REPUBLIC OF KENYA

THE NATIONAL TREASURY & PLANNING

INFRASTRUCTURE FINANCE AND PUBLIC PRIVATE PARTNERSHIPS ADDITIONAL FINANCING (IFPPP-AF)

PPP DIRECTORATE

COMPONENT 1A – SUPPORT TO INSTITUTIONAL STRENGTHENING

TERMS OF REFERENCE

CONSULTANCY FOR CONDUCTING DUE-DILIGENCE OF THE PRIVATE PARTY SUBMITTING A PRIVATELY INITIATED PROPOSAL

NOVEMBER 2023

TERMS OF REFERENCE FOR A CONSULTANT TO CONDUCT DUE-DILIGENCE OF THE PRIVATE PARTY SUBMITTING A PRIVATELY-INITIATED PROPOSAL

Section I. Background and Context

The Government of Kenya (GOK) has made Public Private Partnerships (PPPs) a priority mechanism to facilitate the development of assets and provision of services to address the major infrastructure gaps in the country. In November 2011, GOK issued a National PPP Policy and in February 2013, through the enactment of the PPP Act, established an institutional framework to attract private sector participation in the provision of public services through PPPs. The institutional framework under the Act includes a PPP Committee, responsible for developing and implementing PPP policy initiatives; a PPP Directorate (PPPD), housed within the National Treasury and Planning, to function as a national center for PPP expertise and for facilitating project development and implementation; and PPP Nodes in contracting authorities at national and county level. Kenya has made significant strides in promoting private sector involvement in the financing, construction, development, operation, and maintenance of infrastructure development projects, and is widely recognized as having one of the most progressive Public-Private Partnerships (PPP) programs in Africa. The program in Kenya has matured over the years with several operational projects in the road and energy sectors, and various pipeline projects at different stages in multiple sectors. The Government of Kenya (GoK) has been working on building robust legal and institutional frameworks, and tools and methodologies for selecting and taking forward projects that not only provide economic benefits but are attractive to private investors. Most recently, the country repealed the PPP Act, 2013, making way for the PPP Act, 2021 that seeks to enhance efficiency in the regulatory process of engagement of the private sector and the way PPPs are conducted in the country to ensure the provision of high-quality facilities and services.

The institutional framework under the Act includes a PPP Committee, responsible for developing and implementing PPP policy initiatives; and a PPP Directorate (PPPD), housed within the National Treasury and Economic Planning, to function as a national center for PPP expertise and for facilitating project development and implementation. With a growing number of project proposals approved by the PPP Committee, the PPP program in Kenya is gathering pace and is taking shape. As of today, there is a substantial pipeline of PPP projects in the transaction phase aiming for successful commercial and financial close (www.pppunit.go.ke)

Because of this, and in accordance with its mandate to provide technical, environmental & social risk management, financial and legal expertise to all contracting authorities (CAs), the PPP Directorate (PPPD) is continually seeking to strengthen its institutional and technical capacity for efficient management and success of its program.

Section 40 of the PPP Act allows the investor (Private Party) to submit Privately-Initiated Proposals (PIPs) to CAs for projects aligned with national infrastructure priorities and addressing demonstrated societal needs. The Act details the process from submission of a PIP to project award covering the stages of project development. Section 41 of the Act requires the PPPD, in coordination with a CA, to conduct due diligence of a Private Party before commencing the evaluation of a PIP. The due-diligence is aimed at assessing the integrity of the Private Party submitting the PIP.

The PPPD intends to conduct an international tender to select a Consulting Firm (Consultant) to support them in conducting due-diligence on Private Parties submitting Privately-Initiated Proposals (PIPs) as and when they are received and taken-up for evaluation.

Section II: Objective

The objective of this assignment is to conduct due diligence on any Private Party submitting a PIP and provide an independent opinion on the integrity as well as the technical, financial and legal capacity of the Private Party as per the requirements of section 41 of the PPP Act.

Section III: Scope of work

The Consultant is expected to meet the above objective and submit its independent opinion on the integrity of the Private Party and confirm that the Private Party:

i. has not been debarred by any country or any international organization from participating in public private partnerships or similar arrangements;
ii. is not corrupt, has not engaged in acts of corruption, and has not been sued or convicted on account of acts of corruption;
iii. is not insolvent, under receivership or bankrupt and its affairs are not being administered by a court or judicial officer, its business activities have not been suspended, and it is not subject to any current legal proceedings;
iv. is tax-compliant in all jurisdictions in which it has local tax presence, and in its home country of registration, and is not at default on payment of social security and employment benefits or contributions in its jurisdictions of operation and registration; and
v. has not, and its directors or officers have not, been convicted of any criminal offence related to professional conduct within a period of five years preceding the submission of the proposal, and have not otherwise been disqualified pursuant to administrative suspension or debarment proceedings.

The Consultant is expected to provide its independent opinion, and including, without limitation, perform the following tasks:

Task 1: Document collection and sufficiency check

- Understand the PPP legal framework of Kenya, review other related procurement laws and assess their applicability to and implications on section 41 of the PPP Act.
- Collect and verify authenticity of documents submitted by the private party comprising, but not limited to, company profile, company formation details, audited accounts for the previous three years and evidence of the financial capacity of the private party and of each of the consortium members if the private party is constituted through a consortium
- Undertake an assessment within 5 days of commencement of the assignment on the availability of information to undertake the due-diligence of the private party and inform the PPPD on additional information required from the private party
- The Consultant will conclude Task 1 with a note on the data collected for conducting due-diligence on the private party and the sufficiency of the information collected to execute the assignment.

Task 2: Assessment of legal identity of the Private Party

- Review the company profile, company formation documents to assess if the company is duly and validly existing under the laws of the country it is registered in and has the full power and authority to execute and perform its obligations as a Private Party in a PPP Agreement as per the PPP Act.

- In case of a listed company in any stock exchange, assess if the company is duly compliant with the stock market listing requirements and has no enquiries pending against it that may impact the ability of the Private Party to contract under the PPP Act.
- Assess if the performance of the proposed PIP by the private party will not conflict with, result in the breach of, or constitute a default under any of the terms of the private party's memorandum and articles of association.
- Assess whether the Private Party, its subsidiaries or affiliates has a history of disputes/litigation and in particular confirm that there are no court matters or decisions that could impact the project negatively.
- Assess whether the PIP is in any conflict with the laws of Kenya or any of her international obligations.
- Review the company's policies on ethics, environment and Corporate Social Responsibility (CSR) to ensure they align with the values of the proposed project.
- Identify the beneficial owners of the company to assess transparency and potential conflicts of interest.
- Identify any potential conflicts of interest among key personnel.

Task 3: Assessment of financial standing

- Review the audited financial statements of the private party to assess if the statements are in accordance with the laws of the country of incorporation
- Assess and issue an opinion on the financial health of the Private Party from various sources of evidence such as audited financial statements and any other relevant documentation.
- Assess if the company has a credit rating from reputable credit rating agencies and assess their creditworthiness.
- Evaluate the company's financial capacity in line with the proposed project, considering the project's proposed needs, capital requirements and financial commitment.
- Assess that the private party is not insolvent, under receivership or bankrupt and its affairs are not being administered by a court or judicial officer, its business activities have not been suspended, and it is not subject to any current legal proceeding
- Assess that the private party is tax-compliant in all jurisdictions in which it has local tax presence, and in its home country of registration, and is not at default on payment of social security and employment benefits or contributions in its jurisdictions of operation and registration;
- Assess ownership of the private party and assess the financial standing covering the above of the promoters of the private party holding controlling stake in the private party
- Assess that the private party has not, and its directors or officers have not, been convicted of any criminal offence related to professional conduct within a period of five years preceding the submission of the proposal, and have not otherwise been disqualified pursuant to administrative suspension or debarment proceedings.
- Assess terms and conditions of the Private company's long term financial obligations, current and future working capital projections.
- Assess that the Private Party, its affiliates, directors, promoters, proxies or agents have not been convicted of money laundering.
- Evaluate the company's financial capacity in line with the proposed project, considering the project's proposed needs, capital requirements and financial commitment.

Task 4: Integrity due-diligence

- Undertake an independent integrity due-diligence of the private party by conducting background check and gathering information on the private party from reliable sources to assess areas that can be potentially damaging for entering into a PPP Agreement
- Conduct thorough background checks and provide information – shareholding/ ownership structure of the private party, key personnel, litigations, market reputation, regulatory non-compliance, adverse media, willful defaults, etc.
- Assess if any Directors or Promoters have any connections with any political figures and its potential to leverage these relationships to benefit the private party
- Assess that the private party is not corrupt, has not engaged in acts of corruption, and has not been sued or convicted on account of acts of corruption
- Assess potential reputational risks, the extent, nature and credibility of any allegations made against the company or its key principals relating to bribery, corruption, money laundering, large-scale tax evasion, fraud or asset stripping
- Assess from reliable sources if there are any alleged connections between the private party and organized crime or terrorist groups or broader risk of exposure to such groups
- Assess if the private party has been debarred by any country or any international organization from participating in public private partnerships or similar arrangement. The assessment should cover a review of debarred parties of major international procurement agencies, multilateral and bilateral agencies and the countries the private party operates in.

Task 5: Due-diligence report

- Compile the findings based on the above tasks and provide an independent opinion on the integrity as well as the legal and financial capacity of the private party in accordance with the requirements of Section 41 of the PPP Act
- The report will need to include a section on the approach adopted, data sources accessed, interviews conducted, with confidential sources masked and inferences drawn from the due-diligence.
- The report will need detail on the strengths and weakness of the private party, areas red-flagged for further investigation and supported with data and references from reliable sources
- The report will be confidential and will be provided only to the PPPD and its findings will not be disclosed. PPPD retains the right to use the information contained in the report in the context of the assessment and the PIP submitted by the private party
- Recommend based on the data provided on information templates and data that can be procured from a private party to fast track the due-diligence process in the future
- Recommend to the PPPD the representations and warranties that need to be obtained from the Private Party in the event that the PIP proceeds to the next stage of evaluation
- Undertake due-diligence capacity building exercise for PPPD and other stakeholders based on the report prepared; and
- Perform such other tasks as may be assigned by the Director General of PPPD.

Section IV: Estimation of effort and payment schedule

The Consultant is expected to perform the scope of work on a lumpsum basis within a period of [14] days, to the satisfaction of the Director General PPP Directorate, within the guidelines set out herein and based on best industry practices.

Section V: Payment Modality

The payment to the Consultant will be made on a completion of the following milestones on the basis on submission and acceptance of the following reports:

No.	Deliverable	Time frame from commencement	Percentage payment
1	Note on data sufficiency	10^{th} day	10%
2	Draft Due-diligence report	20^{th} day	50%
3	Final Due-diligence report	30^{th} day	40%

Note: the timelines are based on the availability of relevant data from the private partner for conducting a due diligence. The timelines for deliverable 2 and 3 will commence from the day relevant information requested in the note on data sufficiency is made available to the Consultant.

Section VI: Qualifications and Experience:

- Proven experience of at least 10 years in conducting integrity due-diligence of companies acquiring companies, establishing strategic alliances or joint venture partnerships, acquiring or merging with another business, appointing senior management personnel etc.
- Specific experience and references in conducting legal and financial due-diligence of at least two infrastructure construction companies in the past.
- Understanding of the development of large infrastructure projects on PPP basis including experience in drafting and negotiating complex commercial agreements and PPP; project finance, development of Evaluation Criteria, preparation of PPP procurement documents, managing bidding processes, a resolving legal issues and formulation of policy and institutional assessments.
- Experience working in Sub-Saharan Africa and in Kenya is a prerequisite.
- Similar experience across multiple geographies with offices or affiliates different geographies will be an advantage