



IMPROVING TRANSPARENCY AND ACCOUNTABILITY IN PUBLIC-PRIVATE PARTNERSHIPS

DISCLOSURE DIAGNOSTIC REPORT: KENYA

© 2018 International Bank for Reconstruction and Development / The World Bank
1818 H Street NW
Washington DC 20433
Telephone: 202-473-1000
Internet: www.worldbank.org

This work is a product of the staff of The World Bank with external contributions. The findings, interpretations, and conclusions expressed in this work do not necessarily reflect the views of The World Bank, its Board of Executive Directors, or the governments they represent.

The World Bank does not guarantee the accuracy of the data included in this work. The boundaries, colors, denominations, and other information shown on any map in this work do not imply any judgment on the part of The World Bank concerning the legal status of any territory or the endorsement or acceptance of such boundaries.

Rights and Permissions

The material in this work is subject to copyright. Because The World Bank encourages dissemination of its knowledge, this work may be reproduced, in whole or in part, for noncommercial purposes as long as full attribution to this work is given.

Any queries on rights and licenses, including subsidiary rights, should be addressed to World Bank Publications, The World Bank Group, 1818 H Street NW, Washington, DC 20433, USA; fax: 202-522-2625; e-mail: pubrights@worldbank.org.

IMPROVING TRANSPARENCY
AND ACCOUNTABILITY IN
PUBLIC-PRIVATE PARTNERSHIPS

DISCLOSURE DIAGNOSTIC REPORT: KENYA

Contents

- Acronyms2
- List of Figures3
- List of Tables.....3
- Acknowledgments4
- Executive Summary6
- 1. Introduction 11
- 2. Transparency and Openness13
- 3. PPP Experience and Institutions.....16
- 4. Legal and Institutional Framework for PPP Disclosure18
- 5. Disclosure in Practice and Key Challenges26
- 6. Gap Assessment29
- 7. Recommendations32
- 8. Key Material Reviewed.....36
- Annex A: Suggested Amendment of Clause 60 of PPP Act 2013.....38
- Annex B: Suggested Text for Disclosure Guidelines40
- Annex C: Suggested Template for Disclosure.....47
- Annex D: Suggested Standard Contractual Clauses50
- Annex E: Comparison of the World Bank Framework, Current Disclosure Practice, and Agreed Guidelines for Kenya57

Acronyms

ATI	Access to Information
CA	Contracting Authority
e-Promis	Electronic Project Monitoring Information System
ESIA	Environmental and Social Impact Assessment
FCCL	Fiscal Commitments and Contingent Liabilities
FOI	Freedom of Information
IFC	International Finance Corporation
IFMIS	Integrated Financial Management Information System
IPG	Infrastructure, PPPs and Guarantees
KenGen	Kenya Electricity Generating Company Limited
KenHA	Kenya National Highways Authority
KPI	Key Performance Indicator
NPL	National Priority List
NPV	Net Present Value
OAG	Office of the Auditor General
OCDS	Open Contracting Data Standard
OGP	Open Government Partnership
PDMO	Public Debt Management Office
PFM	Public Finance Management
PPADA	Public Procurement and Asset Disposal Act
PPIAF	Public-Private Infrastructure Advisory Facility
PPP	Public-Private Partnership
PPPU	Public-Private Partnerships Unit
PSIA	Preliminary Social Impact Assessment
RAP	Resettlement Action Plan
RFP	Request for Proposals
RFQ	Request for Qualifications
SPV	Special Purpose Vehicle
UNCAC	United Nations Convention Against Corruption
VfM	Value for Money
WBG	World Bank Group

List of Figures

Figure 1: Hansard Web Portal.....	14
Figure 2: Elements of the World Bank’s Recommended PPP Disclosure Framework	32

List of Tables

Table ES.1: Snapshot of Recommended Disclosure	8
Table 1: Key Themes of the Disclosure Environment in Kenya.....	12
Table 2: Institutional Framework for PPPs.....	17
Table 3: Implications of Key Legislation for PPP Disclosure.....	19
Table 4: Roles of Institutional Actors in PPP Disclosure.....	24
Table 5: Current PPP Disclosure Practices	27
Table 6: Gap Assessment.....	29
Table 7: Suggested Contents for PPP Disclosure Guidelines for Kenya.....	34
Table B.1: Summary of Specific Disclosures	42

Acknowledgments

This Public-Private Partnerships Disclosure Diagnostic Report for Kenya has been prepared by a team consisting of Shyamala Shukla, Senior Specialist, Infrastructure, PPPs and Guarantees (IPG), World Bank Group (WBG), and Task Team Leader for the Global Project on Transparency and Accountability in Public-Private Partnerships; Dr. Prashant Sharma, Senior Consultant, IPG; Joyce Mutegi, Adetoun Adetona, and Mirelle Raad, Consultants, IPG; and Susanne Foerster, Senior Legal Consultant, IPG. Halim Mirzoaliev, Ministry of Finance, Tajikistan, and Voice Secondee, World Bank, provided valuable technical insights and inputs into this work.

Abha Joshi-Ghani, Senior Advisor, Jordan Schwartz, Director, Laurence Carter, Senior Director, and Clive Harris, Head, Maximizing Finance for Development (MFD) provided valuable guidance during the course of the work.

The World Bank team thanks the Government of Kenya, National Treasury for providing valuable inputs and information, and excellent leadership in the implementation of this project, specifically, Eng. Stanley Kamau, Former Director, PPP Unit; Dr. Nathan Ronoh Tuimising, Legal Expert, PPP Unit; Wohoro Ndoho, Director-General Public Debt Management Office; Kaara Wainaina, Communications Expert, PPP Unit; Wycliffe Ondieki, Monitoring and Evaluation Expert, PPP Unit; CPA Judith A.M. Nyakawa, PPP Unit; Robert Shekleton, Consultant, PPP Unit; Joseph Ndungu, Economist, PPP Unit; Winnie Kosgei, Financial Advisor, PPP Unit; Teodoro S. Regino, Technical Expert, PPP Unit; and Adah Olando, Financial Analyst and Executive Assistant to Director, PPP Unit.

Michael Opagi, Manager CASPA, International Finance Corporation (IFC); Mehnaz Safavian, Lead Financial Sector Specialist, Finance and Markets Global Practice, World Bank; Junglim Hahm, Regional Program Leader, Public-Private Infrastructure Advisory Facility (PPIAF); Evans Kamau, Investment Officer, CASPA, IFC; Serah Njoroge, Regional Program Coordinator, PPIAF; Hadija Diba, County PPP Advisor, Finance and Markets Global Practice, World Bank; Felister Munya, County PPP Advisor, Finance and Markets Global Practice, World Bank; and Samuel Baiya, Consultant, PPIAF, provided valuable inputs during the implementation of the project.

The team would like to thank the following individuals who provided excellent technical inputs during various meetings and stakeholder consultations:

Njee Muturi, Solicitor-General, Office of the Attorney General (OAG); Lucy Kagwanja, Government Transactions Department, OAG; Sharon Irungu, State Counsel, OAG; Racheal Wanjiku, State Counsel, OAG; Christine Kanini, State Counsel, OAG; Dr. P. Kiprono, Senior Economist, Ministry of Interior, State Department of Interior; Eliana Shiroko, Chief Economist, Ministry of Devolution and Planning; Laban Cheruiyot, Monitoring and Evaluation Officer, Ministry of Devolution and Planning; Joseph Gichimu, Senior Economist, Ministry of Health; Doris Kimbui, Resource Mobilizing Officer, Kenyatta National Hospital; James Muchiri, Liaison Officer for the PPP Unit, Ministry of Education; Chris Yegon, Deputy Director, Local Universities, Ministry of Education; Dr. Paul Njiru, Deputy Vice Chancellor, University of Embu; Dr. B. N. Mwasi, Registrar, Planning, University of Eldoret; Paul Gachanja, PPP Node Member, Kenyatta University; and Thomas Kitonyi, Member, Project Appraisal Team, Kenya Technical Training College.

Eng. Richard J. Muiro, Chief Engineer (Electrical), Ministry of Energy and Petroleum; Daniel Kiptoo, Advisor to the Cabinet Secretary, Ministry of Energy and Petroleum; Wilson Karuki, Assistant Engineer, Ministry of Energy and Petroleum; Moses Wekesa, Director, Business Development, KenGen; Elizabeth Njenga, Manager, KenGen; Eng. Francis Makhano, Assistant Manager, Energy, KenGen; Philip Yego, Supply Chain Director, KenGen; Beatrice Musyoka, Chief Economist, KenGen; David Makezi, Legal Officer, Kenya Power; and Dr. Tiren, Manager, Legal, Geothermal Development Corporation.

Eng. George M. Kiiru, Head, PPP, KenHA; Eng. Stanley W. Mwawasi, Manager (Design & Construction), KenHA; Eng. K. Seda, KenHA; Eng. Raphael Murimi, Senior Superintending Engineer, Ministry of Transport, Infrastructure, Housing and Urban Development; Eng. B. K. Njenga, Principal Superintending Engineer, Ministry of Transport, Infrastructure, Housing and Urban Development; Christopher Khaya, Principal Housing Officer, Ministry of Transport, Infrastructure, Housing and Urban Development; Dr. Antony Moire, Assistant Program Coordinator, Ministry of Transport, Infrastructure, Housing and Urban Development; L. Mochamal, Acting Senior Assistant Director, Social Infrastructure, Ministry of Transport, Infrastructure, Housing and Urban Development; C. A. Otunga, Deputy Solicitor General, Ministry of Transport; Eng. Margret Ogai, Manager, Kenya Roads Board; Wilson K. Chuchir, General Manager, Kenya Urban Roads Authority (KURA); Richard Kyallo, KURA; James Kimuyu, Manager, Planning, Kenya Civil Aviation Authority; Joseph A. M. Mutheu, Manager, Planning, Kenya Airports Authority; and Alex Gitari, General Manager, Finance, Kenya Airports Authority.

Walter Odera, Economist, African Development Bank; Jonathan Muga, Head, Mining, Energy and Infrastructure Finance, East Africa, CFC Stanbic Bank; John Maingi, Analyst, Mining, Energy and Infrastructure Finance, East Africa, CFC Stanbic Bank; Jochan Mugaji, Banker, CFC Stanbic Bank Limited; Michael Mutiga, Managing Director, Corporate and Investment Bank, Citibank; Nathan Njoroge Kihungi, Africa Corporate Finance Counsel, East Africa General Counsel, Citibank; Joyceanne Wainana, Chief Executive Officer, Citibank; Onesmus Mwangolo, Director, Local Corporates and Public Sector Head, Citibank; Edgar Irawly, Head, PPP Unit, Barclays Bank Limited; Nereah Okanga, Legal Counsel, Barclays Bank Limited; Samuel Kimemia, Finance, UAP Insurance; and Allan Waititu, Director, Equity Bank Limited.

Prof. Albert Mumma, Advocate, Prof. Albert Mumma and Company Advocates; Justus Omollo, Lawyer, Prof. Albert Mumma & Company Advocates; Sandra Waswa, Senior Program Officer, Access to Information, Article 19; Elsy Sainna, Deputy Executive Director, International Commission of Jurists; Anne Nderi, Program Manager, Access to Information, International Commission of Jurists; Abhishek Sharma, Director, Trade Logistics, Trade Mark East Africa; Quresh H. Ahmed, Chief Executive Officer, Bomas of Kenya; Ambrose Risasi, Procurement Officer, Bomas of Kenya; Felix K. Korir, Project Coordinator, Bomas of Kenya; and Rimoh Ratiah, PPP Expert, TNM.

The team thanks Sandra Gain for editing the document and Victoria Adams-Kotsch for the cover, layout, and formatting.

This is a joint product of the PPP Unit, National Treasury, Government of Kenya, the World Bank Group, and the PPIAF. Funding for this product has been provided by PPIAF and the World Bank Group IPG.

Executive Summary

A World Bank Public-Private Partnerships (PPP) team conducted a study in Kenya between September 2016 and March 2017 using the PPP Disclosure Diagnostic template recommended by the World Bank Framework for Disclosure of Information in PPPs. This study has been consolidated in the form of a PPP Disclosure Diagnostic Report for Kenya. The Diagnostic Report examines the political, legal, and institutional environment for disclosure in PPPs. Based on a gap assessment exercise with key political, legal, institutional, and process findings benchmarked against the World Bank's framework, the Diagnostic Report makes specific recommendations to improve disclosure, including recommended customized guidelines for PPP disclosure in Kenya.

The findings suggest that there has been movement toward greater transparency and openness in all areas of government in Kenya, with several new initiatives having been launched in recent years. The 2010 Constitution of Kenya created new obligations on public bodies to promote more transparent governance structures. This was enhanced substantially with the recent enactment of the Access to Information Act 2016, which, among other things, promotes proactive disclosure of information held by public authorities. Kenya has taken other progressive steps, such as signing the United Nations Convention Against Corruption, joining the Open Government Partnership, launching the Open Data Initiative, placing all its parliamentary proceedings since 1980 on the Hansard web portal, launching electronic applications for certain services, launching the e-Promis (electronic Project Monitoring Information System) to track budget and performance data, using an integrated financial management information system for more transparent financial management, and using a dedicated suppliers' portal to process large numbers of government procurement tenders.

However, given that most of these initiatives are recent and still being institutionalized, their impact in improving disclosure in the PPP space, so far, has not been substantial.

The past decade has seen an increase in interest in the use of PPP in Kenya, largely driven by Kenya Vision 2030. The Public-Private Infrastructure database indicates that 25 PPP projects with a total investment commitment of US\$9.3 billion reached financial closure between 1990 and 2014 in Kenya.¹ Currently, there are 71 projects in the National Priority List of PPP projects approved by the PPP Committee. The National Priority List is an organic list that increases or shrinks as projects enter or exit the list, subject to established procedures. These projects cover a variety of sectors, key among these being transport, energy, education, housing, and health.

Kenya has a relatively well-developed legal and institutional framework for PPPs. PPP Policy 2011 was followed by the enactment of the PPP Act in 2013. Subsequent to the PPP Act, several key enabling regulations and guidelines have been put in place or are in the process of being finalized. These include PPP Regulations 2014, Project Facilitation Fund Regulations 2017, draft PPP (Amendment) Bill 2016, draft County PPP Regulations 2015, and draft Petition Regulations 2015. The PPP Unit, which is housed in the National Treasury, became operational in 2010 and has been strengthened with technical, legal, safeguards, procurement, PPP, and financial expertise.

¹ See <https://ppi.worldbank.org/snapshots/country/kenya>.

In addition, Kenya has a comprehensive legal and policy framework that directly and indirectly affects PPP disclosure. Key legislation that supports proactive disclosure² includes the Access to Information (ATI), PPP, and Public Finance Management (PFM) Acts. The ATI Act 2016 supports the adoption of standards for proactive disclosure of information relating to PPP projects undertaken by the government. The PPP Act 2013 provides for the proactive disclosure of basic project and procurement information. The provisions in the PFM Act 2012 and the Fiscal Commitments and Contingent Liabilities Guidelines 2015 enable the disclosure of substantial information about the government's fiscal commitments and contingent liabilities.

However, the provisions in law are scattered, and it is important to provide a synthesized and synergized system for optimal disclosure practices in the PPP space, consistent with the country's overall Open Kenya agenda.

In practice there is limited information on PPPs in the public domain. The information being published currently includes the approved National Priority List of Projects, Requests for Qualifications, list of short-listed bidders, and awards.

This Diagnostic Report recommends a systematic structure for proactively disclosing information through customized guidelines for disclosure in PPPs in Kenya. The report suggests a holistic approach to disclosure through predefined standards, tools, and mechanisms, allowing for increased disclosure efficiency. Kenya intends to use this framework as a tool to amplify its legal policy and statutory standards on PPP disclosure within the Kenyan jurisdiction. It is believed that this will result in the enhancement of the credibility of the PPP program in the country.

Recommended Disclosure

The recommended design for Kenya follows the World Bank's framework, but is subject to and intended to be implemented within the structure of governing national laws in Kenya. It is hierarchical and includes a logical framework that moves from a high-level mandate to disclose toward the basic elements that need to be disclosed. Table ES.1 provides a snapshot of the recommended features of the suggested guidelines for Kenya.

² Proactive disclosure includes all information that is disclosed by governments voluntarily or under a mandate provided by legislation or policy.

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

LEGISLATIVE MANDATE	Application of disclosure guidelines to strengthen the regulatory mandate, including recommendations on ideal legislative amendments to PPP Act 2013 to enhance disclosure
DETAILED GUIDANCE	<p>Applicability of disclosure principles in the PPP Act (as well as other relevant legislation and regulations) to PPP contracts and project information</p> <p>Elements of disclosure during the various phases of the PPP project process</p> <p>Timelines for disclosure</p> <p>Details of confidentiality provisions</p> <p>Template for disclosure</p> <p>Standard contract clauses</p>
DISCLOSURE DURING PROJECT IDENTIFICATION AND PREPARATION	<p>National Priority List of Projects</p> <p>Basic project information</p> <p>Project Progress Tracker</p> <p>Project Information Memorandum</p>
DISCLOSURE DURING PROCUREMENT	<p><i>Pre-tender:</i> approved pipeline of projects; brief descriptions of projects, services, estimated costs, likely sources of revenue, and tentative procurement dates; project information memorandum</p> <p><i>Tender:</i> Request for Qualifications, short-listed bidders, Request for Proposals (only with respect to short-listed bidders), award</p> <p><i>Post-tender:</i> feasibility study report; Request for Proposals</p>
DISCLOSURE FOLLOWING EXECUTION OF PROJECT AGREEMENT (COMMERCIAL CLOSE)	<p>Project information (s.60, PPP Act); material risks and allocation</p> <p>Financing structure</p> <p>Guarantees, grants, annuity/availability payment schedule, land and asset transfers, and other support; revenue share</p> <p>Tariffs</p> <p>Project documents, including redacted PPP agreements and feasibility study report (including PSIA/ESIA and RAP) with necessary edits</p> <p>Performance reports</p> <p>Termination and handback provisions</p> <p>Material renegotiations or changes</p>
CONFIDENTIAL INFORMATION	Principles governing confidential information consistent with the ATI and PPP Acts
STANDARD CONTRACT PROVISIONS	<p>Reports, documents, and other information the private provider should maintain and submit to the contracting authority; timelines for submission and disclosure</p> <p>Language on what constitutes confidentiality, format for listing confidential clauses, and clause for disclosure in public interest</p>

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

PLATFORM	A single platform is recommended with a user-friendly integrated back end for use by multiple entities, with a hierarchy of roles related to uploading, validation, and disclosure of information; a user-friendly front end with structured content; and regular updates to registered users	
TIMELINES	Basic project information	Within 30 business days after approval for inclusion in NPL, and updated thereafter with each new milestone and annually
	Project progress tracking	Within 30 business days from inclusion in NPL, and within 30 business days of each status change
	<i>Disclosure of information prior to commencement of procurement</i>	
	Project Information Memorandum	Within 30 business days of approval of the feasibility study or on or before RFQ release, whichever is earlier
	<i>Disclosure of information during procurement</i>	
	RFQ	Following approval and publication of the RFQ
	List of short-listed bidders	As soon as short-listed bidders are notified
	Bid award	16 business days after notification to preferred bidder, unless there is a petition, in which case it shall be 16 business days after resolution of any petition or judicial review applications, as the case may be
	Full RFP	Within 30 business days of achieving financial closure
	<i>Disclosure of information following execution of project agreement (commercial close)</i>	
	Project summary	Within 30 business days of execution of project agreement (commercial close)
	Financial structure of project (debt and equity of the project and debt and equity providers)	Within 30 business days of financial close
	Project documents, including the following, among others: redacted PPP agreement, feasibility study report (including PSIA/ESIA and RAP) with necessary edits to ensure there is no influence on government achieving financial closure or the best VfM for the project	Within 30 business days of execution of project agreement (commercial close)

TABLE ES.1: SNAPSHOT OF RECOMMENDED DISCLOSURE

	Renegotiations and renegotiated agreements and associated documents (summary information on each renegotiation and redacted renegotiated clauses in the PPP agreement)	Within 30 business days of signature of renegotiated contract
	<i>Performance disclosure throughout contract period</i>	
	Performance Information (actual performance of the private party against KPIs, including such links to external documents and resources as deemed necessary and appropriate)	Within one year of financial close, updated annually
TEMPLATE & DATA STANDARDS	A custom-built disclosure web portal with machine readable features to house the data, consisting of well-structured templates to aid information capture and disclosure at each stage of the PPP project cycle	

Note: ATI = Access to Information; ESIA = Environmental and Social Impact Assessment; KPIs = key performance indicators; NPL = National Priority List; PPP = Public-Private Partnership; PSIA = preliminary social impact assessment; RAP = Resettlement Action Plan; RFP = Request for Proposals; RFQ = Request for Qualifications; VfM = value for money.

1. Introduction

Based on research and analysis over the past few years, the World Bank Group Public-Private Partnerships (PPP) Cross-Cutting Solution Area has worked on creating a Framework for Disclosure in Public-Private Partnerships, which suggests a systematic structure for disclosing information proactively at different phases of the PPP process. Two documents, Jurisdictional Studies and Good Practice Cases, have been developed to provide relevant background and resources complementing the goals of the framework. The framework has undergone a public consultation process and is now being piloted in four countries—Ghana, Honduras, Kenya, and Nigeria. The work in Nigeria involves two projects—with the Nigeria Sovereign Investment Agency and the Infrastructure Concession Regulatory Commission.

The framework suggests the initiation of work with a PPP Disclosure Diagnostic (the Diagnostic) in countries. The objective of the Diagnostic is to help PPP policy makers and practitioners to assess the status of PPP disclosure in the jurisdiction and identify customized PPP disclosure solutions for all PPP types to enable better disclosure. The Diagnostic can also be used by World Bank teams.

The Diagnostic includes an examination of each of the following areas in a country:

- Preliminary overview of the general transparency environment
- History and outlook for PPP disclosure
- Political environment for disclosure
- Legal and policy framework
- Process and institutions
- Guidance on confidential information
- Information systems
- Technology and data standards

Under each of the areas identified, the Diagnostic provides the key questions policy makers and practitioners should ask, analysis and techniques for assessing gaps, resources for learning more, and tools for establishing customized PPP disclosure guidelines for the jurisdiction. The relevance of each of the above areas varies based on the unique circumstances within the country.

This Diagnostic Report is structured around the key themes that are relevant to Kenya's disclosure environment, as summarized in table 1.

TABLE 1: KEY THEMES OF THE DISCLOSURE ENVIRONMENT IN KENYA

THEME	KEY QUESTION	SECTION
Transparency and Openness in Governance	Is there a transparent and open governance environment in Kenya?	2
PPP Experience	Does the government have substantial experience in PPP?	3
	Does the government have an ongoing PPP program?	
Institutional Framework for PPPs	What are the institutions supporting the preparation, procurement, and implementation of PPPs?	3
Legal and Institutional Framework for PPP Disclosure	Is the legal and regulatory environment sufficiently conducive to PPP disclosure?	4
	Does Freedom of Information legislation support proactive disclosure?	
	Do PPP legislation/regulations provide clarity on the elements, timing, institutional structure, and processes for disclosure?	
	Do other related legislation and regulation support disclosure?	
	Are there guidelines and processes in place to guide disclosure?	
	Are there standardized disclosure contract clauses and templates?	
	Is there a web portal/s available with a user-friendly back end and front-end design in machine readable format?	
Disclosure in Practice and Key Challenges	What information is disclosed in practice?	5
	What are the key challenges to disclosure?	

Based on the findings in these areas, an assessment of the specific gaps in the political, legislative, and institutional contexts is detailed in section 6. Section 7 provides specific recommendations. Key material reviewed in the preparation of this Diagnostic is listed in section 8. Annex A provides suggested amendments to the PPP Act. Annex B provides suggested text for Disclosure Guidelines for Information in PPPs in Kenya. Annexes C and D contain a template for disclosure and suggested standard contractual clauses, respectively. Annex E presents a comparison of the World Bank’s Framework for Disclosure, current disclosure practice in Kenya, and the proposed disclosure guidelines for Kenya.

2. Transparency and Openness

Kenya has made impressive strides toward improving transparency and accountability through several legislative and institutional measures in the past decade. The 2010 Constitution of Kenya mandates public bodies to promote more transparent governance structures. Article 10 of the Constitution recognizes transparency and accountability as essential to good governance. Further, Article 35(3) stipulates that “the state shall publish and publicize any important information affecting the nation.”³ Article 232 strengthens this further by stating that “the principles of accountability and transparency in the form of provision to the public of timely, accurate information shall guide public service.”⁴

These Constitutional provisions have been strengthened through an enabling legislation in the form of the newly-enacted Access to Information (ATI) Act 2016, which provides for access to information held by public entities and private bodies. The Kenya ATI Act 2016 is ranked the 16th best Freedom of Information (FOI) law in the world and fifth best in Africa.⁵

At the international level, Kenya signed the United Nations Convention Against Corruption (UNCAC) in 2003. The UNCAC states that “transparency and accountability in matters of public finance must [also] be promoted, and specific requirements are [to be] established for the prevention of corruption, in the particularly critical areas of the public sector, such as the judiciary and public procurement.”⁶

Kenya joined the Open Government Partnership (OGP) in 2012, committing to greater transparency and accountability on issues relating to anti-corruption, e-government, elections and political financing, fiscal status, public participation, and public service delivery. In its first OGP Action Plan for 2012–13, Kenya made commitments on improving transparency in electoral processes, promoting public participation, improving transparency in the judiciary, and open budgets. Two of these commitments related to defining electoral boundaries, and the public vetting of judges and case allocation system have been substantially realized.⁷

While continuing its efforts on the first OGP Action Plan, Kenya has recently developed a second Action Plan (July 2016–June 2018) that includes commitments related to publishing oil and gas contracts, including revenue information to ensure transparency and accountability of the extractives sector; ensuring greater transparency around bids and contracts by individuals and companies in Kenya; creating transparent public procurement processes, public oversight of expenditure, and ensuring value-for-money toward citizen priorities; improving access to government budget information and creating wider and more inclusive structures for public participation; and enhancing the right to information by strengthening records

³ See <http://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/201-35-access-to-information>.

⁴ See <http://www.klrc.go.ke/index.php/constitution-of-kenya/174-chapter-thirteen-the-public-service/part-1-values-and-principles-of-public-service/401-232-values-and-principles-of-public-service>.

⁵ Continuous ranking is done by the Centre for Law and Development. See <http://www.rti-rating.org/country-data/> for the most recent results.

⁶ <https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html>.

⁷ For more details on Kenya’s OGP commitments and progress, see <http://www.opengovpartnership.org/country/kenya>.

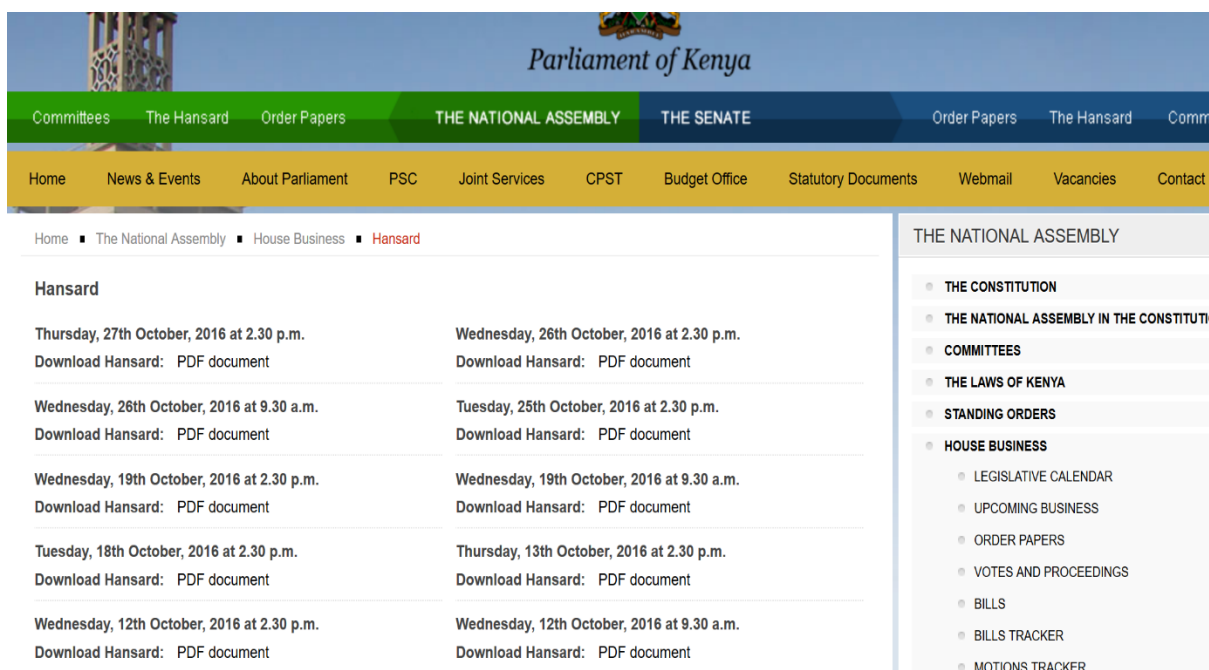
management and access to information.⁸ Some of these commitments are being implemented at the national level.

Open Data and e-Government Initiatives

In 2011, Kenya became the first Sub-Saharan African country to make government data open through the Presidential launch of the Kenya Open Data Initiative.⁹ The government's Open Data Portal contains government data sets related to a variety of sectors, such as population distribution, school enrollment, agricultural production, and so forth. However, these data sets are not comprehensive and, in many cases, provide links to reports or other government websites where the user may or may not find the relevant data set.

Most ministries, departments, and agencies have websites, but the information that is available is less structured and updated only on an ad hoc basis. Parliamentary proceedings since 1980 are available through the Hansard web portal; however, the information is not organized by theme or sector (figure 1).

FIGURE 1: HANSARD WEB PORTAL



⁸ For more details on Kenya's OGP commitments and progress, see <http://www.opengovpartnership.org/country/kenya>.

⁹

http://www.opengovpartnership.org/sites/default/files/legacy_files/country_action_plans/KenyaOGPAActionPlan.doc.

In addition, some e-citizen services are available in areas such as business, marriages, driving, lands, immigration, and civil registration.¹⁰

The National Treasury has launched e-Promis (electronic Project Monitoring Information System) to track budget and performance data of over 3,000 donor and government funded projects across the country. The web-based platform allows coordinated monitoring and evaluation of national, county, and Constituency Development Fund projects. The platform appears to be technologically robust, with the potential to be highly informative. Currently, it lacks actual project data.

The Integrated Financial Management Information System (IFMIS) is a major initiative of the National Treasury to “enhance efficiency in planning, budgeting, procurement, expenditure management and reporting in the National and County Governments in Kenya.”¹¹ When IFMIS is fully implemented, government payments across all ministries, departments, and agencies and county governments will be processed through this system.

E-procurement, an important component of IFMIS, is a priority of the government, following the Presidential directive that “all government procurements must be done through the e-procurement system.”¹² A dedicated suppliers’ portal, with 569 entities currently registered on it, is being used to process government tenders.¹³ The government has committed to mapping current disclosures and data collection processes against the Open Contracting Data Standard (OCDS) toward developing an Open Data Policy for IFMIS by February 2018, and redesigning the suppliers’ portal in accordance with OCDS by June 2018.

There are indications that transparency-related reforms are being driven by the top echelons of the government, with significant political buy-in. However, corruption and opacity in decision making continue to feature in public discourse. Respondents to the Global Competitiveness Report 2015–16 ranked corruption as the most problematic factor in doing business.¹⁴ A 2013 survey by Transparency International Kenya suggests that 70 percent of Kenyans believe that corruption has become worse or stayed the same over the previous two years, with 33 percent believing that levels have increased substantially.¹⁵ The Transparency International Corruption Perceptions Index for 2016 ranks Kenya 145 of the 176 countries surveyed.¹⁶

¹⁰ The section on business has particular relevance for this project, as it could be developed further to provide a searchable database of all entities registered with the Company Registry.

¹¹ See <http://supplier.treasury.go.ke/site/tenders.go/index.php/pages/about>. General budget documents are also available through the website of the National Treasury: <http://www.treasury.go.ke/budget.html>.

¹² http://www.opengovpartnership.org/sites/default/files/Kenya_AP2_2016_0.pdf.

¹³ There is some repetition in this process, as the National Treasury website also has a dedicated space for publishing tenders. See <http://www.treasury.go.ke/tenders.html>.

¹⁴ <http://www.weforum.org/issues/global-competitiveness>.

¹⁵ <http://www.transparency.org/gcb2013/country/?country=kenya>.

¹⁶ See https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

3. PPP Experience and Institutions

The past decade has seen an increase in interest in the use of PPPs in Kenya, driven by the government's desire to upgrade infrastructure and transition Kenya into an industrialized, middle-income country, as outlined in Kenya Vision 2030.

It is estimated that Kenya has an infrastructure funding gap of US\$4 billion per year, amounting to about 7.2 percent of gross domestic product.¹⁷ This is a significant requirement. Vision 2030 has identified the private sector as key to reducing the infrastructure deficit. It is expected that PPPs will become a larger part of Kenya's infrastructure provision in the future. According to the Public-Private Infrastructure database, 25 PPP projects reached financial closure in Kenya between 1990 and 2014, representing a total investment of US\$9.3 billion. Of these, 16 projects were in the energy sector.¹⁸ Currently, there are 71 projects in the National Priority List of PPP projects approved by the PPP Committee. These projects cover the transport and infrastructure; energy and petroleum; education, science, and technology; environment, water, and natural resources; housing and urban development; health; industrialization and enterprise development; agriculture, livestock, and fisheries; East African affairs, commerce, and tourism; and information, communications, and technology sectors. Several projects, including the Second Nyali Bridge, Nairobi-Mombasa Highway, Nairobi-Nakuru Highway, Nairobi-Thika Highway, Geothermal Plant at Olkaria, and University Students Hostels, are in different stages of active development or implementation.

Kenya has a relatively well-developed legal framework for PPPs. The processes were first formalized in 2009 when the Government of Kenya issued the Public Procurement and Disposal (Public-Private Partnership) Regulations. These regulations set up the PPP Secretariat in Kenya, which was housed in the National Treasury and began operating in 2010. The PPP Secretariat then transitioned into the PPP Unit following the enactment of the PPP Act in 2013.

The PPP law outlines the roles and responsibilities of various institutions, provides for a procurement process for PPPs, and establishes the Project Facilitation Fund to support project preparation, provision of viability gap funding, liquidity to meet contingent liabilities, administrative costs of the PPP Unit, and transaction advisors' retainer fees. Subsequent to the PPP Act, several key enabling regulations and guidelines are close to being finalized or already in force, such as the PPP Regulations 2014, Project Facilitation Fund Regulations 2017, draft County PPP Regulations 2015, draft PPP Petition Committee Regulations 2016, PPP (Amendment) Bill 2016, and draft Guidelines for Managing Fiscal Commitments and Contingent Liabilities 2015. The PPP Manual is also currently under development.

The PPP Act 2013 defines the institutional framework for identifying and implementing PPPs. Key institutional actors in the project identification, development, procurement, and operational phases include the contracting authority, PPP Unit, and PPP Committee. Each key contracting authority has a PPP node staffed with financial, technical, procurement, and legal experts. The PPP node identifies, screens, procures, and monitors PPPs, with the PPP Unit acting as a facilitating, appraising, and monitoring body, responsible for the overall implementation of the PPP Act 2013. Other institutions, including the Parliament, Cabinet, Cabinet Secretary to the Treasury, PPP Committee, and PPP Petition Committee,

¹⁷ Government of Kenya, National Treasury, PPP Unit, Workshop Presentation, Overview of the PPP Framework in Kenya, Relevance of Disclosure and Role of the PPP Unit, January 17, 2017.

¹⁸ See <https://ppi.worldbank.org/snapshots/country/kenya>.

perform guidance, approval, and oversight roles. The institutional framework and process have clear gatekeeping roles at every stage of the PPP project lifecycle.

The nature of the institutions and their role in PPP projects in Kenya are summarized in Table 2.

TABLE 2: INSTITUTIONAL FRAMEWORK FOR PPPs

INSTITUTION	NATURE OF THE INSTITUTION AND ITS ROLE IN THE PPP PROCESS
Contracting authorities	The contracting authority is a department, agency, corporation, or county government that initiates PPP projects relevant to its sector. ^a Contracting authorities initiate, develop, procure, and contract manage PPPs.
PPP Unit	The PPP Unit serves as the Secretariat to the PPP Committee and is mandated to provide technical, financial, and legal support to it, as well as any PPP nodes. The PPP Unit facilitates the work of the contracting authorities.
PPP Committee	PPP Committee members include the Principal Secretaries of Finance (Chair), National Planning, Lands, County Government, Transport Infrastructure, and Energy; Director of the PPP Unit as Secretary; Attorney General or his/her representative; and four persons (private persons) appointed by the Cabinet Secretary. The PPP Committee assesses projects at various stages, provides approvals to project proposals, and issues new policy and guidance.
Public Debt Management Office (PDMO)	PDMO was established under section 62 of the Public Finance Management Act 2012, as a department within the National Treasury. It provides input to the PPP Committee on Fiscal Commitments and Contingent Liabilities at various stages of the PPP process.
Cabinet Secretary to the Treasury	The office of the Cabinet Secretary was established under Article 152 of the Constitution. The Cabinet approves the PPP Committee's recommendation to include a project in the National Priority List.
Parliament	The Parliament, comprising the National Assembly and the Senate, was established under Article 93 of the Constitution. It is the final approving authority for all PPP projects where natural resources are involved. All audits and other reports on entities funded by the public are tabled in the Parliament.
PPP Petition Committee	The PPP Petition Committee was established under section 67 of the PPP Act. It hears and determines petitions and complaints from private parties on the tendering process.
Office of the Auditor General (OAG)	OAG is an independent office established under Article 229 of the Constitution and section 4 of the Public Audit Act 2015. OAG audits any entity that is funded using public moneys, which includes PPP projects.

a. PPP Act 2013, s. 2(1)(b).

4. Legal and Institutional Framework for PPP Disclosure

Key Legislation

The comprehensive legislative framework in Kenya directly and indirectly affects PPP disclosure. Article 35(1) of the Constitution mandates access to government-held information and information held by private entities with a bearing on the fundamental rights of citizens. Article 35(3) of the Constitution provides for the publication and publicizing of any important information affecting the nation.

Until recently, the realization of this right required citizens to approach the courts for redress. However, since the Kenyan Parliament passed the ATI in August 2016, citizens can receive information proactively and on demand from public and private entities. The ATI Act 2016 also defines certain exemptions under which information can be withheld.

The PPP Act 2013 mandates disclosure of information related to PPP projects at various stages. This includes publishing the National Priority List of approved projects,¹⁹ procurement notices,²⁰ certain bid documents such as the Request for Qualifications (RFQ),²¹ information about successful bidders, and information about the nature and scope of the contract, its value, cost, and duration.²²

Legislation also broadly defines confidential information. Confidentiality must be mostly inferred from key legislation, regulations, and policy read together. Section 40(5) of the PPP Regulations 2014 obliges the bid evaluation team to keep the process confidential. Regulation 60(1)(c) of the PPP Regulations mandates the PPP Petition Committee to seek and examine information or documents, while restricting disclosure only to the specific purpose of examining the petition.

Other major laws with a bearing on PPP disclosure include the Public Audit Act 2015, which provides the Office of the Auditor General (OAG) with the mandate to carry out financial, performance, procurement, and forensic audits of public entities at the national and county levels to examine the economy, efficiency, fairness, and effectiveness of public expenditure. OAG tables its reports in the Parliament and/or the relevant county assemblies. Citizens have the right to access all of OAG's official reports. The Public Finance Management Act 2012 obliges the Cabinet Secretary to the Treasury to report to the Parliament the government's fiscal commitments and contingent liabilities (FCCL), as well as publish budgetary allocations to public entities.

Table 3 provides a summary of existing laws and their implications for PPP disclosure.

¹⁹ PPP Act 2013, s. 25.

²⁰ PPP Act 2013, s. 37.

²¹ PPP Act 2013, s. 43.

²² PPP Act 2013, s. 60.

TABLE 3: IMPLICATIONS OF KEY LEGISLATION FOR PPP DISCLOSURE

CLAUSE	DESCRIPTION	IMPLICATIONS FOR PPP DISCLOSURE
<i>Constitution of Kenya</i>		
Article 10(2)	Establishes transparency as one of the key principles of governance.	Members of the public are entitled to transparency in PPP projects as government undertakings.
Article 20(4)	Obliges judicial organs and other authorities to “promote the spirit purport and objects of the Bill of Rights,” which includes the duty to interpret the Constitution purposively, including promoting principles on access to information.	Judicial authorities are obliged to promote the right to access information, which is part of the Bill of Rights.
Article 35(1)	Every citizen has the right of access to information held by the state.	Enables citizens to request access to information on PPPs held by state organs.
Article 35(3)	Obliges the government to publish proactively and publicize any important information affecting the nation.	Supports the publication of information relating to PPPs.
Article 201(a)	Enshrines openness as one of the principles that must guide public finance.	PPPs impact public finance and therefore constitute part of this information.
Article 232(1)(f)	Identifies transparency and the provision of timely and accurate information to the public as key principles underlying public service.	Provides a basis for the staff of the PPP Unit, the PPP Committee, and contracting authorities to undertake PPP project information disclosure.
Article 229	Establishes the Office of the Auditor General, which inter alia is mandated to audit the accounts of any entity that is financed using public funds.	Although private companies are interpreted locally as not subject to audit by the supreme audit institution per Kenyan law, if there is government financing involved, such as government debt or equity in the company, the entity would be open to audit under this provision.
<i>Access to Information Act 2016</i>		
Section 2	Defines a public entity as a public office as defined in the Constitution, or any entity performing a function within a commission, office, agency, or other body established by the Constitution.	Contracting authorities and the PPP Unit are public entities under the Act.
Section 2	Defines a private body for the purposes of the Act as any private entity or non-state actor that receives public resources and benefits, utilizes public funds, engages in public functions, provides public services, has exclusive contracts to exploit natural resources, or is in possession of information of significant public interest.	SPVs fall within the definition of private body and are affected by the Act’s requirements to disclose.
Sections 4(4), (5), and (6)	General duty to disclose by public entities and private bodies unless nondisclosure is justifiable in accordance with the parameters set in the Act.	Presumption of proactive disclosure subject to specific exceptions.

CLAUSE	DESCRIPTION	IMPLICATIONS FOR PPP DISCLOSURE
Section 5(1)(a)	Obliges public entities to disclose the following: procedures followed in decision making, including channels of supervision and accountability; guidelines in dealing with the public or corporate bodies, including the rules, regulations, instructions, manuals, and records held by it or under its control or used by its employees for discharging its functions; and a guide that identifies the classes of information held by it, subjects to which they relate, and location of any indexes that can be inspected by any person.	This is the basis for proactive disclosure by public entities, which in this context would include the PPP Unit, CAs, and SPVs in the context of PPPs.
Section 5(1)(e)	Obliges public entities to publish on their website (or through other means) information related to contractual arrangements, including the nature of the contract, contract sum, name of the contractor, and contract duration, subject to specific limitations under section 6.	This enables the publication of the details of the terms and conditions of PPP contracts. This also implies that the PPP Unit/PPP Committee should issue enabling guidance on what elements of information on the nature of the contract can be published.
Section 5(3)	Identifies the Internet as a key medium for information disclosure.	SPVs and the PPP Unit can disclose information through their websites.
Section 6	Limits the right of access to information where the information is likely, among other things, to prejudice substantially the commercial interests, including intellectual property rights, of an entity or third party; cause substantial harm to the ability of government to manage the economy of Kenya; undermine significantly a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; damage a public entity's position in any actual or contemplated legal proceedings; or infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.	PPP-related information may be withheld if it satisfies any of the justifications specified.
Section 6(3)	Provides an override to exemptions, such that the limits shall not apply if a request for information relates to public safety or environmental risk, or where the public interest in disclosure outweighs the harm to protected interests.	This is a standard provision in the public interest and applies to PPP project information as well.
<i>PPP Act 2013 and PPP Regulations 2014</i>		
Sections 24 and 25	Obliges the PPP Unit to publish a National Priority List of projects approved by the PPP Committee and the Cabinet.	Enables early proactive disclosure of project information.
Section 45(3)	Provides restrictions on the disclosure of information related to competitive dialogues.	Provides clarity on elements to be considered confidential.

CLAUSE	DESCRIPTION	IMPLICATIONS FOR PPP DISCLOSURE
Section 60	Obliges contracting authorities to publish the following information upon signing a project agreement: Results of the tender Nature of the project Successful bidder Project cost at net present value Tariff Duration of the project.	Establishes the specific elements and timing of disclosure of information by the contracting authorities following signing of the contract.
Section 69	Obliges the SPV/project company/private party in the PPP to maintain and submit financial accounts to contracting authorities.	Contracting authorities, as public entities and holders of such financial reports, may disclose this information in accordance with the ATI law.
Regulation 33(3)	Obliges contracting authorities to publish the names of the short-listed bidders.	Establishes the list of short-listed bidders as a key element of disclosure during the bid process.
Regulation 36(1)	Obliges contracting authorities to publish a notice of invitation to tender.	Enables public disclosure of high-level particulars of projects under procurement.
Regulation 37	Obliges contracting authorities to hold a pre-bid conference for clarifying issues in relation to the tender. The pre-bid conference is open to all potential bidders.	Enables disclosure of information relevant to a specific tender.
Regulation 40(5)	Obliges the Evaluation Committee to preserve the confidentiality of the tender evaluation process.	Provides clarity on the elements that are subject to confidentiality.
Regulation 55	Obliges the PPP Unit to publish model bid documents for PPP projects, guidelines for model bid documents, and model PPP project agreements on its website.	Establishes the proactive disclosure of standard documents as approved by the PPP Committee.
Section 14(2)(j)	Mandates the PPP Unit to maintain a record of all project documentation.	Establishes the role of the PPP Unit as the repository of all PPP-related information.
Regulation 6(2)	Obliges the PPP Unit to maintain the following information: studies, reports, minutes of meetings, decisions, recommendations, announcements, requests, expressions of interest, letters, bidding documents, complaints, and petitions.	
<i>Public Audit Act 2015</i>		
Sections 35, 36, and 38 (also Article 229 of the Constitution)	Mandates the audit function of OAG, including conduct of financial, forensic, and performance audits, including post audit following six months of closure of projects to examine value for money.	PPPs are covered under this mandate, with the implication that all audit reports will be disclosed.
Section 38	Mandates OAG to examine the public procurement of a state organ or a public entity to confirm whether procurements were done lawfully and effectively.	This also applies to the PPP procurement process, with the implication that resulting audit reports are disclosed.
Section 72	Provides public access to all audit reports.	This would include PPP audit reports.

CLAUSE	DESCRIPTION	IMPLICATIONS FOR PPP DISCLOSURE
<i>Public Finance Management Act 2012</i>		
Section 33	Obliges the Cabinet Secretary to the Treasury to submit an Annual Debt Report and Debt Management Strategy to Parliament, including a statement on FCCL.	This includes PPP FCCL, currently implemented through the annual Budget Policy Statement.
Sections 37(8) and 38(1)(b)	Obliges the Cabinet Secretary to the Treasury to publicize budget estimates.	This would include disclosure of information on government budgetary support to PPPs.
<i>FCCL Guidelines 2015</i>		
Section 12(i)-12(iv)	Obliges the Public Debt Management Office to publish all information on PPP FCCLs in the Debt Management Strategy and Annual Debt Report. Mandates the PPP Unit to publish statements of FCCLs on its website.	Mandates disclosure of information on all liabilities arising from PPPs.

Note: ATI = Access to Information; CAs = contracting authorities; FCCL = Fiscal Commitments and Contingent Liabilities; OAG = Office of the Auditor General; PPP = Public-Private Partnership; SPV= special purpose vehicle.

Virtually all legislation in Kenya makes provision for one or more forms of disclosure, report making, and other transparency and accountability principles. These represent useful reinforcing pillars for improved disclosure practices within the PPP space in Kenya.

Policy Guidelines

The Guidelines for the Assessment and Management of Fiscal Commitments and Contingent Liabilities in PPP in Kenya, 2015 (FCCL Guidelines 2015)²³ require all contracting authorities to prepare and submit quarterly (and consolidated annual) FCCL reports to the Public Debt Management Office (PDMO).²⁴ PDMO is required to publish this information in its Debt Management Strategy and its Annual Debt Report, which are submitted to the Parliament. The Guidelines require the PPP Unit to publish this information on its website.

The Guidelines require the disclosure of the following specific information:

- The quantum and term of fiscal commitments
- Contingent liabilities classified by category/sector
- Explanation of the reasons for taking on the contingent liabilities
- Full exposure: aggregate value of the face value of all guarantees issued
- Estimated fiscal cost at net present value of the total estimated payments and/or annual cash flows

²³ The FCCL Guidelines 2015 is an abridged version of the more elaborate FCCL Technical Guidance Manual.

²⁴ FCCL Guidelines 2015, p. 46.

- Risk(s) associated with contingent liabilities by sector
- Summary information on individual guarantees: purpose/reason, term, and beneficiary
- Summary information on events of realized risk and associated payments
- Information on how claims against the guarantees will be/have been paid.

Emerging Jurisprudence

PPPs and the attendant statutory and policy frameworks are relatively recent in Kenya. Jurisprudence is just beginning to emerge particularly on disclosure of evaluation reports. These have arisen from complaints and petitions filed before the PPP Petition Committee, where unsuccessful bidders have sought access to evaluation reports.²⁵ These cases are relevant to the evolution of disclosure. However, disclosure to bidders does not quite amount to public disclosure.

In Republic v Public-Private Partnerships Petition Committee (The Petition Committee) & 3 others Ex Parte A P M Terminals [2015] eKL, the High Court held that in determining the boundaries for disclosure in PPPs, the PPP Petition Committee should take into account confidentiality as an important principle. It suggested that the Petitions Committee may order disclosure of redacted evaluation reports if it thinks fit. The PPP Petition Committee, in its decision, ordered the contracting authority (Kenya Ports Authority) to disclose to all bidders a summary of the evaluation report consisting of the marks awarded to each bidder against the evaluation criteria.

In HCIG-Energy Investment Co. Ltd and Liketh Investment Kenya Limited (HCIG Consortium) v Ministry of Energy & Petroleum Contracting Authority & 5 others [2014] eKLR, the court opined that a bidder, not being a natural person, does not have a right of access to information, and rejected the request for disclosure of an evaluation report on the grounds that the right to access information was available only to Kenyan citizens.

Jurisprudence on PPP disclosure has also emerged through the constitutional right to information. Civil society organizations have consistently sought improved transparency through public interest petitions, such as those described in the following paragraphs.

In Okiya Omtatah Okoiti & 2 Others v The Hon. Attorney General & 3 Others (Petition No. 58 of 2014), the petitioners filed a public interest petition challenging implementation of the Standard Gauge Railway Project on the grounds inter alia that the respondents violated the constitutional thresholds of procurement. The court dismissed the petition on the grounds that the petitioners relied on documents that were irregularly obtained, as the source and origin had not been disclosed by the petitioners.

In Friends of Lake Turkana Trust v Attorney General & 2 others [2014] eKLR, the petitioners sought orders compelling the Government of Kenya, the Kenya Power and Lighting Company Limited, and the Kenya Electricity Transmission Company Limited to make full and complete disclosure of all agreements entered into with the Government of Ethiopia relating to the proposed purchase of electricity from Ethiopia and/or the Gibe III project, including, but not limited to, the memorandum of understanding signed in 2006. The

²⁵ Regulation 60(1) of the PPP Regulations 2014 states that the PPP Petition Committee may require the production of documents for purposes of resolving a petition, but it cannot disclose the documents.

High Court granted full disclosure. The court’s decision was delivered at a time when access to information was limited to the constitutional right to information. With the enactment of the Access to Information Act 2016, the public has an enhanced basis for seeking information from the government.

Key Institutions in PPP Disclosure

Drawing from relevant legal and policy frameworks, Table 4 provides a summary of the roles of institutions in PPP disclosure.

TABLE 4: ROLES OF INSTITUTIONAL ACTORS IN PPP DISCLOSURE

INSTITUTION	ROLE IN PPP DISCLOSURE
Contracting authorities	Publish project information upon execution of project agreements ^a Create and own all information on a PPP project
PPP Unit	Serve as a resource center for PPPs Publish the National Priority List of approved PPP projects Collate, analyze, and disseminate information on PPPs Maintain a record of all project documentation
PPP Committee	Formulate PPP policy guidelines Take custody of project agreements Establish/approve guidelines for disclosure of information
Public Debt Management Office	Publish and publicize information on fiscal commitments and contingent liabilities ^b
Cabinet Secretary to the Treasury	Make regulations on various aspects of PPPs ^c Provide the Parliament with full and regular reports on PPPs ^d
Parliament	Final reporting institution for information on PPPs Once any information is reported to the Parliament, it becomes public unless progressed under the standing orders on in-camera proceedings.
PPP Petition Committee	Dispute resolution body in the PPP process The Petition Committee can play a key role in interpreting various statutory and policy frameworks in the context of disclosure.
Office of the Auditor General	Supreme audit institution for all projects, including PPPs, with responsibility to disclose all audit reports

INSTITUTION	ROLE IN PPP DISCLOSURE
Commission on Administrative Justice (Ombudsman)	Investigate violations of the Access to Information Act Request/receive reports from public entities on the implementation of the Access to Information Act Release unlawfully withheld information ^e Therefore, the Commission on Administrative Justice (Ombudsman) can cause PPP information to be published.
Judiciary	Determine whether nondisclosure of information by a public entity or private body outweighs public interest ^f The High Court determines appeals on decisions of the Commission on Administrative Justice ^g and the PPP Petition Committee

a. PPP Act, s 6(1).

b. Public Finance Management Act 2012, s. 64(2).

c. PPP Act, s. 15; s. 28; s. 39; s. 44; s. 62(2); s. 67(6); s. 71.

d. Constitution of Kenya, Art. 153(4)(b). See also Public Finance Management Act 2012, s. 33, 34, 64(1)(d).

e. Access to Information Act 2016, s. 21, s.23.

f. Access to Information Act 2016, s. 6(4).

g. Access to Information Act 2016, s. 23(3).

5. Disclosure in Practice and Key Challenges

Disclosure in Practice

The statutory and policy Framework for Disclosure in Kenya promotes greater transparency. The PPP Unit's website provides laws, regulations, and policies that guide the PPP process. A significant number of the existing legal and procedural documents were subject to disclosure and public participation, including the PPP Regulations 2014, County PPP Regulations 2015, PPP (Amendment) Bill 2016, PPP Petition Regulations 2016, and PPP Project Facilitation Funds Regulations 2017—all of which were disclosed at their draft stages for public consultations and debate. Recently, the draft PPP Manual has been made available for comments.²⁶ However, only minimal information on existing or upcoming PPP projects is currently available publicly.

The PPP Unit publishes the National Priority List of approved PPP projects, including the name of the contracting authority, a brief description of the project, and its current status. The estimated value of the project is not provided.²⁷ The list is updated monthly to reflect any changes. feasibility study reports are not available publicly.

During the procurement phase, the contracting authorities provide information on current projects before commencement of procurement on their websites, although these are not archived in an organized way and are not uniformly available. RFQs and project information memorandums are published and can be downloaded from the PPP Unit's website or the relevant contracting authority.²⁸ Lists of prequalified firms are disclosed by the contracting authorities, although these are not archived for later reference. Requests for Proposals (RFPs) related to approved or ongoing projects are not available on the PPP Unit's website, although several contracting authorities stated that RFP documents are typically placed on their websites for contracts procured under the Public Procurement and Asset Disposal Act (PPADA) 2015, in some cases accessible to all, but mostly only to short-listed bidders.²⁹ Evaluation reports are not disclosed, but the names of successful bidders are disclosed on the contracting authority's website. Contract documents and performance reports are not available in the public domain.

The current practice on PPP disclosure is summarized in table 5.

²⁶ With respect to statutory instruments, this is in line with the Statutory Instruments Act 2013, section 8(4), which provides at least 14 days for submission of comments from the public on any statutory instrument (which includes guidelines and manuals).

²⁷ See <http://pppunit.go.ke/index.php/project/ongoing-projects>. See also

<http://pppunit.go.ke/index.php/project/upcoming-projects>; <http://pppunit.go.ke/index.php/project/past-projects>.

²⁸ For example, see <http://www.pppunit.go.ke/index.php/news/2016/11/rfq-nairobi-nakuru-mau-summit-highway>.

²⁹ For projects procured under PPADA 2015, all procuring entities are expected to follow the standard templates for tender documents that the Public Procurement Oversight Authority has published on its website. This has resulted in the practice of some procuring entities making tender documentation available to the public.

TABLE 5: CURRENT PPP DISCLOSURE PRACTICES

DOCUMENT/INFORMATION	PUBLISHED ON THE PPP UNIT'S WEBSITE	PUBLISHED ON THE RELEVANT CONTRACTING AUTHORITY'S WEBSITE
National Priority List (with basic project information)	Yes (also published in other media, such as newspapers)	No
Feasibility study report	No	No
Project information memorandum	Link available to access information from the contracting authority's website	Yes; no organized archive
Request for Qualifications	No, but announcement with links to the relevant contracting authority's website	Yes; no organized archive
Lists of prequalified firms	No	Yes; no organized archive
Request for Proposals	No	Available only to bidders while the tender process is ongoing
Evaluation report	No	No
Name of successful bidder	No	Yes
Contract documents	No	No
Performance reports	No	No

A comparison of the World Bank's Framework for Disclosure, current disclosure practice in Kenya, and the proposed disclosure guidelines for Kenya is provided in annex E.

Key Challenges

Kenya has embarked upon an ambitious plan to provide infrastructure services through the PPP route in line with its Vision 2030. It has put in place a sound legal and institutional framework for PPP. However, several challenges to improving disclosure in PPPs remain. Some of these are discussed in the following subsections.

Long Gestation Period in the PPP Process

With limited experience and institutional capacity, Kenya is at an early stage of development of its PPP market. The incipient nature of the market has resulted in relatively long gestation periods for projects. Mandating greater information disclosure may bring added transaction time and cost.

Fear of Litigation

Another concern that can pose a challenge is that greater disclosure may lead to greater litigation. However, there are no existing studies in Kenya that establish a causal link between more or less disclosure and litigation. Given that the country is encouraging greater transparency with the enactment of the Access to Information Act 2016, the solution might lie in ensuring that processes and criteria are made as objective and transparent as possible to reduce the scope for successful litigation.

Size of the Market

The PPP market in Kenya is relatively small, with relatively fewer projects achieving financial close annually compared with larger emerging markets like Brazil, Turkey, or India. There is therefore room for concern that greater disclosure obligations may be deleterious to market interest. However, stakeholder discussions suggest that this may not necessarily be a concern shared by all stakeholders. The willingness to disclose among the private sector, including financiers, appears to be mixed, with varying views on the level and timing of disclosure.

Lack of Awareness about the PPP Process

Kenya has a vibrant media and committed civil society organizations. Their understanding of the PPP process, however, remains limited and this could be a challenge to how they can help to drive the process of disclosure. It is imperative that the government educates the public and civil society organizations about the PPP process.

6. Gap Assessment

TABLE 6: GAP ASSESSMENT

COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT
POLITICAL ECONOMY	<p>Clear support from the highest levels of government (national and subnational) to disclosure in general</p> <p>Agreement on PPP disclosure among internal stakeholders (ministries, agencies, and subnational governments)</p> <p>Sufficient agreement on the need to disclose and pressure to disclose among important external stakeholders (political parties, unions, private sector, users, media, political commentators, think tanks, civil society organizations, and any others)</p>	<p>Y</p> <p>Y</p> <p>Y</p>	<p>There is internal support. There is agreement among external stakeholders as well on the need to disclose, but the pressure on government to disclose by external stakeholders is still developing. Private sector support for disclosure is substantial although still evolving.</p> <p>However, there is no approved plan within the government for implementing disclosure systematically.</p> <p>Therefore, the political economy gap is assessed to be between small and moderate.</p>
LAW	<p>Are there laws, policies, and procedures in place that include the following?</p> <ul style="list-style-type: none"> • Proactive disclosure by governments or agencies • Coverage of proactive disclosure relating to contracts or PPP • High-level definition of confidential information, and protection of sensitive contract information • Timelines for disclosure • Are there any significant legislative or policy impediments or constraints to PPP disclosure? 	<p>Y</p> <p>Y</p> <p>Y</p> <p>N</p> <p>N</p>	<p>There is coverage of contracts or PPP as well as proactive disclosure in the Freedom of Information, PPP, and Public Finance Management Acts, including a high-level definition of confidential information. However, there is no systematic structure with timelines for disclosure.</p> <p>Therefore, the legislative gap is assessed to be small.</p>

COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT
GUIDANCE	<p>Clearly established roles and responsibilities on PPP disclosure</p> <p>Processes and actions clearly established in guidance or internal orders</p> <p>Timelines for disclosure clearly established</p> <p>Clear guidance available for officials on the identification and treatment of confidential information, including the timeframe associated with confidentiality, and factors to be considered as a test of commercial sensitivity or public interest</p> <p>There are penalties associated with failure to disclose</p> <p>Mechanisms that monitor implementation of disclosure policies, internal and external</p> <p>Processes for checking the accuracy of information and validation, internal and external</p>	<p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p>	<p>This gap is assessed to be wide, given the absence of guidance for all of these features.</p>
DATA, TEMPLATE & STANDARD CONTRACT PROVISIONS	<p>Degree of consistent, structured, and exploitable information disclosed across projects</p> <p>Defined common open data model/ pattern?</p> <p>Guidance on improving data collection and data quality?</p> <p>Simple and extensible structure?</p> <p>Summary records for all available data at various stages and processes?</p> <p>Information on unit and staff managing data standards</p> <p>Comprehensive and clear template for disclosure that covers key pieces of pre- and post-procurement information, including financial and performance information:</p> <ul style="list-style-type: none"> • The template is flexible enough to cater to different kinds of PPPs and to PPPs in different sectors • The template is dynamic, that is, suited to ongoing financial and performance disclosure • Instructions for filling the template are included as required 	<p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p> <p>N</p>	<p>There are no templates, standard contract provisions, or data standards. The gap is assessed to be high in this area.</p>

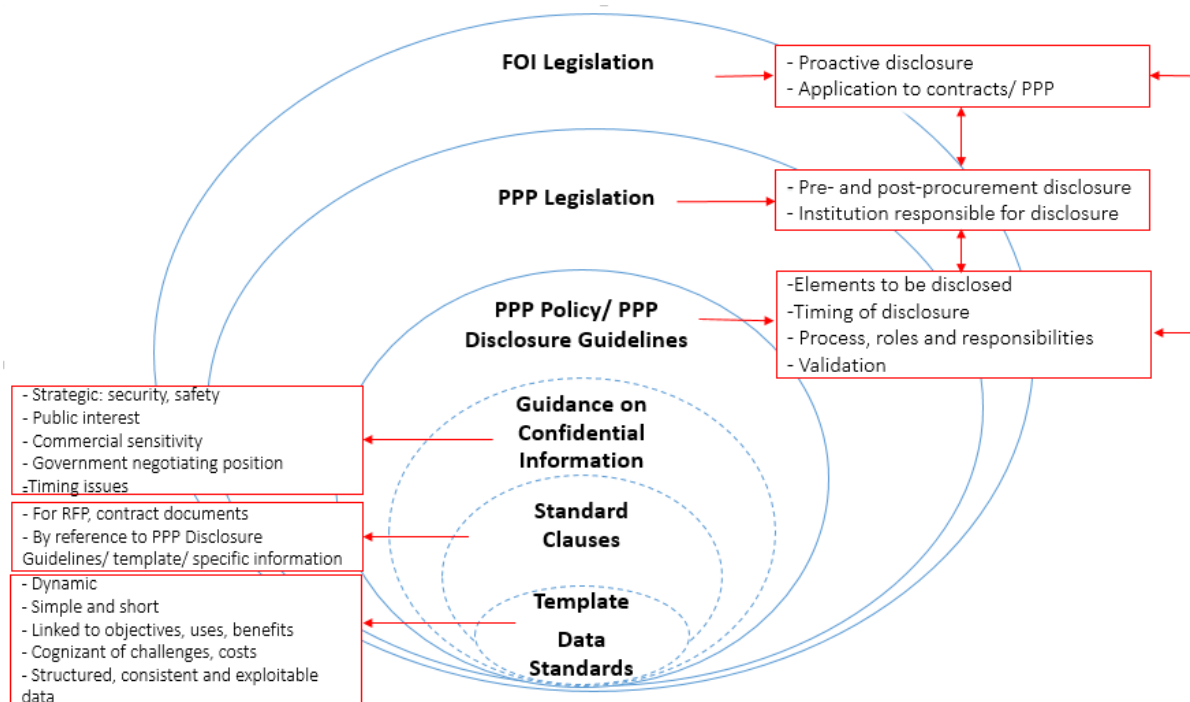
COMPONENT	RAPID REVIEW	Y/N	GAP ASSESSMENT
<p>DATA, TEMPLATE & STANDARD CONTRACT PROVISIONS</p>	<p>There are standard contract provisions that provide the following:</p> <ul style="list-style-type: none"> • Specific language for confidential information • Specified period for which the information will be confidential • Format for listing the specific confidentiality clauses of each contract • Clearly stated information that the private provider is expected to maintain along with timelines for submission • Specified audit mandate with the extent of disclosure to audit 	<p>N</p>	<p>There are no templates, standard contract provisions, or data standards. The gap is assessed to be high in this area.</p>
<p>RESOURCES</p>	<p>Budget is available Skilled, trained labor is available Technology and web platform/s are compatible, with easy upload and download of information Security systems to prevent data and information tampering</p>	<p>N Y N Y</p>	<p>There is a platform, but it does not include all the desired features; skilled labor is available, but the PPP Unit staff is already stretched. The communications team is currently maintaining the website and can continue to handle disclosure under a new policy, but further training for a more sophisticated web portal would be required. Budget is available but not for this specific purpose, and the government PPP Unit and the contracting authorities might need to provide specifically for this as the number of projects increases.</p> <p>The gap here is assessed to be moderate.</p>

7. Recommendations

The findings of the Diagnostic suggest that there is a legislative mandate for greater transparency in PPPs in Kenya with the enactment of the Access to Information Act 2016 and the PPP and Public Finance Management laws. However, given the relatively low level of structured information in the public domain, the institutional process and roles and responsibilities related to disclosure need to be more clearly delineated for more effective disclosure. The findings of the Diagnostic suggest that strengthening the disclosure clauses of the PPP Act, creating an institutional Framework for Disclosure, and embedding this in practice through standard contractual clauses and a dedicated web portal could facilitate improved disclosure in practice.

The World Bank’s Framework for Disclosure in PPPs recommends a six-layer design (figure 2).

FIGURE 2: ELEMENTS OF THE WORLD BANK’S RECOMMENDED PPP DISCLOSURE FRAMEWORK



Note: FOI = Freedom of Information; PPP = Public-Private Partnership; RFP = Request for Proposals.

The framework design is based on the key drivers of disclosure, major factors influencing the drivers, challenges and benefits associated with disclosure, and uses and various categories of users of information once it is disclosed. Linked directly to these aspects is the issue of customizing disclosure based on specific PPP contract clauses, levels of government support, and risk-sharing mechanisms within contracts. The framework recommends the incorporation of the following key items in a country’s disclosure framework:

- Mandate to disclose, through FOI, PPP, or other legislation/policy
- More detailed guidance on what, when, and how to disclose

- ❑ Elements of disclosure in different phases with a simple template
- ❑ Timelines for disclosure
- ❑ Guidance on confidential information
- ❑ Standard contractual clauses.

Based on the findings of the diagnostic and a gap assessment exercise benchmarked against the World Bank’s framework, as detailed in earlier sections, this section makes a few focused recommendations on disclosure.

1. *Legislative mandate for disclosure.* The findings of the Diagnostic suggest that there is an extensive legal basis for pursuing structured disclosure in Kenya. However, the Government of Kenya can consider legislative amendments to improve clarity and institutionalize disclosure in practice. In countries or provinces with strong institutional practices, such as the United Kingdom, Australia, British Columbia, Chile, and others, legislation includes in the following: (a) proactive disclosure; (b) specific coverage, preferably by direct mention of PPPs, or contracts and contract information, as well as performance and procurement information as part of the definition of information; (c) disclosure mechanisms, that is, how the information will be disclosed; and (d) redactions, that is, what information will not be disclosed. The degree of detail to be included in the legislation depends on each country’s surrounding integrity risk environment, but good practice suggests it should provide enough detail to ensure sufficient accountability of the public and private actors involved in a project. For example, although section 60 of the ATI Act 2016 says that the results of any tender, nature of the project, successful bidder, project cost at net present value, project value and tariff, and duration of the project must be published, detailed guidance for publication of other critical information related to feasibility studies, consultations with stakeholders prior to procurement, risk assessments, evaluation criteria, renegotiations, and performance indicators could be useful.

Currently, the PPP Act provides for basic proactive disclosure of information. Based on the findings of the Diagnostic, nascent but improving investor confidence in projects, government’s evolving ability to make payments and manage contracts, and need for institutionalizing the practice of disclosure, it is recommended that the Government of Kenya should consider legislative amendments to strengthen the disclosure clauses of the PPP Act 2013. The specific advantages of more detailed coverage of disclosure in the PPP Act through an amendment are that there will be a stronger mandate for disclosure and better clarity on what to disclose. Suggested legal drafting is included as annex A.

2. *Guidelines for disclosure.* A full suite of instruments, as envisaged in the design of the World Bank Group’s disclosure framework, could facilitate disclosure in Kenya. Detailed suggested guidelines for disclosure for Kenya based on five of the six layers of the World Bank’s framework are included as annex B. Table 7 provides a summary of the suggested contents.

TABLE 7: SUGGESTED CONTENTS FOR PPP DISCLOSURE GUIDELINES FOR KENYA

CONTENT	DESCRIPTION
ELEMENTS TO BE DISCLOSED	<p>Specifics of disclosure at each stage of the PPP process, preferably an exhaustive list of items.</p> <p>Given the nascent status of PPPs in Kenya and the demands of onerous PPP disclosure requirements, the elements to be disclosed should remain limited to basic project information, key milestones, procurement, key contract features, key project documents, renegotiations, and performance.</p>
PLACE OF DISCLOSURE	<p>Common PPP Unit/National Treasury platform</p> <p>Responsibilities for populating and managing the platform shared between the PPP Unit, contracting authorities, and special purpose vehicle</p> <p>Technical assistance is being provided for the design and creation of the web portal under World Bank technical assistance.</p>
TIMELINES	<p>Specifics of timelines for each element</p> <p>Flexible timelines that take into account the internal processes involved</p> <p>Key procurement documents disclosed in line with table B.1 in annex B</p> <p>Contract documents and performance information with reasonable lag times for internal processes, such as removal of confidential information and validation of information.</p>
TREATMENT OF COMMERCIAL-IN-CONFIDENCE AND OTHER CONFIDENTIALITY PROVISIONS	<p>Confidential information will be identified on a case-by-case basis, and will be broadly based on the provisions of the Access to Information Act 2016 and the PPP Act 2013.</p>
VALIDATION PRIOR TO DISCLOSURE	<p>Given that there could be high costs to external validation, it is suggested that the PPP Unit takes the responsibility for validation of disclosed information.</p>
TEMPLATE & DATA STANDARDS	<p>A format for ensuring ease and uniformity in disclosure</p> <p>Uniformity can help in data aggregation by sector, risk profile, value, type, and so forth. A template is suggested as part of the Draft Guidelines.</p>

3. *Standard contractual clauses.* Clauses on information disclosure used in Kenyan contracts so far are limited to reinforcing confidentiality of information. It is recommended that the Government of Kenya creates standard clauses on disclosure to provide specific language that should be included in PPP contracts by public authorities. These clauses would help government teams in appropriately negotiating provisions related to the responsibility of private providers to provide information to the public authority, the rights and responsibilities of the public authority to disclose information, direct disclosure obligations on the special purpose vehicle, and confidentiality provisions. These would also enable the government entity and the private party to understand their respective roles in disclosure prior to contract signing. Inclusion of clear disclosure provisions in the standard contract is also a good way to disseminate and educate investors and potential bidders about the government's approach to information disclosure. Standard clauses would also help greatly in institutionalizing disclosure. Annex D suggests text for standard contractual provisions.

4. *Template and data standard.* Supply-side issues are a key impediment to timely and high-quality disclosure. This impediment could be mitigated by applying procurement strategies that provide bidders with incentives to compete on mechanisms to disclose information without unreasonably increasing internal costs. In addition, Kenya is in a position to support the transfer of technology, systems, and instruments that support building, processing, and disseminating the required information, and, therefore, could incorporate this as a substantial aspect of improving its disclosure guidelines. The PPP Unit and contracting authorities would need to work on systems for collection and aggregation of information. It is recommended that, to the extent possible, reports should be machine readable or provided as inputs into a shared information system and able to be turned into structured data that can be selectively converted into open data as required.

In addition, systems need to be built into the design of the disclosure guidelines that will enable continuous publishing of procurement as well as performance information and data as and when key changes happen. Linking and cross-referencing with other existing similar information sets or databases could be useful. Defining or using harmonized information standards could not only reduce human and financial resource challenges, but also allow for comparative analysis of infrastructure projects. A template for disclosure is provided in the suggested text for the guidelines in annex B. A project portal has been created and provided to the Government of Kenya.

5. *Strategic communication.* Disclosure of information appears to be influenced by a host of challenges and benefits. The key challenges appear to be the reluctance of public bodies to share information in the absence of a clear mandate, a dearth of practical internal guidance, non-availability/inaccuracy of data, time and cost of disclosure, and lack of oversight mechanisms. Sometimes, disclosed information becomes inaccessible, especially when it consists of full contract documents in the public domain. Challenges such as increased litigation and consequent delays during or after procurement may also arise for governments that disclose documents, feeding back into the general reluctance to share information.

Given the longer-term and distinct benefits of disclosing—such as greater accountability in expenditure, higher level of confidence in the fairness of the process, and better quality of bids, along with the potential for formulation of improved long-term PPP policies and practice—it is essential that challenges are overcome. This can be done by building the right guidelines for disclosure, as suggested above, as well as by framing the discussion strategically, through well-planned communication with stakeholders.

Since the framework recommends disclosure beginning with the entry of a project into the approved preliminary pipeline, it is important that strategic communication around projects and programs is formulated at an early stage. This requires making disclosure not a one-way process but a two-way interactive process to ensure that the feedback loops are completed, and the disclosed information is understood, absorbed, and used optimally by all stakeholders. Strategic communication also entails placing the project in the right context, benchmarking it in terms of tariff (and cost) and services using available regional, national, and local benchmarks of existing projects, and discussing the pros and cons of different alternatives for providing services, highlighting the relative advantages of the selected alternative. It is also important to frame the discussion around other key issues, such as competition and confidentiality, which may be of concern to the private sector.

8. Key Material Reviewed

Laws, Regulations, and Policy Documents of the Government of Kenya

Access to Information Act, 2016

Capital Markets Act, 2002

Companies Act, 2015

Constitution of Kenya, 2010

County PPP Regulations, 2015

Draft PPP Manual, 2016

FCCL Technical Guidance Manual, 2015

Guidelines for the Assessment and Management of Fiscal Commitments and Contingent Liabilities in PPPs in Kenya, 2015

National Priority List (ongoing)

OGP Action Plan (First), 2012–13

OGP Action Plan (Second), 2016–18

PPP Act, 2013

PPP Petition Committee Guidelines, 2014

PPP Petition Regulations, 2015

PPP Policy, 2011

PPP Project Facilitation Fund Regulations, 2015

PPP Regulations, 2014

Public Audit Act, 2015

Public Finance Management Act, 2012

Public Procurement and Asset Disposal Act, 2015

Public Procurement and Disposal Regulations, 2009

Railways Corporation Act, 1979 and 2102

Roads Act, 2007

Statutory Instruments Act, 2013

Vision 2030 Document, 2008

Water Act, 2016

Other Documents

Corruption Perceptions Index Report, 2015, Transparency International, Berlin

Disclosure in PPPs: Jurisdictional Studies, 2015, World Bank

Global Competitiveness Report, 2015–16, World Economic Forum, Geneva

A Framework for Disclosure in Public-Private Partnership Projects, 2015, World Bank

UN Convention Against Corruption, 2003, United Nations

Key Websites

Centre for Law and Development

eCitizen Portal, Government of Kenya

e-Promis Portal, Government of Kenya

Integrated Financial Management Information System (IFMIS), Government of Kenya

Open Contracting Data Standard (OCDS)

Open Data Portal, Government of Kenya

Open Government Partnership

Parliament of Kenya

PPP Unit, National Treasury, Government of Kenya

Private Participation in Infrastructure Database, World Bank

Suppliers Portal, National Treasury, Government of Kenya

United Nations Office on Drugs and Crime

World Economic Forum

Annex A: Suggested Amendment of Clause 60 of PPP Act 2013

FOURTH SCHEDULE

Amendments

PROACTIVE PUBLICATION OF CERTAIN PROJECT DOCUMENTS AND INFORMATION

60. Publication of information concerning projects

Revised section (60) 1:

[(1) Subject to and without prejudice to the requirements of the Access to Information Act 2016, information in respect of a public-private partnership project shall be provided to any citizen expeditiously at a reasonable cost upon request.]

(2) A contracting authority shall [publish in a designated website or in any other form specified in the guidelines issued under subsection (4) the following information:

- (a) basic project information;
- (b) actual dates of achievement of key project milestones;
- (c) project information memorandum;
- (d) procurement information;
- (e) project summary;
- (f) information relating to renegotiation;
- (g) project documents;
- (h) performance information.

(3) No confidential information as stated in the Access to Information Act 2016 and as specified in the guidelines issued under subsection (4) shall be disclosed.

(4) The Committee shall with the assistance of the unit [OR The unit shall upon approval by the Committee] formulate guidelines that

- (a) specify details regarding the elements of information to be disclosed;
- (b) determine the point in time at which the contracting authority shall publish the respective elements of information;
- (c) define confidential information [including a list of items that qualify as confidential information];

- (d) prescribe the method of disclosure;
- (e) delineate responsibilities for disclosure;
- (f) determine how the information is going to be validated prior to publication;
- (g) provide sample [standard] contractual provisions related to proactive disclosure.

[(h) identify appropriate governance and administrative arrangements for proactive disclosure of project information including creating a designated website for publishing public-private partnership information.]

These guidelines will be reviewed and amended from time to time as appropriate.

[(5) The unit shall assist contracting authorities in connection with the exercise of their functions under this Act, including by providing training on information lodgment, handling, and publishing.]

Annex B: Suggested Text for Disclosure Guidelines

1. Introduction

Article 35 of the Constitution of Kenya 2010 establishes the right of access to information to citizens of Kenya. The newly-enacted Access to Information Act 2016 gives effect to the right of access to information as provided in the Constitution and provides a framework for public entities and private bodies proactively to disclose information in their possession.

Section 5(1) (c) of the Access to Information Act requires public entities proactively to “publish all relevant facts before initiating any project.” Section 5(1) (e) requires proactive publication of particulars of contracts. Among the methods of access, the Act includes publication on the internet. Section 17(3) (c) also mandates the authorities to work on creating records of transactions and other information in electronic form within a given period of time.

The PPP Policy Statement, a precursor to the PPP Act 2013, lists one of the principles of PPPs as ensuring good governance, transparency, and accountability in the whole process of PPP development. The policy also states that the procurement process must provide as much information in the public domain as practicable, ensuring equal access to all bidders. The PPP Act 2013, Public Finance Management Act 2012, and Guidelines for the Management of Fiscal Commitments and Contingent Liabilities 2015 similarly require proactive disclosure of certain pieces of information. It is important, however, to note that access to information is not an absolute right and is therefore subject to certain limitations. There are clear principles under Article 24 of the Constitution and section 6 of the Access to Information Act 2016, which provide the basis for these limitations.

Public-private partnerships have been identified as an enabler of the country’s Vision 2030 and are fast gaining momentum in the country. Owing to the importance of transparency and information disclosure in enhancing the confidence of investors and other stakeholders, including the general public, the National Treasury, Government of Kenya seeks to embed disclosure into its PPP process and institutions. The objective of these Guidelines is to provide guidance to enable systematic and organized disclosure of information at different stages of the PPP process. Since disclosure is an evolving area in Kenya and the recently enacted Access to Information Act will see the development of jurisprudence in this area over the next few years, these Guidelines will be revisited and revised every two to three years, if and as required.

2. Application

These Guidelines will apply to all PPP projects initiated under the PPP Act 2013, including projects initiated by county governments and privately initiated infrastructure projects.

3. Specific Disclosures

- a. Specific disclosures will consist of the elements included in subsections b to i below, and will follow table B.1 and the template provided in annex C. Confidential information as provided under section 4 will be redacted before publication.
- b. *Basic project information.* Basic project information along with estimated dates for key milestones³⁰ will be provided within 30 business days of approval by the Cabinet for inclusion of the project in the National Priority List. Basic project information will include the project name, location, sector, sponsoring agency, estimated value, project need, description of asset and services to be provided, rationale for selecting the project for development as a PPP, and name and deliverables of the transaction advisor procured for the process. In the case of unsolicited projects, the rationale will be provided for the same.
- c. *Project progress tracking.* Actual dates of achievement of key milestones will be provided within 30 business days from inclusion in the National Priority List, and within 30 business days of each status change.
- d. *Project information memorandum.* A project information memorandum³¹ detailing salient information about the project will be published within 30 business days of approval of the feasibility study or on or before release of the Request for Qualifications (RFQ), whichever is earlier.
- e. *Procurement information.* Summary procurement information and key documents will be provided during the procurement process. The RFQ, list of short-listed bidders, and award will be published immediately after approval of the relevant entity. The full Request for Proposals (RFP) document will be disclosed publicly within 30 business days of achieving financial closure.
- f. *Project summary.* Summary information on the PPP agreement will be provided within 30 business days of execution of the project agreement (commercial close). The project summary will include basic information on the PPP agreement, including the nature and scope of the project, parties to the agreement, project risk matrix, amounts and types of government support provided to the project, information on tariffs and pricing, termination clauses, handback provisions, and key performance indicators with target levels.
- g. *Project documents.* Key project documents (including redacted project agreements) will be disclosed within 30 business days of execution of the project agreement (commercial close). The feasibility study report (including Preliminary Environmental and Social Impact Assessment/Environmental and Social Impact Assessment and Resettlement Action Plan) will be disclosed within 30 business days of signature of the agreement.

³⁰ These will be disclosed if and as available. Dates for all key milestones may not be available at the project concept stage.

³¹ The current template of the project information memorandum consists of the following: an overview of the country, sector, and project; technical, commercial, and legal details; details of the partners involved; overview of government support; and information on the procurement process.

- h. *Financial information.* Information on the financing structure (debt-equity ratio, ownership, and so forth) of the project will be provided within 30 business days of financial close.
- i. *Renegotiations.* Summary information relating to each renegotiation will be published within 30 business days of signature of the renegotiated contract. At this time, the redacted renegotiated agreement will also be published.
- j. *Performance information.* Information on the performance of the private party on key performance indicators against agreed target levels will be published within one year of financial close of the project, with annual updates. Performance information will also include, among others, information on construction milestones, key financial information of the project, and details relating to performance failures. Performance information will be updated annually, consistent with the project’s contract management framework. Performance assessments, such as audit reports, extracts from the private party reports (special purpose vehicle self-reporting), and extracts from independent expert reports will be disclosed annually.
- k. *Unsolicited proposals.* Basic information related to unsolicited proposals will be disclosed upon approval to negotiate (when the project enters the National Priority List), and subsequently after execution of the project agreement (commercial close), as detailed in table B.1.
- l. *Projects that do not reach financial close.* Where the execution of the project agreement is reached (commercial close) but the project eventually does not reach financial close, a summary explanation of the reasons thereof will be provided.

TABLE B.1: SUMMARY OF SPECIFIC DISCLOSURES

NO.	DOCUMENT	CONTENTS	CREATOR	APPROVER	TIME
<i>Disclosure of information at project initiation, updated thereafter</i>					
1.	Basic project information	Project name Location Sector Sponsoring agency Estimated value Project need Description of asset and services to be provided Rationale for selecting the project for development as a PPP Estimated dates of key milestones (where available) Name and deliverables of the transaction advisor procured In case of unsolicited projects, the rationale for the same	CA	PPPU	Within 30 business days after approval for inclusion in NPL and updated thereafter with each new milestone and annually. For unsolicited projects, upon approval to negotiate (and entry into NPL), including the name of the proponent

NO.	DOCUMENT	CONTENTS	CREATOR	APPROVER	TIME
2.	Project progress tracking	A section on the web-based platform that will reflect actual dates of achievement of key milestones	PPPU from entry into NPL until execution of project agreement (commercial close); CA after commencement of operations until end of contract	PPPU/CA	Within 30 business days from inclusion in NPL; and within 30 business days of each status change. For unsolicited projects, upon approval to negotiate (and entry into NPL).
<i>Disclosure of information prior to commencement of procurement</i>					
3.	Project information memorandum	Salient information about the project	CA	PPPU	Within 30 business days of approval of the feasibility study or on or before RFQ release, whichever is earlier.
<i>Disclosure of information during procurement</i>					
4.	RFQ		CA	PPPU	Following approval and publication of RFQ.
5.	List of short-listed bidders		CA	PPPU	As soon as short-listed bidders are notified.
6.	Bid award		CA	PPPU	16 business days after notification to the preferred bidder, unless there is a petition, in which case, it shall be 16 business days after resolution of any petition or judicial review applications, as the case may be.
7.	Full RFP		CA	PPPU	Within 30 business days of achieving financial closure.

NO.	DOCUMENT	CONTENTS	CREATOR	APPROVER	TIME
<i>Disclosure of information following execution of project agreement (commercial close)</i>					
8.	Project summary	Project scope and nature Project cost at NPV Parties to the PPP agreement Project risk matrix Government support Project value, tariffs, and pricing Termination clauses Handback provisions Key performance indicators with agreed target levels Duration of project Implementation structure (SPV and any subcontractors)	CA	PPPU	Within 30 business days of execution of project agreement (commercial close). This will apply to unsolicited projects as well.
9.	Financial structure of the project	Debt and equity of the project Debt and equity providers Government of Kenya financial support/contribution Grant funding	CA	PPPU	Within 30 business days of financial close. This will apply to unsolicited projects as well.
10.	Project documents	Including the following: Redacted PPP agreement Feasibility study report (including PSIA/ESIA and RAP) with necessary edits to ensure there is no influence on government achieving financial closure or the best VfM for the project	CA	PPPU	Within 30 business days of execution of project agreement (commercial close). This will apply to unsolicited projects as well.
11.	Renegotiations and renegotiated agreements and associated documents	Summary information on each renegotiation Redacted renegotiated clause(s) in the PPP agreement	CA	PPPU	Within 30 business days of signature of renegotiated contract. This will apply to unsolicited projects as well.

NO.	DOCUMENT	CONTENTS	CREATOR	APPROVER	TIME
12.	Where execution of project agreement (commercial close) takes place but project does not reach financial close	Summary explanation of why financial close did not take place	CA	PPPU	Within 30 business days of decision.
<i>Performance disclosure throughout contract period</i>					
13.	Performance Information	Performance of the private party on key performance indicators against agreed targets (including information on construction milestones, key financial information, and information on performance failures, if any) Audit reports Audited financial statements Private party reports Extracts from independent expert reports	CA Audit report provided by the PPPU	PPPU	Within one year of financial close, updated annually. This will apply to unsolicited projects as well.

Note: CA = contracting authority; ESIA = Environmental and Social Impact Assessment; NPL = National Priority List; NPV = net present value; PPP = Public-Private Partnership; PPPU = PPP Unit; PSIA = preliminary social impact assessment; RAP = Resettlement Action Plan; RFP = Request for Proposals; RFQ = Request for Qualifications; SPV = special purpose vehicle; VfM = value for money.

4. Confidential Information

- a) Confidential information will be identified on case-by-case basis, and will be broadly based on the provisions of the Access to Information Act 2016 and the PPP Act 2013.

5. Method of Disclosure

All information and documents will be published on a web-based platform owned and administered by the PPP Unit, National Treasury and any other media platforms as identified in the PPP Act 2013 and PPP Regulations 2014.

6. Responsibilities for Disclosure

- a) The onus for information collection, generation, and data entry onto the web-based platform will be on the contracting authority and the PPP Unit. The responsibility of approving and publishing information lies with the PPP Unit, in line with table B.1.
- b) The contracting authority will carry out data entry of all information and documents on the web-based platform so as to leave at least 20 business days within the given timelines for the PPP Unit to validate, approve, and publish the information.

7. Approval of Information for Publication

All information shall be approved by the Director of the PPP Unit or any official designated by him/her for publication.

8. Standard Contractual Provisions

- a) A section/chapter entitled “Transparency and Information Disclosure” will be included in all draft contractual documentation included in the RFP and in all PPP contracts to be signed by the contracting authorities, at the national and county government levels.
- b) The section/chapter mentioned in 8.a. above will contain clauses pertaining to the proactive disclosures to be carried out by the public entity, including disclosure of summary project and contract information, project documents, procurement information including procurement documents, and ongoing performance information disclosure.
- c) The section/chapter mentioned in 8.a. above will also contain the obligation of the private entity to provide documents and information as and when required and in the format required by the public entity as part of its sanctionable service obligations should there be a failure to provide information on the part of the private party.
- d) The section/chapter mentioned in 8.a will include a subsection dealing with confidential information, and will list the items of confidential information in a schedule along with the date up to which the information will be considered confidential, where applicable.
- e) The contract will be structured in a way such that confidential information can be easily removed before publication of the project agreement.
- f) Sample disclosure clauses for use in all draft project documentation included in the RFP and in all project agreements are provided in annex D and its schedules.

Annex C: Suggested Template for Disclosure

DISCLOSURE DURING THE PROJECT IDENTIFICATION, DEVELOPMENT, AND PROCUREMENT STAGES

BASIC PROJECT INFORMATION

[disclosed at the identification phase within 30 business days of approval by the Cabinet for inclusion in the National Priority List (NPL); updated at execution of the project agreement (commercial close)]

- Project name
 - Location
 - Sector
 - Sponsoring agency/department
 - Estimated project value
 - Project need
 - Description of asset
 - Description of services
 - Rationale for selection of PPP mode
 - Name and deliverables of the transaction advisor
 - In case of unsolicited projects, the rationale for the same
-

ESTIMATED PROJECT MILESTONES

(within 30 business days from inclusion in NPL; and within 30 business days of each status change)

- Project proposal received
- Project proposal screened
- Project proposal enters National Priority List of projects
- Project feasibility study under development
- Project feasibility study approved
- Request for Qualifications (RFQ)
- Request for Proposals (RFP)
- Award
- Execution of project agreement (commercial close)
- Financial close
- Commencement of construction or development
- Completion of construction or development
- Commissioning
- Contract expiry

PROCUREMENT DOCUMENTS

- Feasibility study report (*within 30 business days of execution of project agreement (commercial close)*)
- Project information memorandum (*within 30 business days of approval of the feasibility study or on or before RFQ release, whichever is earlier*)
- Request for Qualifications (*following approval and publication of RFQ*)
- Short-listed bidders (*as soon as short-listed bidders are notified*)
- Request for Proposals (*within 30 business days of achieving financial closure*)
- Award (*16 business days after notification to preferred bidder, unless there is a petition, in which case, it shall be 16 business days after resolution of any petition or judicial review applications, as the case may be*)

DISCLOSURE FOLLOWING SIGNATURE OF CONTRACT

CONTRACT INFORMATION

[within 30 business days of execution of project agreement (commercial close)]

- Public authority: name of authority, name of representative, address, telephone, fax, e-mail
- Private party: name of company or consortium, name of representative, address, telephone, fax, e-mail
- Financial structure (figure showing debt/equity/proportion/providers) (provide link to company registry)
- Links to project documents

RISKS

RISK	DESCRIPTION	ALLOCATION

GOVERNMENT SUPPORT

Guarantees
Grants
Availability/annuity payment schedule
Land leases, asset transfers
Other support
Revenue share, if any

TARIFFS

Tariffs and pricing

TERMINATION PROVISIONS

PARTY	BRIEF DESCRIPTION OF EVENT OF DEFAULT
Concessionaire	
Authority	
Handback terms and conditions	

RENEGOTIATIONS

RENEGOTIATION 1	RENEGOTIATION 2	RENEGOTIATION 3	RENEGOTIATION 4

PERFORMANCE INFORMATION *(within one year of financial close; updated annually)*

KEY PERFORMANCE INDICATORS	Year 1		Year n	
	Target	Achievement	Target	Achievement

Performance failures

Year	
Category of failure	
Number of events	
Penalty or abatement provided in contract	
Penalty or abatement imposed	
Penalty paid or abatement effected: Yes/No	

Performance assessments Links to audit reports (if any), extracts of special purpose vehicle reports, extracts of independent expert reports

Annex D: Suggested Standard Contractual Clauses

Section [insert number]: DISCLOSURE REQUIREMENTS

Obligations Regarding Specific Disclosures

1. Freedom of Information

- 1.1 The [Private Party] acknowledges that the [Contracting Authority] is subject to the requirements of the Access to Information Act 2016 and the PPP Act 2013 and may be entitled to disclose certain project-specific information without consulting or obtaining the consent of the [Private Party].
- 1.2 The [Private Party] agrees to facilitate the [Contracting Authority's] compliance with its disclosure requirements under the Access to Information Act 2016 and the PPP Act 2013.
- 1.3 Where the [Contracting Authority] receives a request for information under the Access to Information Act 2016 or the PPP Act 2013 in relation to information that the [Private Party] is holding and which the [Contracting Authority] does not hold itself, the [Contracting Authority] shall refer to the [Private Party] such request for information that it receives as soon as practicable and in any event within [five] business days of receiving the request and the [Private Party] shall
 - (a) provide the [Contracting Authority] with a copy of all such information in the form the [Contracting Authority] requires as soon as practicable and in any event within [ten] business days (or such other period as the [Contracting Authority] acting reasonably may specify) of the [Contracting Authority's] request; and
 - (b) provide all necessary assistance as reasonably requested by the [Contracting Authority] in connection with any such information to enable the [Contracting Authority] to respond to a request for information within the time for compliance set out in the Access to Information Act 2016.
- 1.4 Where the [Contracting Authority] receives a request for information under the Access to Information Act 2016 the [Contracting Authority] shall be responsible for determining at its absolute discretion whether information is exempt from disclosure under the Access to Information Act 2016 and for determining what information will be disclosed in response to any information request in accordance with the Access to Information Act 2016.

2. Public Relations and Publicity

- 2.1 The [Private Party] shall not by itself, its employees or agents, and its subcontractors shall not communicate with representatives of the press, television, radio, or other communications media on any matter concerning this PPP agreement without the prior written approval of the [Contracting Authority].
- 2.2 The [Private Party] may not represent the views of the [Contracting Authority] on any matter, or use the name of the [Contracting Authority] in any written material provided to third parties, without the prior written consent of the [Contracting Authority].

3. Publication of PPP Project Information

- 3.1 The parties agree that the [Contracting Authority], subject to section 4 (Confidentiality) below, is entitled to disclose as detailed out in Schedule [] the following information:
 - (a) Procurement documents and information;
 - (b) All project documents including this PPP agreement and other associated documents (such as

- the feasibility study report, including the Environmental and Social Impact Assessment and the Resettlement Action Plan);
- (c) Summary project information as set out in Schedule [] of this PPP agreement;
 - (d) Performance information related to this PPP agreement.
- 3.2 The [Private Party] acknowledges that the [Contracting Authority] will publish the information mentioned in subsection 3.1 above, subject to section 4 (Confidentiality), on a web-based platform owned by the Government of Kenya.

4. Confidentiality

Confidential Information

- 4.1 For the purpose of this PPP agreement, confidential information means,
- (a) The subset of confidential information included in column 1 of Schedule [] of this PPP agreement in each case for the period specified in column 2 of Schedule [].
 - (b) Any other information (however it is conveyed or on whatever media it is stored) that may fall within the definition of “confidential information” as stated in section 6 of the Access to Information Act 2016, including all personal information as defined in section 2 of the Access to Information Act 2016.
- 4.2 Without prejudice to sections 1 and 3, the parties shall keep confidential all confidential information received by one party from the other party relating to this PPP agreement and any other project agreements or the PPP project and shall use all reasonable endeavors to prevent their employees and agents from making any disclosure to any person of any such confidential information.

Permitted Disclosure

- 4.3 Confidential information may be disclosed if:
- (i) disclosure of such confidential information is reasonably required by any person engaged in the performance of its obligations under the PPP agreement for the performance of those obligations;
 - (b) a party can demonstrate that such confidential information is already, or becomes, generally available in the public domain legitimately otherwise than as a result of a breach of this clause;
 - (c) such disclosure is required pursuant to (i) any statutory or legal obligation, (ii) any order of a court of competent jurisdiction, (iii) a Parliamentary obligation placed upon the party making the disclosure, (iv) the rules of any regulated stock exchange, or (v) any order from a governmental or regulatory authority;
 - (d) the confidential information is provided to:
 - (i) each party’s own professional advisers or insurance advisers; and/or
 - (ii) the lenders or the lenders’ professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation, or otherwise) to the [Private Party] to enable it to carry out its obligations under the PPP agreement, or may wish to acquire shares in the [Private Party] in accordance with the provisions of this PPP agreement to that person or their respective professional advisers, but only to the extent reasonably necessary to enable a decision to be taken on the proposal (subject to notification); and/or
 - (iii) international or bilateral financial institutions involved in the PPP project as lenders, political risk insurers, or guarantors (subject to notification).

- (e) the disclosure of such confidential information by the [Contracting Authority] relates to the design, construction, operation, and maintenance of the PPP project and any disclosure of other confidential information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new private partner, its advisers, and lenders, should the [Contracting Authority] decide to retender the PPP agreement or undertake any market testing and taking due account of the intellectual property rights of the [Private Party];
 - (f) such disclosure is required for any application, registration, filing, or recording of the required permits and property registration in connection with the PPP project;
 - (g) the disclosure of confidential information by the [Contracting Authority] to any other relevant authority or their respective advisers or to any person engaged in providing services to the [Contracting Authority] is necessary for any purpose related to or ancillary to the PPP agreement; or
 - (h) such disclosure is necessary for the purpose of:
 - (i) the financial audit of the [Contracting Authority's] or the [Private Party's] accounts by statutory bodies such as the Auditor General's office;
 - (ii) any examination pursuant to [insert reference to any auditing obligations for public contracts] of the performance audit with which the [Contracting Authority] has used its resources;
 - (iii) complying with a proper request from either party's insurance adviser or insurer on placing or renewing any insurance policies or in relation to any insurance claim made; or
 - (iv) (without prejudice to the generality of Clause 4.3 (d) above compliance with [insert reference to any laws requiring disclosure (for example, environmental laws)]).
- 4.4 When disclosure is permitted under clauses 4.3 (a), (c), (f), (g), and (i) above, the party providing the information shall ensure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this PPP agreement. The [Private Party] shall expressly inform any person to whom it discloses any information under this clause of the confidentiality restrictions set out in this clause and shall procure its compliance with the terms of this clause as if it were party to this PPP agreement and the [Private Party] shall be responsible for any breach by any such person of the provisions of this clause.
- 4.5 The provisions of section 4.3 are not applicable to [insert relevant exceptions for specific project, for example, national security information as defined in and as far as protected by section 4 of the Access to Information Act 2016].

Confidential Information Related to End Users

- 4.6 Where the [Private Party], in carrying out its obligations under the PPP agreement, is provided with personal information relating to [end users (for example, prisoners, patients, or pupils)], the [Private Party] shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the [Private Party] has obtained the prior written consent of that [end user] and has obtained the prior written consent of the [Contracting Authority]. This provision does not prejudice the obligations of the [Private Party] under the Freedom of Information Act 2016.
- 4.7 No later than [] days following termination or expiry of this agreement, the [Private Party] shall ensure that all documents and/or computer records in its possession, custody, or control, which contain personal information relating to [end users] including any documents in the possession, custody, or control of a subcontractor, are delivered to the [Contracting Authority].

5. Reporting Obligations, Provision of Information, and Documents

5.1 Obligation to Disclose Information, Documents, and Records upon Request

- 5.1 (a) The [Private Party] shall provide to the [Contracting Authority] all information, documents, records, and the like in the possession of, or available to, the [Private Party] as may reasonably be requested by the [Contracting Authority] for the purpose of complying with any of its statutory reporting obligations, including but not limited to its reporting obligations under the Public Finance Management Act 2012, Access to Information Act 2016, Public-Private Partnership Act 2013, and Guidelines for the Management of Fiscal Commitments and Contingent Liabilities 2015.
- (b) To this end, the [Private Party] shall ensure that all such information in the possession of any subcontractor or other counterparty to any project agreement shall be available to the [Contracting Authority] and the [Private Party] has included, or shall include, appropriate provisions to this effect in all project agreements.

Project Information

- 5.2 (a) The [Private Party] shall provide to the [Contracting Authority] a project summary as set out in Schedule [] of this PPP agreement within seven business days after signature of this PPP agreement and an updated version including information on the financial structure of the special purpose vehicle (SPV) as described in Schedule [] of this PPP agreement within seven business days after [insert definition for financial close].
- (b) In the event of any relevant change of the project information described in subsection (a), the [Private Party] shall provide to the [Contracting Authority] the updated information and copies of the updated documents [] business days after the relevant change has occurred.
- (c) In the event of renegotiation, the [Private Party] shall provide to the [Contracting Authority] information on the renegotiation as well as links to the renegotiated PPP agreement within seven business days after signature of the renegotiated PPP agreement.

Information Relating to Performance

- 5.3 The parties agree that the [Private Party] shall provide to the [Contracting Authority] information relating to performance as set out in Schedule [] of this PPP agreement. This will include a summary of key performance indicators (KPIs) and target levels within [] business days after signature of this PPP agreement as well as each year during the term of this PPP agreement on [] information on performance against KPI targets and performance failure, as well as copies of performance assessments (such as private party reports (SPV self-reporting)). Cross reference to performance information clauses (if necessary) or omit altogether if fully addressed elsewhere in the project agreement.

Audited Financial Statements

- 5.5 The [Private Party] shall provide to the [Contracting Authority] audited financial statements annually and no later than [180] days after the end of the fiscal year of the [Private Party].

Enforcement of Reporting and Information Obligations

5.6 The parties agree that the scope of services under this PPP agreement includes obligations of the [Private Party] to provide information as set out in [Section/Subsection [] of this Agreement to the [Contracting Authority] and that failure to do so will constitute a breach of its obligations under this agreement.

Schedule []

Format for submission of summary project information for disclosure

PPP AGREEMENT INFORMATION *(submitted within 30 business days of execution of the project agreement (commercial close) and updated at financial close and in case of any change)*

- Public authority: name of authority, name of representative, address, telephone, fax, e-mail
- Private party: name of company or consortium, name of representative, address, telephone, fax, e-mail
- Financial structure (figure showing debt/equity/proportion/providers) (provide link to company registry) (to be provided within 30 business days of financial close)
- Copies of project documents

RISKS

RISK	DESCRIPTION	ALLOCATION

GOVERNMENT SUPPORT

Guarantees
Grants
Availability/annuity payment schedule
Land leases, asset transfers
Other support
Revenue share, if any

TARIFFS

Tariffs and pricing

TERMINATION PROVISIONS

PARTY	BRIEF DESCRIPTION OF EVENT OF DEFAULT
Concessionaire	
Authority	

Handback terms and conditions

RENEGOTIATIONS

RENEGOTIATION 1	RENEGOTIATION 2	RENEGOTIATION 3	RENEGOTIATION 4

Schedule []

Format for submission of performance information for public disclosure

PERFORMANCE INFORMATION (*key performance indicators and target summary to be submitted within 30 business days of financial close and achievement and performance failure information to be updated annually*)

KEY PERFORMANCE INDICATORS	Year 1		Year n	
	Target	Achievement	Target	Achievement

Performance failures

YEAR	
Category of failure	
Number of events	
Penalty or abatement provided in contract	
Penalty or abatement imposed	
Penalty paid or abatement effected: Yes/No	

Performance assessments	Extracts of special purpose vehicle reports
--------------------------------	---

Schedule []

Payment deductions for noncompliance with the obligation to provide information

Period of delay in compliance	Payment deduction

Schedule []

Confidential information

Clauses/schedules	Period for which information will remain confidential

Annex E: Comparison of the World Bank Framework, Current Disclosure Practice, and Agreed Guidelines for Kenya

	WORLD BANK FRAMEWORK	CURRENT DISCLOSURE PRACTICE IN KENYA	AGREED FRAMEWORK
1.	<i>BASIC PROJECT INFORMATION</i>		
1.1.	Name	Y	Y
1.2.	Location	Y	Y
1.3.	Sector	Y	Y
1.4.	Sponsoring agency/department	Y	Y
1.5.	Estimated project value	Y	Y
1.6.	Project need: benefits provided, economic and social (including specific information on the public interest aspect)	Y/N	Y
1.7.	Stakeholder consultations	N	Y
1.8.	Reason for selection of PPP mode and type in brief	N	Y
1.9.	Brief description of other modes analyzed and reasons for rejecting these	N	Y
1.10.	Technical description of the physical infrastructure	N	Y
1.11.	Dates of various approvals	N	Y
1.12.	High-level description of the services	Y	Y
1.13.	Estimated demand to be served annually	N	Y
1.14.	Project additionality	N	Y
1.15.	Name and deliverables of the transaction advisor	Y	Y
2.	<i>CONTRACT MILESTONES AND DOCUMENTS</i>		
2.1.	Date of execution of project agreement (commercial close)	N	Y
2.2.	Date of financial close	N	Y
2.3.	Date of commencement of construction or development	Y/N	Y

2.4.	Date of completion of construction or development	N	Y
2.5.	Date of commissioning	N	Y
2.6.	Date of contract expiry	Y	Y
2.7.	All contract documents (with appropriate redactions)	N	Y
3.	<i>PARTIES TO THE CONTRACT WITH CONTACT DETAILS</i>		
3.1.	Public authority: name of authority, name of representative, address, telephone, fax, e-mail	Y	Y
3.2.	Private party: name of company or consortium, name of representative, address, telephone, fax, e-mail	Y	Y
3.3.	Financiers: name of lead financial institution, other financial institutions, name of representative of lead financial institution, address, telephone, fax, e-mail	N	Y
4.	<i>Procurement Information</i>		
4.1.	Dates and summary details	Y	Y
4.2.	Final feasibility study	N	Y
4.3.	Land acquisition, rehabilitation, social- (including information on human rights impact assessment) and environmental assessment-related information	N	Y
4.4.	Reports of independent procurement auditors (if any)	N	NA
4.5.	<i>Procurement documents</i>		
4.5.1.	Request for Qualifications	Y	Y
4.5.2.	Pre-qualification or short list	Y	Y
4.5.3.	Request for Proposals	N	Y
	Evaluation criteria: brief description with weightage	Y	Y
	Brief information on constitution of the evaluation committees	N	N
	Negotiation parameters: brief description of the parameters for negotiation with preferred proponent	N	N
	Minutes of pre-bid meetings	N	N
4.5.4.	Selection of preferred bidder	Y	Y
5.	<i>RISK</i>		

5.1.	Pre-construction risk: all risks up to financial close	N	Y
5.2.	Construction/completion	N	Y
5.3.	Cost risk: capital, operating	N	Y
5.4.	Refinancing risk	N	Y
5.5.	Risk related to change in law, taxes, scope, technical standards, regulatory framework	N	Y
5.6.	Exchange rate risk	N	Y
5.7.	Operating risk	N	Y
5.8.	Commercial risk, market risk, demand risk	N	Y
5.9.	Performance risk	N	Y
5.10.	Financial risk	N	Y
5.11.	Force majeure risk	N	Y
5.12.	Environmental risk	N	Y
5.13.	Social risk	N	Y
6.	<i>EVALUATION OF PPP OPTION (VALUE FOR MONEY OR OTHER APPROACH USED)</i>	N	Y
6.1.	Evaluation report (value for money or other)	N	N
6.2.	Rationale for doing the project as a PPP, including any qualitative or quantitative value-for-money, final feasibility studies (including cost-benefit analysis, if any) or other analysis that might have been used, including nonfinancial benefits that have been quantified or considered	N	Y
6.3.	Discount rates used along with the risk premium used, if any, and an explanation for the rate of risk premium used, referring to guidance, if any, available in this regard or describing project-specific circumstances that justify the risk premium rate used	N	Y
6.4.	Risk comparison of other financing mechanisms	N	Y
7.	<i>FINANCIAL INFORMATION</i>	N	Y
7.1.	Equity-debt ratio	N	Y
7.2.	Share capital	N	Y
7.3.	Shareholders with proportion held and voting rights	N	Y
7.4.	Details of any provisions related to contracts providing for caps on equity transfer in	N	Y

	different stages of the contract, especially during the construction stage and for a few years thereafter		
7.5.	Commercial lenders, institutional investors, bilateral or multilateral lenders, public issue of bonds, supplier credit, other	N	Y
7.6.	Categorize senior debt, mezzanine debt, other	N	Y
7.7.	Amount and tenor of each, fixed or floating rate	N	Y
7.8.	Security and step-in arrangements	N	Y
7.9.	Forecast internal rate of return	N	Y
8.	GOVERNMENT SUPPORT	N	Y
8.1.	<i>Guarantees (type and details of the guarantees provided—both explicit and contingent guarantees)</i>	N	Y
8.1.1.	Minimum revenue guarantee	N	Y
8.1.2.	Exchange rate guarantee	N	Y
8.1.3.	Debt repayment guarantee	N	Y
8.1.4.	Other guarantees	N	Y
8.1.5.	Fiscal commitments and contingent liability disclosure reports	N	Y
8.2.	<i>Grants</i>	N	Y
8.2.1.	Subsidy as a proportion of project value	N	Y
8.2.2.	Capital subsidies paid during construction with periodicity or milestones	N	Y
8.2.3.	Operating subsidies and their periodicity or milestones	N	Y
8.3.	<i>Service payments (payments made by the public authority or purchaser to the private provider for infrastructure services (applicable in private finance initiative–type projects))</i>	N	Y
8.3.1.	Total payments and periodicity	N	Y
8.3.2.	Methodology for calculating payments	N	Y
8.3.3.	Indexation used	N	Y
8.4.	<i>Land leases, asset transfers</i>	N	N
8.4.1.	Property numbers with the quantum of land transferred	N	N
8.4.2.	Zoning information of land	N	N

8.4.3.	Conditions of transfer of land	N	N
8.4.4.	Equipment transfers: details of equipment with conditions of transfer	N	N
8.4.5.	Human resources/personnel transfers: details and conditions of transfer	N	N
8.5.	<i>Other support</i>	N	N
8.5.1.	Non-complete clauses	N	Y
8.5.2.	Provision for revenue shortfall loan	N	N
8.6.	<i>Revenue share, if any</i>	N	
8.6.1.	Revenue share on base case	N	N
8.6.2.	Revenue share on upside	N	N
8.6.3.	Graphs: annual concessionaire payments to government	N	Y
9.	TARIFFS	N	
9.1.	<i>Tariffs and pricing (where the infrastructure is financed partly or fully through the levy of user charges)</i>	N	Y
9.1.1.	Methodology for tariff setting/pricing	N	Y
9.1.2.	Scope for reviews of tariff, pricing, regulatory mechanisms	N	Y
9.1.3.	Graphs: tariff increases over time, consumer price index movement	N	Y
10.	CONTRACT TERMINATION	N	
10.1.	Concessionaire: events of default, termination of payments made, methodology used for total payments	N	Y
10.2.	Authority: events of default, termination of payments made, methodology used for total payments	N	Y
11.	RENEGOTIATIONS	N	
11.1.	Nature of variation	N	Y
11.2.	Rationale for variation	N	Y
11.3.	Change in roles and responsibilities of the parties due to the variation, if any	N	Y
11.4.	Change in original risk allocation due to the variation, if any	N	Y
11.5.	Change in original fiscal commitments or contingent liabilities of government due to the variation, if any	N	Y

11.6.	Change in capital or operational costs due to the variation, if any	N	Y
11.7.	Change in tariffs or service levels due to the variation, if any	N	Y
11.8.	Date of variation	N	Y
12.	<i>PERFORMANCE INFORMATION</i>	N	
12.1.	Annual demand levels	N	Y
12.2.	Annual revenues (where revenue share clauses or other related clauses, such as minimum revenue guarantees, are present in the contract)	N	Y
12.3.	Actual internal rate of return (where there is government equity investment or other form of government support that is substantial)	N	Y
12.4.	Performance (actual year-wise performance against 10 to 12 identified key performance indicators)	N	Y
12.5.	<i>Performance failures</i>	N	Y
12.5.1.	Year	N	Y
12.5.2.	Category of failure	N	Y
12.5.3.	Number of events	N	Y
12.5.4.	Penalty or abatement provided in contract	N	Y
12.5.5.	Penalty or abatement imposed	N	Y
12.5.6.	Penalty paid or abatement effected	N	Y
12.6.	<i>Performance assessments</i>	N	Y
12.6.1.	Audit reports	N	Y
12.6.2.	Independent performance assessments of the independent engineer	N	Y
12.6.3.	Any other performance reports available for the project	N	Y

The World Bank Group provides assistance to governments in developing countries to improve access to infrastructure and basic services through public-private partnerships (PPPs). When designed well and implemented in a balanced regulatory environment, PPPs can bring great efficiency and sustainability to the provision of such public services as water, sanitation, energy, transport, telecommunications, healthcare, and education.

The World Bank Group's unique value proposition rests with its capacity to provide support along the entire PPP cycle—upstream policy and regulatory guidance, transaction structuring advice, as well as financing and guarantees to facilitate implementation.



worldbank.org/ppp



@WBG_PPP #PPPs