***Project Tendering:*** This shall be consistent with the PPP Act. As a general principle, projects should be tendered with a maximum of information provided to the potential bidders, including the level of Government Support to be extended to the undertaking;

iv) ***Project Negotiation:*** Guidelines shall include guidance to follow in preparing and organizing for the negotiations with first ranked bidders and the approval procedures required from oversight state departments such as state department responsible for Treasury and/or the state department responsible for fiscal management;

v) **Project approvals**: The approval of PPP projects shall be done in accordance with the PPP Act.

vi) **Project Monitoring and evaluation**: this step involves development of a monitoring and evaluating plan aimed at reviewing PPP project performance to ensure compliance with the project agreement during implementation and operation period and to ensure that the transfer of asset at the expiration of the project agreement is consistent with the terms and conditions in the project agreement.

3.5 Project Implementation Structures

PPP projects will be developed and implemented by the relevant public entities, e.g, sector state departments, statutory bodies, public enterprises, County Governments and local authorities. PPP project implementation framework shall be coordinated by the PPP Committee and PPP Unit in the state department responsible for Finance, which shall develop and distribute PPP Operating Guidelines and Manuals for use by public entities in developing PPP projects. The PPP Committee will be responsible for the approval of project concept, feasibility study, bid documents, and the negotiated contracts. The Cabinet shall be the final authority in the approval of PPP projects but will delegate such responsibilities to the PPP Committee or the Contracting Authority as will be prescribed in the regulations. All Concessions of natural resources shall be ratified by Parliament as provided for in the Constitution of Kenya.

Public entities intending to use PPP as a method of delivering infrastructure services shall be required to have the capacity to manage the commercial processes involved and will be required to hire transaction advisors in those cases where capacity is lacking.

3.6 Options for PPP Arrangement

In determining whether PPP is an appropriate procurement option for public infrastructure and services, Government will consider among others:

-**Value for Money**: The best value for money outcome in public services is the key consideration at all stages of a project's development and procurement. Government will test value for money (VfM) by comparing the costs of PPP proposals against established benchmarks wherever possible. The key benchmark will consist of an estimate of the costs of providing an equivalent service through public finance. Because this benchmark may be unavailable, or impractical, in the early years of the PPP program, reliance must be placed on the competitive tension that can only come from well conducted competitive bidding to ensure VfM.

-**Affordability:** Two kinds of affordability will be tested in the assessment of PPP projects: (1) affordability to consumers which will be determined by conducting a consumer demand, affordability and a willingness to pay survey; and (2) affordability to Government which will be assessed by determining whether the proposed PPP project can be financed from the government budget over its life.

3.7 Risk Allocation Structure

In order to be viable, PPP projects must carefully allocate all relevant risks to specific parties and must determine if a project is financially and commercially viable for the project's given risk allocation structure. The principle that Government will follow in allocating the risks of a PPP project will be to optimize, rather than maximize, the transfer of project risks to the private party. Government will seek to allocate risks to the party that is best able to manage controllable risks; or best able to insure uncontrollable but insurable risks; or best able to bear the financial consequences of uncontrollable and uninsurable risks.

3.8 Contingent Liabilities

Government will continuously review the level of contingent liabilities arising from the PPP program in relation to national debt.

All public entities including county governments, local authorities and the PPP Unit will be required to seek approval from the state department responsible for Finance/Treasury for all direct and contingent exposure arising from any given PPP project. The Government will issue more comprehensive guidelines on how to dimension contingent liabilities and the approval process.

Government will establish a Project Facilitation Fund which among others will provide a source of liquidity for calls under contingent liabilities accepted by Government on any given PPP project.

3.9 Procurement of PPP Projects

PPP projects shall be procured in an open and transparent manner consistent with the PPP Act and in line with national and relevant international standards, procurement rules, and with the need to ensure effective competition. All public entities involved in the procurement of PPP projects shall ensure fairness, equity, transparency, competitive tension, accountability and cost effectiveness in the process. The procurement process must provide as much information into the public domain as practicable, with equal access to all bidders, particularly criteria related to the evaluation of the bids.

The Government recognizes that the benefits of private sector participation in infrastructure will be increased by the effective competition, including reliance on international competitive bidding for award of projects, ensuring that business activities are subject to appropriate commercial pressures, dismantling unnecessary barriers to entry, and implementing and enforcing adequate competition laws. The awarding of infrastructure contracts or concessions will be designed to guarantee procedural fairness, non-discrimination, and transparency.

3.10 Privately Initiated Investment Proposals

Privately Initiated Investment Proposals will be limited to projects that demonstrate genuine innovation and/or use of proprietary technology, economic viability and satisfy the principles of public interest. Detailed procedures for dealing with Privately Initiated Investment Proposals and the process by which they are guided will be described in the legal framework.

3.11 Contractual Arrangement

PPPs will be financed, managed and implemented under an enforceable project agreement between the contracting authority and a Special Purpose Vehicle established by the successful private party with a sole purpose of executing the project.
The project agreement will set forth clear guidance on the following key issues where applicable:

(i) The term of the project agreement, timing of implementation and the process by which the project will be deemed to meet contractual specifications during its commissioning tests;

(ii) A management plan that sets forth how the project will be operated and managed during the project agreement term;

(iii) Penalties for failure to meet schedule and/or specifications at commissioning or failure to adhere to best practice standards during operations;

(iv) Stepping in rights of lenders;

(v) Responsibilities related to environment mitigation;

(vi) A clear mechanism as to how tariffs, or user charges, will be set;

(vii) A clear payment mechanism;

(viii) Allocation of risks to the party best able to manage them;

(ix) Process by which the project will be monitored by Government for adherence to the project agreement;

(x) Events of default, remedies, timing;

(xi) Provisions related to the transfer of the asset at the conclusion of the project agreement;

(xii) Dispute resolution process;

(xiii) Governing law and jurisdiction of the contract; and

(xiv) Any other provisions

3.12 Output Specifications

The formal agreement between the contracting authority and the private party will be specified in terms of verifiable service standards to be provided on the basis of output or performance based specifications. The level of service quality and design should be related to the objective for the service and user requirements.

3.13 Post-Transaction PPP Contract Compliance, Performance Monitoring and Evaluation

Government recognizes the importance of the role played by the public sector in the implementation of public private partnerships to ensure that they are successful and sustainable. PPPs will only deliver the planned benefits if each of the parties continues to perform, as required by the contract, for the entire term of the contract. While Government will delegate to the Public Entities, or the regulatory authority, or both, the responsibility to ensure compliance with the Project Agreement and imposition of penalties for failure to adhere to its terms, it will ensure that Public entities have the necessary support and capacity to fulfill their role in the PPPs. The public entity will establish clear procedures to monitor the contractor's performance. The PPP Unit and the PPP Committee shall have an oversight role in this process.

3.14 Stakeholder Participation

Stakeholder participation builds trust amongst the participants and leads to the creation of long-term collaborative relationships. In this respect, public entities will be required to consult the stakeholders throughout the project cycle to ensure that the PPP project addresses their needs. stakeholders to be consulted shall include employees and their trade unions, the public, the people who will use the assets and services provided, local communities, sectoral interest groups, amongst others.

3.15 Communications Strategy

The success of the PPP program requires widespread public support. A PPP communications and awareness strategy, led by the PPP Unit at the state department responsible for Finance, will be directed to key stakeholders, officials of the public service procuring agencies, employees in the sectors, where PPPs will be developed and the general public. A communication strategy shall be developed for each PPP project by the Unit in conjunction with the public entities and, where applicable with the private sector.

The communications strategy should be implemented through appropriate media, including website(s), television, newspapers, journals, magazines, radio and workshops.

The communications strategy will focus on the objective and subjective attributes of the project, which include economic and social benefits to be realized by its implementation, relationship to Kenya's long term development, scope, content and timing of bidding process, likely bidders and other stakeholders, implementing private party and financing structure (once this is known), length and construction period.

3.16 Human Resource Capacity

PPPs are different from traditional procurement methods and their preparation and implementation requires different skills and capacities. The PPP Unit will spearhead the development of the requisite human resource capacity within the PPP Unit and the Nodes to facilitate development of sustainable PPP projects. Transaction advisors engaged to work on PPP projects will be required to transfer skills to the local counterpart staff and key performance indicators put in place to monitor such transfer of skills. Also to be included in the training program are the staff of the state department responsible for Finance responsible for dimensioning and monitoring of contingent liabilities, critical review of project appraisals, and approval of contingent liabilities.

4. IMPLEMENTATION FRAMEWORK

The Government, in collaboration with other stakeholders, will develop an implementation framework that will include enactment of a PPP law review and amendment of related legislation, establishment and reconstitution of PPP Ccommittee and the project facilitation fund, creation of PPP Nodes, adoption of appropriate regulations, a prioritized PPP projects implementation program and PPP operating guidelines together with standard bidding documents.

Annex I
Permitted PPP Arrangements

There are several well defined models of Public Private Partnerships, differing in purpose, service scope, legal structure and risk sharing, and over time there have been permutations and combinations of these structures some of which are defined hereunder:

a) management contract whereby a Contracting Authority awards a private party the responsibility to manage and perform a specific service, within well-defined specifications for a specified period of time not exceeding ten years, and the Contracting Authority retains ownership and control of all facilities and capital assets and properties;

b) output performance based contract whereby the Contracting Authority awards a private party the responsibility to operate, maintain and manage infrastructure facility for a specified period of time not exceeding ten years and the Contracting Authority retains ownership of the facility and capital assets;

c) a lease whereby the private party pays the procurement entity rent or royalties and manages, operates and maintains the facility or utilises leased land for the purpose of exploration, production and development of minerals and receives fees, charges or benefits from consumers for the provision of the service or sale of products for specified time not exceeding thirty years;

d) a concession whereby a private party through a contractual license issued by the public entity is granted the right to operate, maintain, rehabilitate or upgrade the infrastructure facility and to charge a user fee while paying a concession fee to the public entity;

e) a Build-Own Operate scheme whereby a private party designs, finances, constructs, owns, operates and maintains the infrastructure facility and provides services for an agreed time period

f) Build-Operate-and-Transfer - A contractual arrangement whereby the private party undertakes the construction, including financing, of a given infrastructure facility, and the operation maintenance thereof and transfers the facility to the Contracting Authority at the end of the fixed term which shall not exceed thirty years

g) Build-Lease-and-Transfer - A contractual arrangement whereby a private party is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the Contracting Authority concerned on a lease arrangement for a fixed period after which ownership of the facility is automatically transferred to the Contracting Authority Unit concerned

h) Build-Transfer-and-Operate - A contractual arrangement whereby the public sector contracts out the building of an infrastructure facility to a private party such that the contractor builds the facility on a turn-key basis, assuming cost overrun, delay and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the Contracting Authority and the private party operates the facility on behalf of the Contracting Authority under an agreement

i) Develop-Operate-and-Transfer - A contractual arrangement whereby favourable conditions external to a new infrastructure project which is to be built by a private party are integrated into the arrangement by giving that private party the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values. The infrastructure facility shall be transferred the Contracting Authority within a period not exceeding 30 years while the developed property remain a property of the private party in perpetuity

j) Rehabilitate-Operate-and-Transfer - A contractual arrangement whereby an existing facility is turned over to the private party to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is transferred to the Contracting Authority

k) Rehabilitate-Own-and-Operate - A contractual arrangement whereby an existing facility is transferred to the private party to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity;

l) Land Swap - A contractual arrangement whereby existing public land or asset is transferred to the private party without limitation in exchange of an asset or facility developed by the private party.