

THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013

(No. 15 of 2013)

IN EXERCISE of the powers conferred on the Cabinet Secretary for the National Treasury in section 71 of the Public Private Partnerships Act, 2013, the Cabinet Secretary makes the following Regulations—

PETITION COMMITTEE REGULATIONS, 2014

Interpretation. **1.** In these Guidelines, unless the context otherwise requires—

“petition” shall include objections and complaints in relation to—

(a) the shortlisting of bidders under section 40(1) of the Act;

(b) the disqualification of a private party under section 40(2) of the Act;

(c) the prequalification of bidders on the basis of the bidders’ technical bids under section 47 of the Act; or

(d) the decision of the contracting authority to enter into negotiations with a successful bidder under section 52(1) of the Act.

“successful bidder” shall include a first ranked bidder and a preferred bidder.

Petitions. **2.** (1) A private party may file a petition, in relation to the process for tendering for, or entering into, a project agreement, against –

(a) the shortlisting of bidders under section 40(1) of the Act;

- (b) the disqualification of a private party under section 40(2) of the Act;
- (c) the prequalification of bidders on the basis of the bidders' technical bids under section 47 of the Act; or
- (d) the decision of the contracting authority to enter into negotiations with a successful bidder under section 52(1) of the Act.

(2) Where a private party files a petition with the Petition Committee in relation to a decision by a contracting authority specified under paragraph (1), that private party shall file the petition within fifteen days of the.

Register.

3. (1) The Petition Committee shall establish a register to be known as the Petition Register into which the Petition Committee shall cause to be entered the details of each petition.

(2) When a petition is filed with the Petition Committee, the Petition Committee shall assign the petition a serial number before the petition's details are entered into the Petition Register

Notification of contracting authorities.

4. (1) When a petition is filed before the Petition Committee, the Petition Committee shall notify the contracting authority within three working days in writing.

(2) The petition Committee may notify a contracting authority of the filing of a petition out of time if it is not possible to make the notification within time.

Service on respondents.

5. (1) The Petition Committee shall require a petitioner to serve the respondents with a copy of the petition and file an affidavit of service with the Petition Committee within three working days of filing the petition.

(2) The Petition Committee may, after a petition has been filed, require a petitioner to—

- (a) provide additional details; and

(b) submit a list of experts or witnesses.

Response by
respondents.

6. A respondent who has been served with a petition shall—
- (a) file a response within seven working days of service; and
 - (b) provide additional information to the Petition Committee including documents prescribed under Parts 7 and 8 of the Act as may be required by the Petition Committee.

Abandoning
or
withdrawing a
petition.

7. (1) A petition shall be deemed to have been abandoned where—
- (a) the petitioner fails to serve the respondent or respondents with a copy of the petition within the prescribed time;
 - (b) the petitioner fails to provide details required under the Act when filing a petition; or
 - (c) the petitioner fails to attend a hearing when required to do so by the Petition Committee.
- (2) Where a petition is deemed to have been abandoned, the Petition Committee shall dismiss the petition and notify the petitioner and the respondent or respondents that the petition has been dismissed.
- (3) A petitioner may withdraw the petition by notice in writing to the Petition Committee at any time before the Petition Committee determines the petition.
- (4) Where a petitioner has withdrawn a petition, the Petition Committee shall notify the other parties in writing of the withdrawal.
- (5) Where a respondent does not file a response, the Petition Committee may determine the petition on the basis of

the documents filed in relation to the petition.

Forms and
fees.

8. (1) A petition shall be filed in the prescribed form as set out in the First Schedule.

(2) Despite the generality of paragraph (1), a petitioner shall provide the following information when filing a petition—

- (a) the name and address of petitioner;
- (b) the name and address of respondent or respondents;
- (c) the tender name and reference number;
- (d) the decision complained of;
- (e) the date of the decision;
- (f) copies of relevant documents;
- (g) the grounds for the petition; and
- (h) affidavits in support of the petition which may include sworn witness statements.

(3) The Petition Committee may charge fees in respect of the following—

- (a) filing charges;
- (b) adjournment charges;
- (c) expert expenses; or
- (d) other administrative charges;

(4) The fees charged by the Petition Committee shall be as prescribed in the Second Schedule.

Suspension of
a tender
process.

9. (1) Where a petition has been filed, the tender process shall not be suspended.

(2) Despite paragraph (1), a tender may be suspended by the

Petition Committee where—

(a) the petition is against the decision of the contracting authority to enter into negotiations with the preferred bidder; or

(b) the Petition Committee determines it is just to do so.

Preliminary objections.

10. (1) If a respondent objects to a petition, he or she may file a preliminary objection.

(2) Where a person files a preliminary objection to a petition, that person shall file the preliminary objection within three working days of service of the petition by the petitioner.

(3) The Petition Committee shall hear and determine a preliminary objection within seven days of the objection being filed.

Financial bids.

11. (1) The contracting authority shall return unopened financial bids of bidders whose technical bids have not been prequalified, after fifteen days of the invitation of prequalified bidders under section 48(1) of the Act, where a petition has not been filed by a private party in relation to a tender.

(2) Where a private party files a petition with the Petition Committee, within the prescribed time after the prequalification of bidders on the basis of the bidders' technical bids under section 47 of the Act, a contracting authority shall retain the financial bids of all the bidders.

(3) The contracting authority shall return unopened financial bids of bidders whose technical bids have not been prequalified under section 47 of the Act after the Petition Committee has determined the petition or petitions in relation to the tender.

Negotiations.

12. (1) The contracting authority shall enter into negotiations with the successful bidder after fifteen days of the declaration of the first ranked bidder, where a petition has not been filed with the Petition Committee by a private party in

relation to a tender.

(2) A contracting authority shall not enter into negotiations with a successful bidder where a private party has filed a petition in relation to the tender with the Petition Committee within the prescribed time.

(3) Despite paragraph (2) contracting authority may enter into negotiations—

(a) with a successful bidder if the petition is dismissed by the Petition Committee before a determination is made; or

(b) with a successful bidder if the Petition Committee determines the petition in favour of the successful bidder.

(4) Where a petition has been filed with the Petition Committee in relation to a tender, the contracting authority shall request all bidders who have prequalified under section 47 of the Act to extend the validity of their bids until the petition or petitions in relation to the tender has or have been determined.

Quorum.

13. (1) Where a petition has been filed the quorum of the business of the Petition Committee shall be at least half of the members.

(2) Where for any reason the members present at a meeting of the Petition Committee do not constitute a quorum, that meeting shall be postponed until a quorum can be formed.

Hearings.

14. (1) The Petition Committee shall notify the parties to a petition of the time and place of a hearing in relation to the petition at least seven days before the hearing is held.

(2) The petition shall be heard in public except where the Petition Committee determines that a matter or a portion of the hearing shall be heard in camera.

(3) The Petition Committee shall hold a hearing to consider the petition within fourteen days of the filing of responses by respondents unless the Petition Committee

determines that the hearing should be held out of time.

Chairperson
to convene
meetings.

15. The Chairperson of the Petition Committee shall convene meetings of the Committee by notice in writing.

Conflicts of
interest.

16. (1) Where a member of the Petition Committee has a personal or fiduciary interest in a project, proposed contract, or any matter in relation to a petition, that member shall declare the interest at the first meeting of the Committee at which that member is present where the petition is considered.

(2) A member's declaration of a conflict of interest shall be recorded in the minutes or the proceedings of the Petition Committee.

(3) A member who has declared his or her conflict of interest shall not participate in the hearing, determination or any process in relation to the petition.

(4) Where a member fails to declare a conflict of interest in relation to a petition, that member's contribution or vote shall not be considered when determining the petition.

Dealings with
the Petition
Committee.

17. (1) A petitioner, a respondent or any other party in relation to a petition may appear before, or deal with, the Petition Committee –

(a) in person; or

(b) through a representative.

(2) A petitioner, a respondent or any other party, in relation to the hearing of a petition, may be permitted by the Petition Committee to appear or make submissions –

(a) orally;

(b) through written documents;

(c) through electronic documents; or

(d) through any other form of communications that the

Petition Committee may permit.

Proceedings to be in writing.

18. (1) The proceedings of the petition shall be recorded in writing and where they have been recorded using audio equipment or audio-visual equipment they shall be reduced in writing.

(2) Written copies of the proceedings of the petition shall be provided to the parties upon payment of prescribed fees.

Decisions of the Petition Committee.

19. (1) The Petition Committee shall make a decision on the petition within seven days of the hearing to consider the petition

(2) Decisions of the Petition Committee shall be in writing and they may be by consensus or by simple majority vote.

(3) Where there's a tie in a vote in relation to a decision of the Petition Committee, the Chairperson shall cast a deciding vote.

(4) The decisions of the Petition Committee shall be signed by the members present when the decision was made.

Language.

20. (1) The language of hearings shall be English but where a party is unable to communicate in English, the Petition Committee shall provide a translator, at the party's cost.

(2) A party that asks for translation services shall give reasonable notice to the Petition Committee of at least seven days.

Records to be kept for six years.

21. Copies of all records or documents or decisions of the Petition Committee shall be retained by the Committee for at least 6 years.

The *Sub-judice* Rule.

22. The Petition Committee may enforce the *Sub-judice Rule* where the circumstances require.

Consolidation. **23.** The Petition Committee may consolidate two or more petitions made by two or more different petitioners where it deems fit.

Joinder of parties. **24.** The Petition Committee may permit a party to be enjoined in a petition where that party shows just cause.

Orders. **25.** The Petition Committee, in relation to a petition, may make the following orders—

(a) conservatory orders;

(b) final orders; or

(c) orders extending stipulated times for any justifiable reason.

FORM PC 1

PETITION NO.....OF.....20.....

BETWEEN

.....APPLICANT

AND

.....RESPONDENT (*Contracting Authority*)

Request for review of the decision of the..... (*Name of the Contracting Authority*) ofdated the...day of20.....in the matter of Tender No.....of20...

PETITION NOTICE

I/We.....,the above named Applicant(s), of address: Physical address.....Fax No.....Tel. No.....Email, Country..... hereby request the Public Private Partnerships Petition Committee to review the whole/part of the above mentioned decision on the following grounds , namely:-

- 1.
- 2.

By this memorandum, the Applicant requests the Petition Committee for order or orders that: -

- 1.
- 2.

SIGNED(Applicant)

Dated on.....day of/...20.....

FOR OFFICIAL USE ONLY

Lodged with the Secretary Public Private Partnerships Petition Committee on.....day of20.....

Petition Committee Secretary

FORM PC 2

REQUEST NO.....OF.....20.....

BETWEEN

.....APPLICANT

AND

..... RESPONDENT (*Contracting Authority*)

- TO: 1) (*Contracting Authority*)
2)(Applicant)

HEARING NOTICE

Whereasthe Applicant herein has instituted a complaint against(*Contracting Authority*) on..... (Date) particulars of which were set out in a Petition served upon you on

You are hereby required to appear on the.....day of.....20.....at.....am/pm when the complaint against you will be heard by this Petition Committee sitting at

If you fail to appear the Applicant may proceed with the complaint and determination by order of the Petition Committee may be made in your absence.

Dated on the.....day of.....20.....

Petition Committee Secretary

SECOND SCHEDULE

Guideline 8

FEEES FOR PETITIONS

1. Administrative fee Kshs 20,000
2. Upon filing a Petition, the fees payable shall be as follows—

<i>Subject of Petition</i>	<i>Fees</i>
(a) The shortlisting of bidders under section 40(1) of the Act	0.01% of the estimate project cost, as established in the project feasibility study under taken pursuant to section 33(1) of the Act, but not less than KShs 250,000.
(b) The disqualification of a private party under section 40(2) of the Act;	0.01% of the estimate project cost, as established in the project feasibility study under taken pursuant to section 33(1) of the Act, but not less than KShs 250,000.
(c) The prequalification of bidders on the basis of the bidders' technical bids under section 47 of the Act.	0.03% of the estimate project cost, as established in the project feasibility study under taken pursuant to section 33(1) of the Act, but not less than KShs 500,000.
(d) The decision of the contracting authority to enter into negotiations with a successful bidder under section 52(1)	0.05% of the estimate project cost, as established in the project feasibility study under taken pursuant to section 33(1) of the Act, but not less than KShs 750,000.
3. Upon grant of an adjournment to a party by the Committee	Kshs.125,000
4. Fee for filing preliminary objection	Kshs.125,000
5. Fee for filing a defence or a Reply or an Affidavit	Kshs 15,000
6. The Secretary may demand additional fee if the fee paid at the time of filing is less than that ascertained to be chargeable.	

Made on the2014.

HENRY ROTICH,
Cabinet Secretary for the National Treasury.