



REPUBLIC OF ZAMBIA

REPORT

OF THE

COMMITTEE ON NATIONAL ECONOMY, TRADE AND LABOUR MATTERS

ON THE

PUBLIC-PRIVATE PARTNERSHIP (AMENDMENT) BILL, N.A.B. NO 7 OF 2018

FOR THE

**SECOND SESSION OF THE TWELFTH NATIONAL ASSEMBLY
APPOINTED ON WEDNESDAY, 20TH SEPTEMBER, 2017**

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REPORT OF THE COMMITTEE ON NATIONAL ECONOMY, TRADE AND LABOUR MATTERS ON THE PUBLIC-PRIVATE PARTNERSHIP (AMENDMENT) BILL, N.A.B. NO 7 OF 2018, FOR THE SECOND SESSION OF THE TWELFTH NATIONAL ASSEMBLY APPOINTED ON WEDNESDAY, 20TH SEPTEMBER, 2017

Consisting of:

Dr S Musokotwane, MP (Chairperson); Ms M Miti, MP (Vice Chairperson); Mr G G Nkombo, MP; Mr E M Mwila, MP; Mr C Chali, MP; Mr D Chisopa, MP; Dr S Kopulande, MP; Mr D Livune, MP; Mr E Kamondo, MP; and Mr M Mubika, MP.

The Honourable Mr Speaker
National Assembly
Parliament Buildings
P O Box 31299
LUSAKA

Sir

1. Your Committee on National Economy, Trade and Labour Matters has the honour to present its Report on the Public-Private Partnership (Amendment) Bill, N.A.B. No. 7 of 2018, referred to it by the House on Wednesday, 13th June, 2018.

FUNCTIONS OF THE COMMITTEE

2. The functions of your Committee are provided under Standing Order 157 (2). In this regard, Standing Order (157) (2) (v) mandates your Committee to consider Bills referred to it by the House.

MEETINGS OF THE COMMITTEE

3. Your Committee, in considering the proposed legislation, held eight (8) meetings during which it interacted with various stakeholders and examined in detail the submissions presented before it.

PROCEDURE ADOPTED BY THE COMMITTEE

4. In order to acquaint itself with the ramifications of the Bill, your Committee sought both written and oral submissions from different stakeholders. The list of witnesses who submitted comments and appeared before your Committee is at Appendix I of this Report.

OBJECTS OF THE BILL

5. The objects of the Bill are to:

- a) revise the functions of the Public-Private Partnership Unit in the Department of the Ministry responsible for finance;
- b) revise the functions of the Public-Private Partnership Council; and
- c) provide for matters connected with, or incidental to, the foregoing.

SALIENT PROVISIONS OF THE BILL

6. The salient provisions of the Public-Private Partnership (Amendment) Bill, N.A.B. No. 7 of 2018, are as set out hereunder.

Clause 2-Amendment of Section 3

Clause 2 deletes the definitions of “local authority” and “Unit”. The Clause also inserts the definition of “Consolidated Fund” to have the same meaning given to the term in the Constitution.

The Clause further inserts the definition of “Department”, which refers to the Department that is established under the proposed Clause 4 to perform the functions of a Public-Private Partnership Unit for the purposes of Public- Private Partnerships undertaken under the Act. It also aligns the definition of “local authority” with the definition of the term in the Constitution.

Clause 3-Amendment of Section 4

Clause 3 amends Section 4 of the Act by the deletion of Section 4 and substitution therefor of a new Section 4 which establishes the Public-Private Partnership Department. The Department shall be under the control and supervision of the Ministry responsible for finance.

Clause 4-Amendment of Section 5

Clause 4 repeals Section 5 and replaces it with a new Section 5 that provides for the revised functions of the Department. Some of the functions provided for are to recommend to the Government on the use of Public-Private Partnerships in the financing, construction, maintenance and operation of any project; advise the Government on administrative procedures in relation to the project development and on matters of policy relating to Public-Private Partnerships; and develop technical and best practice guidelines in relation to all aspects of Public-Private Partnerships, standardised bidding documents and public-private partnership agreement provisions for the purposes of this Act.

Clause 5- Amendment of Section 7

Clause 5 repeals Section 7 of the Act and replaces it with a new Section 7 that provides for the functions of the Council. Some of the functions provided for are to formulate policies relating to Public-Private Partnerships for purposes of the Act, as well as to approve projects and award agreements for purposes of the Act.

Clause 6-Amendment of Section 8

Clause 6 deletes paragraph (b) of Section 8 of the Act and replaces it with a new paragraph that provides for the composition of the Council consisting of five

Ministers appointed by the President, one of whom shall be designated Vice-Chairperson.

Clause 7-Amendment of Section 10

Clause 7 repeals Section 10 of the Act and replaces it with a provision relating to the constitution of the Public-Private Partnership Technical Committee as well as its composition. The Clause further provides that the members of the Technical Committee appointed by the Minister shall hold office for a term of three years from the date of appointment and are eligible for appointment for a further term of three years. The Clause furthermore provides for the instances when the office of member of the Technical Committee becomes vacant.

Clause 8-Amendment of Section 14

Clause 8 repeals Section 14 of the Act and replaces it with a provision which allows for the appointment of a Director of the Public-Private Partnership Department who shall be responsible for the administration of the Department in accordance with the Act. The Clause further provides for other officers that are necessary for the operation of the Department to be appointed by the Civil Service Commission.

Clause 9-Amendment of Sections 26 to 35

Clause 9 repeals and replaces sections 26 to 35 to distinctively refer to a technical proposal and financial proposal in the Act.

Clause 10- Amendment of Clause 43

Clause 10 amends paragraph (q) of Section 43 of the Act by inserting the words "including proceeds arising from projects" immediately after the word "terms".

Clause 11-Insertion of new Section 65A

Clause 11 provides for a new Section 65A which provides that a contracting authority shall remit a percentage of the fees collected as determined by the Council to the Department.

Clause 12-Amendment of Section 67

Clause 12 provides for the deletion of sub-section (2) of Section 67 of the Act.

Clause 13-Amendment of the Second Schedule

Clause 13 proposes the amendment of paragraph 2 of the Second Schedule by the deletion of sub-paragraph (5) and substitutes it with a provision revising the quorum for Council meetings. The provision stipulates that five members shall constitute a quorum at a meeting of the Council.

Clause 14- General Amendment

Clause 14 provides for a general amendment of the words "Unit" to "Department", "Public Service Commission" to "Civil Service Commission", and "Notwithstanding" to "Despite", wherever the words appears in the Act.

CONCERNS RAISED BY STAKEHOLDERS

7. Generally speaking, all stakeholders were of the view that the proposed PPP Bill is progressive as it provides safeguards in the contraction of public-private partnerships. They explained that this will enhance public confidence and ensure successful implementation of public-private partnerships in Zambia. They argued further that unlike resorting to borrowing to finance development, PPPs have the advantage of minimising debt contraction. This is so because, in most cases private capital is used to finance these projects which then generate resources to enable the developers recoup their investment from the project itself.

Furthermore, the coordinated approach to analysing proposed public-private projects will ensure consistence in the manner these partnerships are approved. This will enhance project assessment and ensure that only viable projects are selected for partnerships thereby creating value for money.

In supporting the Bill, stakeholders, however, raised the concerns set out hereunder.

i) Clause 10: Composition of the Technical Committee

Some stakeholders were concerned that the part-time Members of the PPP Council and the Technical Committee were mainly high level Government officials. While it is appreciated that this was meant to introduce effective oversight at the highest level of Government, it might create problems at implementation. They argued that the Government officials had other core responsibilities and as such they would not dedicate ample time to the work of the Council or indeed the Technical Committee.

Other stakeholders were concerned that the membership of the Technical Committee was not flexible to accommodate different expertise considering that PPPs cut across various sectors including Energy, ICT, Aviation, Road Infrastructure to mention just a few. They were of the view that specialised sectors required certain expertise and qualifications that might be missing among the membership represented on the Technical Committee. This will not only adversely affect the quality of the PPP projects but also disadvantage negotiation position of the Government before entering into PPPs. They advocated for the need to have a flexible membership of the Technical Committee which would allow for co-opting members of the public who are highly qualified on a full time basis. This would also enhance commitment and sense of ownership.

ii) Clause 5: Approval or rejection of project or award of an agreement

Some stakeholders noted that the functions of the PPP Council are streamlined and that it retains the authority to approve or reject projects or awards of agreements. However, Clause 5(2) suggests that the Council shall receive recommendations from the PPP Department which is in apparent conflict with Clause 5 which states that recommendation of awards and projects is the function of the PPP Technical Committee.

Stakeholders further observed that the 21 day time limitation for the PPP Council to approve or reject projects or awards of agreements does not appear in the Bill. This is likely to affect timeliness negatively.

iii) Clause 14: Designation of the Director of the PPP under Civil Service Commission

Stakeholders were concerned that Clause 14 provides that the Director and staff of the PPP Department shall be civil servants. Further, the Director shall be an *ex officio* member of the PPP Technical Committee. The stakeholders were of the view that this provision would compromise the autonomy of the Department and subject it to the civil service bureaucracy thereby fail to serve well the intended purpose.

iv) Clause 9: Amendment of Clauses 26 to 35 inclusive

Stakeholders observed that the same tedious process and procedure for receipt and evaluation of bids has been retained in the Bill. They argued that over the years, the experience had been that this elaborate process was strenuous on both contracting authorities and proposed concessionaires.

v) Clause 11: Insertion of 65A

Some stakeholders were concerned that some PPP projects could be very expensive and the Treasury may not always be ready to fund such projects or the relevant feasibility studies. The challenge of limited funding might negatively affect the conclusion of negotiations on time or derail the process of assessing the proposals from the private sector as to whether or not they meet the minimum criteria of affordability, value for money and whether they optimise the risk allocation between Government and the private sector.

The stakeholders were of the view that since insertion of Clause 65A of the Amendment Bill gives power to a contracting authority to remit a percentage of the fees to the Department to defray administrative costs, there should be a provision to allow the PPP Department to retain some of the funds raised through PPP projects for purposes of funding other projects.

vi) High Fees may Discourage Participation

Other stakeholders complained that high fees would make PPP participation by private sector even more expensive. Contracting Authorities may also use such resources to cover or recover costs in studies, project document preparations, advertisements and evaluations. The proposal by stakeholders is that the PPP Department costs for the proposed activities should be fully funded by the line ministry and hence the Clause must be deleted from the bill.

vii) Regulation vs. Promotion of PPPs

Some stakeholders were concerned that the proposed amendments placed more emphasis on regulation of PPPs when what was needed was the promotion of PPPs. They explained that contracting authorities usually face many challenges in undertaking PPP processes which include among others; limited capacity to originate or manage PPPs. With the orientation shifting towards regulation, stakeholders fear that the desire by contracting authorities to pursue PPPs is likely to

reduce. They argued that the proposed amendments would not improve the implementation of PPPs as intended but rather make it more bureaucratic.

COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

8. Your Committee's observations and recommendations are as outlined below.
- i) Your Committee bemoans the lack of capacity exhibited by public officers in the negotiations of PPPs Agreements with private firms. One case in point is the University of Zambia whose PPP project has no clarity to date as to what period was agreed upon with the concessionaires. Further, on this project, it has been noted that there is a variation on the intended scope of works on this contract which your Committee finds highly irregular. It is not clear to your Committee why the contract was varied from the initial building of student hostels to building other infrastructure including; warehouses, bars and shops among others.

Your Committee strongly recommends that the new PPP institution must ensure that there is adequate capacity in the contracting authority before undertaking any PPP project. In the case of University of Zambia, your Committee recommends that the agreement must be re negotiated without any further delay to protect public good. Your Committee also recommends that the law must clearly define the PPP agreement structure as well as spell out the minimum and maximum period of a concession. Furthermore, in order to ensure strict adherence to regulations governing PPPs, your Committee strongly recommends that punitive measures must be clearly defined in the Act to deter would be violators.

- ii) Your Committee notes that although the Secretary to the Treasury is designated to Chair the Technical Committee under clause 10, it has been observed that the composition of the team does not include the Permanent Secretary responsible for Finance. Further, your Committee feels it is an omission leaving out the Ministry of Works and Supply on the members of the council given that they need to be involved from design stage in order to carry out maintenance effectively.

Your Committee recommends that it is necessary to include the Permanent Secretary, Ministry of Finance on the technical team as it is responsible for the day to day operation of the Public-Private Partnerships and maybe better placed to advise on financial matters. Further your Committee recommends that the Ministry of Works and Supply be included on the members needed to constitute a council.

- iii) Your Committee observes that the functions of the PPP Department cut across various Ministries, Provinces and Other Spending Agencies (MPSAs). Therefore, the rationale that was used to place it under the 'control' and 'supervision' of the Ministry of Finance is not clear. Further, your Committee notes that some key functions of the Ministry responsible for Finance were

transferred to the new established Ministry of National Development Planning. Hence, your Committee feels that the latter could be better placed to house this department. Furthermore, in agreeing with stakeholders who appeared before it, your Committee observes that there isn't much that will change in the new proposed functions since the PPP Department will still be subjected to bureaucracy that exists within ministries.

Your Committee, therefore, recommends that the Unit should be established as an independent agency/authority of the Government rather than be a Department under a Government Ministry. Your Committee feels that this will enhance its efficiency and objectivity. It will additionally provide more authority to recommend and advise the Government on fast growing areas of infrastructure development through PPP's.

- iv) Your Committee observes with concern that, under the current and proposed procedures, a feasibility study on a PPP project is only supposed to be undertaken by an independent entity. Contracting authorities are not allowed to undertake the study even if they have all the expertise for the task.

Your Committee, therefore, recommends that contracting authorities which have the capacity to undertake feasibility studies should be allowed to do so while validation may be carried out by an independent company to give credibility to would-be concessionaires. This can save time and resources for the already constrained contracting authorities. Your Committee further recommends that the New PPP institution yet to be established must include a specialised function to help undertake feasibility studies especially on projects under some institutions without the relevant requisite capacities.

- v) In Clause 7 of the bill, your Committee observes with concern that the Vice Chairperson of the Public-Private Partnership Technical Committee is supposed to be appointed by the Minister. It is not clear as to why this power of appointment as well as determination of allowances to be paid to the technical committee has been given to the Minister.

Your Committee finds this as an irregularity and hence recommends that a vice chairperson must be elected from among members of the Technical Committee while payments to do with allowances must be left with the Cabinet Office through its periodic circulars.

- vi) Your Committee observes that the Bill has not given clear guidelines on the full process that must be followed from the start to the end of the PPP process. Currently, the process takes too long and this negatively affects the achievement of the intended objectives.

Your Committee strongly recommends that the Bill should include a clear understanding of the full process of activities including the type of reports that have to be submitted by the contracting authorities to help reduce

unnecessary delays. The PPP Council should also find other ways of reducing the time of completing the PPP process.

- vii) Your Committee expresses concern at the lack of clarity on the treatment of unsolicited proposals on PPP.

It is recommended by your Committee that there must be clarity with regards their treatment in order to avoid leaving lacunas in the execution of PPPs.

CONCLUSION

9. Your Committee wishes to pay tribute to all stakeholders who appeared before it and tendered both oral and written submissions. It also wishes to thank you, Mr Speaker, for affording it an opportunity to study the Bill. Your Committee also appreciates the services rendered by the Office of the Clerk of the National Assembly and her staff for the support rendered during its deliberations.

We have the honour to be, Sir, your Committee on National Economy, Trade and Labour Matters mandated to consider the Public-Private Partnership (Amendment) Bill, N.A.B. No. 7 of 2018.

Dr S Musokotwane, MP
(Chairperson)

Ms M Miti, MP
(Vice Chairperson)

Mr G G Nkombo, MP
(Member)

Mr E M Mwila, MP
(Member)

Mr C Chali, MP
(Member)

Mr D Chisopa, MP
(Member)

Dr S Kopulande, MP
(Member)

Mr D Livune, MP
(Member)

Mr E Kamondo, MP
(Member)

Mr M Mubika, MP
(Member)

June, 2018
LUSAKA

Dr S Musokotwane
CHAIRPERSON

APPENDIX I - WITNESSES

The Copperbelt University

Prof. M Ngoma, Vice Chancellor

Ms M Mulinchine, Business Development (BDM) Manager

Mr S K Mumba, Legal Counsel

Zambia Revenue Authority

Mr K Chanda, Commissioner General

Mr E Phiri, Director Research

University of Zambia

Mr S Wamundila, Registrar

Mr A Nyirenda, Resident Engineer

Public-Private Partnership Unit

Mr K Shisholeka, Director

Mrs C Mulenga, Acting Assistant Director

Assistant Director – Monitoring and Evaluation

Ministry of Transport and Communication

Eng. M Lungu, Permanent Secretary

Mr S Mbewe, Director Planning

Mrs S Ngosa, Planner

Mrs L Mazuba, Planner

Bank of Zambia

Dr B Ng'andu, Deputy Director – Operations

Mr C Habasonda, Senior Policy Analyst

Mr E Chokwe, Economist

Mr L Kalinda, Lawyer

Mr B Milambo, Economist

Mr F Tamba, Accountant

Mr G Chiluba, Economist

Development Bank of Zambia

Mr D Lushinga, Managing Director

Ms E Kambobe, Head Peer Economic, Post evaluation and Research

Ms E Chirwa, Head Regulatory and Compliant

ZESCO

Mr W Musonda, Acting Managing Director

Mr M Chiwala, Director Legal

Mr C Simwanza, Senior Manager

Ministry of Works and Supply

Mrs A Musunga, Permanent Secretary

Mr B Chuma, Director

Mr C Makasa, Director Planning

Ministry of Housing and Infrastructure Development

Eng. C Mushota, Permanent Secretary

Ms T Katongo, Chief Purchasing and Supplies Officer

Ms A Kambani, Principal Planner

Mr D Mfunne, Director

Ministry of Finance

Mr E M Pamu, Permanent Secretary

Mr A Imwiko, Assistant Director

Mr C M Lusumpa, Principal Economist

Mr K Shisholeka, Director – Public-Private Partnership Unit

Ministry of National Development Planning

Mr C Chabala, Permanent Secretary

Mr M Maketa, Director Planning

Mr C Muleya, Director Public Investment Planning

Mr H Tembo, Principal Planner

APPENDIX II - List of National Assembly Officials

Ms C Musonda, Principal Clerk of Committees

Mr H Mulenga, Deputy Principal Clerk of Committees (FC)

Mr S Mtambo, Senior Committee Clerk (FC)

Mr D Kunda, Committee Clerk

Mr A Chilambwe, Committee Clerk

Ms L Chilala, Typist

Mr M Chikome, Committee Assistant

Mr M Kantumoya, Parliamentary Messenger