



REPUBLIC OF ZAMBIA

REPORT

OF THE

COMMITTEE ON TRANSPORT, WORKS AND SUPPLY

ON THE

PUBLIC- PRIVATE PARTNERSHIP BILL, N.A.B. NO. 18 OF 2023

FOR THE

THIRD SESSION OF THE THIRTEENTH NATIONAL ASSEMBLY

Printed by the National Assembly of Zambia

FOREWORD

Honourable Madam Speaker, the Committee on Transport, Works and Supply, has the honour to present its Report on the Public-Private Partnership Bill, N.A.B 18 of 2023, for the Second Session of the Thirteenth National Assembly. The functions of the Committee are set out under Standing Orders 197(n) and 198(j) of the National Assembly of Zambia Standing Orders, 2021.

In order to acquaint itself with the ramifications of the Bill, the Committee sought both written and oral submissions from various stakeholders, the list of which is at Appendix II. The Committee held ten meetings to consider submissions on the Public-Private Partnership Bill, N.A. B. No. 18 of 2023.

The Committee wishes to pay tribute to all stakeholders who appeared before it and tendered both oral and written submissions. It further wishes to thank you, Madam Speaker, for according it an opportunity to interrogate the Bill. The Committee also appreciates the services rendered by the Office of the Clerk of the National Assembly during its deliberations.

A handwritten signature in blue ink, consisting of stylized initials 'MM' followed by a horizontal line and a final flourish.

Mr Mubika Mubika, MP
CHAIRPERSON

November, 2023
LUSAKA

TABLE OF CONTENTS

FOREWORD.....	2
1.0 MEMBERSHIP OF THE COMMITTEE.....	1
2.0 BACKGROUND.....	1
3.0 OBJECTS OF THE BILL	1
4.0 SALIENT PROVISIONS OF THE BILL.....	1
PART I.....	2
PART II.....	2
Clauses 4 to 6 ó Public-Private Partnership Office.....	2
PART IV	2
Clauses 11 to 39 ó Solicited Proposals	2
PART V	2
Clauses 40 to 47 ó Unsolicited Proposals	2
PART VI.....	2
Clauses 48 and 49 ó Direct Procurement	2
Clauses 50 to 54 ó General Procurement Provisions	3
PART VIII	3
Clauses 55 to 79 ó Public-Private Partnership Agreements.....	3
PART IX.....	3
Clauses 80 and 81 ó Participation in Small and Medium Scale Public-Private Partnerships	3
PART X	3
Clause 82 to 89 ó Public-Private Partnership Project Development Support Fund.....	3
PART XI.....	3
Clause 90 to 96 ó General Provisions	3
5.0 CONCERNS RAISED BY STAKEHOLDERS	3
PART I.....	4
PRELIMINARY PROVISIONS.....	4
PART II.....	4
PUBLIC-PRIVATE PARTNERSHIP OFFICE	4
PART III	5
THE PUBLIC-PRIVATE PARTNERSHIP COUNCIL AND TECHNICAL COMMITTEE.....	5
PART IV	6
SOLICITED PROPOSALS	6
PART V	6
UNSOLICITED PROPOSALS	6
PART VI.....	7
DIRECT PROCUREMENT	7

PART VII.....	7
GENERAL PROCUREMENT PROVISIONS.....	7
PART VIII.....	8
PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS	8
PART XI.....	9
GENERAL PROVISIONS	9
5.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS	10
6.0 Conclusion.....	15
Appendix I.....	17
Appendix II.....	18

1.0 MEMBERSHIP OF THE COMMITTEE

The Committee consisted of Mr Mubika Mubika, MP (Chairperson); Mr Joel Chibuye, MP; (Vice Chairperson), Ms Tasila E Lungu, MP; Mr Emmanuel M Musonda, MP; Mr Sunday C Chanda, MP; Mr Charles A Mulenga, MP; Mr Mutotwe L Kafwaya, MP; Mr Francis Kapyanga, MP; Mr Bernard Kanengo, MP; and Mr Lloyd Lubozha, MP.

2.0 BACKGROUND

Since the *Public-Private Partnership Act, No. 14 of 2009* and the *Public-Private Partnership Act, No. 9 of 2018* were passed, the Government continued to face challenges in implementing Public-Private Partnership (PPP) projects. Notable among the challenges were lack of autonomy, capacity, and adequate funding for the PPP Unit. The challenges were also exacerbated by lack of transparency in the selection, awarding, and approval procedures of potential concessionaires.

The proposed Bill, therefore, sought to strengthen the institutional framework of public-private partnerships, rename the Public-Private Partnership unit, and establish it as the Public-Private Partnership Office. The Bill, once passed, would regulate the implementation of PPPs, and repeal the *Public-Private Partnership Act, No. 14 of 2009*, which in turn, would enhance regulatory environment and bring it in line with global best practices.

3.0 OBJECTS OF THE BILL

The objects of the Bill were to:

- a. regulate the implementation of public-private partnerships in the Republic;
- b. promote the participation of the private sector in the design, financing, construction, development, operation or maintenance of infrastructure or delivery of services through public-private partnerships;
- c. provide for the procedures for the approval, award and implementation of public-private partnerships projects in accordance with principles of transparency, fairness, stability, proper management, integrity, competition, economy and long term sustainability;
- d. provide for rehabilitation, modernisation, expansion and operation of existing infrastructure facilities and systems and their maintenance;
- e. strengthen the institutional framework for the implementation of public-private partnership projects;
- f. provide for the establishment of the Public-Private Partnership Office;
- g. provide for a transparent project selection process, clear procurement procedures, effective regulatory approvals and expanded contractual models in order to promote private sector investment;
- h. provide for the establishment of the Public-Private Partnership Project Development Support Fund;
- i. repeal and replace the *Public-Private Partnership Act, No. 14 of 2009*; and
- j. provide for matters connected with, or incidental to, the foregoing.

4.0 SALIENT PROVISIONS OF THE BILL

The salient provisions of the Bill were set out hereunder.

PART I

Clauses 1 to 3 – Preliminary Provisions

Part I of the Bill provided for the citation of the Act once enacted, interpretation section as well as a clause restricting its application.

PART II

Clauses 4 to 6 – Public-Private Partnership Office

Part II of the Bill provided for the continuation and renaming of the Public-Private Partnership Unit and re-named it as the Public-Private Partnership Office and set its functions. It also provided for the appointment of the Director-General as well as other staff.

PART III

Clauses 7 to 10 – Public-Private Partnership Council and Technical Committee

Part III sought to establish the Public-Private Partnership Council, its functions, as well as constitute a Technical Committee and provide for its functions.

PART IV

Clauses 11 to 39 – Solicited Proposals

This Part provided for project identification and conceptualisation; submission of project list; conceptualisation of project by a contracting authority; project identification and conceptualisation by Public-Private Partnership Office; variation of project list; feasibility study; and appraisal of feasibility study report and project proposal. In addition, this Part provided for requests for expression of interest; pre-selection proceedings; participation of consortia; qualification of bidder or consortium; evaluation committee; disqualification of bidder; approval of evaluation report by Public-Private Partnership Office; request for proposals under single stage procedure; request for proposals under two-stage procedure; content of request for proposal and bid securities. Other provision under Part IV include: clarifications and modifications; evaluation criteria; evaluation of proposal; negotiations; approval of negotiations report by Council; notification report by Council; notification of approval of negotiation report by the Council; notification of approval of public-private partnership agreement; notice of award, confidentiality; record of selection and award proceedings, as well as termination or cancellation of procurement proceedings.

PART V

Clauses 40 to 47 – Unsolicited Proposals

This Part provided for submission of unsolicited proposal; preliminary approval of unsolicited proposal; inspection of project site and evaluation of unsolicited proposal. Other provisions include: preliminary approval, due diligence; procurement of unsolicited proposal as well as conditions for changing unsolicited bidding to solicited bidding.

PART VI

Clauses 48 and 49 – Direct Procurement

Part VI provided for circumstances authorising award without competitive procedures as well as procedure for direct procurement.

PART VII

Clauses 50 to 54 – General Procurement Provisions

Part VII of the Bill provided for prohibition of inappropriate influence on evaluation and other matters; standard solicitation documents; special purpose vehicle; technical expertise of contracting authority as well as standards and procedures.

PART VIII

Clauses 55 to 79 – Public-Private Partnership Agreements

Part VIII of the Bill set out the contents and implementation of public-private partnership agreements, factors in determining duration of agreements; Extension of concession period or agreements; property and assets under public-private partnership agreements; public-private partnership model; subcontracting; fiscal commitment; ownership of assets; acquisition of rights related to projects site; compulsory acquisition of land; easement; collection of prescribed fees of levies; security interest; assignment of public-private partnership agreement; transfer of controlling interest in concessionaire and use of infrastructure, asset facility or other service. Other provisions under Part VIII included revision of concessionaire agreement; takeover of project; substitution of concessionaire; winding-up handback; duties of contracting authority; project implementation; contact manager; inspection; financial management and reporting; small and medium scale public-private partnership; as well as small and medium public-private partnership agreement.

PART IX

Clauses 80 and 81 – Participation in Small and Medium Scale Public-Private Partnerships

Part IX of the Bill provided for definition of a small and medium scale public-private partnership. It also provided for a requirement in procurement for a small and medium scale public-private partnership and the duration of the agreement to be determined by the financial model, and negotiated by the parties.

PART X

Clause 82 to 89 – Public-Private Partnership Project Development Support Fund

Part X of the Bill established the Public-Private Partnership Project Development Support Fund, purpose of the Fund, remission of funds; accounts and audit of Fund; annual report of Fund and regulations relating to the Fund as well as recoverable project development cost.

PART XI

Clause 90 to 96 – General Provisions

This Part provided for the appeals procedure for decisions made under the Act.

5.0 CONCERNS RAISED BY STAKEHOLDERS

The stakeholders who appeared before the Committee supported the Bill and in doing so, they raised concerns as outlined below.

PART I

PRELIMINARY PROVISIONS

Clause 2 – Interpretation

On the interpretation of a öbidderö, some stakeholders were of the view that the definition in its current form was too narrow, and therefore, needed to be widened so as to incorporate a consortium in the definition. The incorporation would be in line with the definition under the *Public Procurement Act, No.8 of 2020*.

Further, stakeholders expressed concern that the Bill did not expressly provide for general principles to guide the governance of PPPs such as transparency, fairness, and long-term sustainability of projects. They recommended that the clause should expressly include general guiding principles governing PPPs such as transparency, fairness, long-term sustainability of projects and the elimination of undesirable restrictions on private sector participation in PPP agreements.

Clause 3 – Application

Stakeholders were of the view that the proposed Law and Regulations should not only concentrate on infrastructure projects. They in that regard recommended the inclusion of clause 3 (1) c, to expressly include other sectors in addition to infrastructure such as a service, research and innovation, which should cater for tourism, culture, sports and other relevant sectors. With that inclusion, they contended that it would be easier for specific sectors or subsectors to develop their own regulations regarding PPP implementation when covered under the Act.

PART II

PUBLIC-PRIVATE PARTNERSHIP OFFICE

Clause 6 – Continuation and Renaming of Public-Private Partnership Unit

Stakeholders appreciated the introduction of the Office of the Director-General as provided for under clause 6 as it would enhance the autonomy of the PPP Office. However, they expressed concern at the contents of clause 4(2) as the proposed structure of the PPP Office could be subjected to the bureaucratic red tapes of the Ministry of Finance and National Planning where it would be domiciled. They were of the view that the organisational structure did not necessarily guarantee autonomy, as it suggested that the PPP Office would be functioning within the framework of the Ministry, which could introduce inefficiencies that could be particularly problematic to the time-sensitive nature of PPP projects. In essence, that raised the questions regarding the extent to which the PPP Office could operate independently in fulfilling its mandate.

In view of the foregoing, stakeholders recommended that there was need to strike a balance between maintaining accountability under the Ministry and fostering operational independence, so as not to unnecessarily delay the implementation of PPP agreements.

Further, stakeholders recommended that there was also a need to safeguard the autonomy of the PPP Office for it to effectively carry out its functions while adhering to the necessary checks and balances.

Clause 5 – Functions of Public-Private Partnership Office

- a. Whilst appreciating the functions of the PPP Office provided under clause 5(1) stakeholders recommended that there was need for it to be entrusted with a level of autonomy sufficient to ensure that its decisions were taken without political interference or inappropriate pressures from infrastructure operators and public service providers.
- b. Stakeholders submitted that clause 5(1)b needed to be amended to read as "receive from a contracting authority proposed projects and assess their suitability for implementation using the public-private partnership approach". This would ensure clarity on what was being proposed under the sub-clause.

Clause 6 – Director-General and Other Staff

- a. Stakeholders noted that clause 6(5) needed to be renumbered as 6(4) which was skipped in the Bill, and proposed to delete number 6(5) in the Bill.
- b. Stakeholders submitted that clause 6(5) which should be re-numbered as 6(4) appeared to allow the Civil Service Commission to employ as many staff as possible whenever need arose. In that regard, they recommended that there was a need to come up with regulations that would establish a clear structure for the management of the PPP Office. This was in view of the fact that the country had a constrained fiscal space and therefore, further recommended that appointments should only take place when a clear structure of the PPP Office was established.

PART III

THE PUBLIC-PRIVATE PARTNERSHIP COUNCIL AND TECHNICAL COMMITTEE

Clause 7 – Establishment of Council

Stakeholders supported the appointment of the ministers and criterion of appointment by the President to the Council. However, they were concerned that the President would be empowered to appoint private sector members to the council. Doing so could compromise members' objectivity and erode the Council's credibility. In this vein, they recommended that appointment of the four private sector members should take into account of qualifications, expertise and experience, with clearly defined processes and criterion to guide selection. The approach should outweigh political considerations.

Clause 8 – Functions of Council

Whilst noting one of the functions of the PPP Council under section 8(1)(a), stakeholders proposed to recast it so as to read "Consider for approval any proposed projects from a contracting authority, pre-reviewed and submitted by the Technical Committee".

The measure would ensure that there was a defined level of structure on how project proposals were to be approved or rejected within the legal framework, to allow some form of transparency or predictability in the process.

Clause 9 - Constitution of Technical Committee

Stakeholders noted and appreciated representation of members of the Technical Committee through institutions named under section 9(1)(c). However, they were of the view that the clause needed to predefine the level of experience to avoid the listed institutions submitting

names of persons without the prerequisite qualifications needed for such a strategic undertaking.

PART IV

SOLICITED PROPOSALS

Clause 39 – Termination or Cancellation of Procurement Proceedings

Stakeholders noted that clause 39(1)(d) provided for cancellation of procurement proceedings when there was evidence of collusion among bidders without indicating the role of the Competition and Consumer Protection Commission (CCPC). They, therefore, recommended that the Bill should indicate clearly the role the CCPC would play to avoid collusion by bidders.

PART V

UNSOLICITED PROPOSALS

Clause 40 - Submission of Unsolicited Proposal

- a. Stakeholders noted that the clause introduced the requirement to conduct preliminary evaluations for unsolicited proposals in order to ensure that due diligence was undertaken in ascertaining the viability of the project.

However, stakeholders were of the view that in considering the unsolicited proposals, there was a need to include provisions that made it mandatory for a contracting authority to undertake feasibility studies for unsolicited proposals, as that would play a significant role in ascertaining the viability of the PPP projects and ensure that they were fairly structured to benefit both the Government and the private partner. The requirement was necessary in aligning the National Planning and Budgeting process with section 24 (1) of the *Planning and Budgeting Act, No.1 of 2020*.

- b. Stakeholders noted that clause 40(6) mandated a contracting authority and the PPP Office to take appropriate action to protect the confidential or proprietary information that a bidder provided as part of unsolicited proposal.

However, they were of the view that the requirement for confidentiality could be strengthened and broadened if a contracting authority and the PPP Office were compelled to enter into a non-disclosure agreement with the bidder for unsolicited proposal for purposes of protecting the private sectors' business idea.

Further, stakeholders submitted that evaluation of the unsolicited proposal against a competition proposal needed to include guidelines which offered some advantage to the unsolicited proposal. For instance, the Bill needed to categorically state that if a competing proposal scored less than 90 per cent of the unsolicited proposal, it should out rightly be rejected.

Clause 45 – Due Diligence

Stakeholders submitted that clause 45 seemed to exclude other competing bidders from being subjected to a due diligence. They recommended that the clause should be rephrased to allow for flexibility on the timing on when to undertake a due diligence, which should be during or

before the evaluation stage of competing bids, after approval of the unsolicited proposal. This was because due diligence on competing bidders would help in the evaluation or selection of the preferred bidder.

Clause 46 - Procurement of Unsolicited Proposal

Clause 46 (1) and (2) stated that where the PPP Council approved an unsolicited proposal, a due diligence report would direct a contracting authority to advertise for competitive proposals. However, stakeholders expressed concern that this provision could discourage innovative and high value unsolicited bids because of the risk of losing the opportunity to new competitors.

They, therefore, recommended that there should be another sub-clause that would reward the unsuccessful unsolicited bidder for the innovation if high value unsolicited bids were to be attained. Further, they recommended that the process should be more transparent to avoid undermining the legitimacy of the PPP Programme.

PART VI

DIRECT PROCUREMENT

Clause 48 – Circumstances Authorising Award Without Competitive Procedures

Stakeholders submitted that some provisions under clause 48 on circumstances that would necessitate the use of direct bidding or procuring a PPP project without a competitive bidding process were too general and open to abuse. They, cited clauses 48 (d), (e), and (g) as not being good enough reasons for direct procurement, as they could easily be abused because of their generality.

Stakeholders recommended that sub-clauses (d), (e), (g), and (h) be removed in order to limit opportunities for abuse. Alternatively, the sub-clauses could be streamlined to provide clearer specific reasons that could give rise to direct procurement without competitive procedures.

PART VII

GENERAL PROCUREMENT PROVISIONS

Clause 53 – Technical Expertise of Contracting Authority

Stakeholders submitted that the involvement of transaction advisors under clause 53(1) would help create agreements that were fair, financially sound and aligned with public interest.

However, they were also of the view that the Bill should have clearly outlined the typical roles and responsibilities of the transaction advisors, to serve as a foundational guide for the PPP Office when hiring them.

PART VIII

PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

Clause 55 – Contents and Implementation of Public-Private Partnership Agreement

- a. Stakeholders submitted that in considering the contents of the PPP agreement which included obligations of the parties to the PPP agreement, there was need for the clause to specify that the financial contribution of each party would be made explicit before signing the PPP agreement.

In view of that, they recommended that the Technical Committee or contracted experts should workout the net present values, payback period and return on investments independently, as that would ensure that the concessionaire did not exaggerate the costs of the project.

- b. With regard to clause 55(c) which set out the contents and implementation of PPP agreements that read as, “the assistance that a contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the project,” stakeholders submitted that the provision should also include “consents”.

In that regard, they proposed that clause 55 (c) should read as:

“the assistance that a contracting authority may provide to the concessionaire in obtaining licences, permits *and* ‘consents’ to the extent necessary for the implementation of the project.”

Clause 60 – Subcontracting

Whilst almost all stakeholders supported the need for a concessionaire to subcontract at least ten per cent of the total works of the project to citizen contractors, others were of the view that the threshold should be increased to twenty per cent in order to be consistent with the Subcontracting Policy in Zambia. However, being cognisant of the nature of the PPP model of financing, most stakeholders supported the view that the threshold be maintained at ten per cent so as not to discourage concessionaires from investing if the threshold was very high.

Clause 71 – Revision of Concessionaire Agreement

Stakeholders noted that clause 71(1) provided that subject to subsection (2) and (3), a PPP agreement shall set out conditions for revision and compensation for a concessionaire if the performance of a public-private partnership agreement had substantially increased or that the value that the concessionaire received for such performance had substantially diminished, as compared with the costs and the value of performance.

In that regard, stakeholders recommended that there should be clear provisions to ensure that the possible losses did not cause onerous unplanned budgetary or contingent liability on the Government.

Clause 74 - Winding-up and Handback

It was noted by stakeholders that clause 74(1) mandated a public-private partnership agreement to provide, among other things, compensation to which the concessionaire may be entitled in respect of assets transferred to a contracting authority or to a new concessionaire or purchased by a contracting authority. However, stakeholders argued that internationally, it

was considered that compensation obligation for a cancelled or partly implemented contract was considered as a public debt.

They recommended that adequate measures needed to be taken in order to ensure that the obligation for cancelled or partly implemented contracts did not create a huge debt burden for the State.

Clause 76 – Project Implementation

Under clause 76(3), stakeholders noted that the PPP Office was mandated to provide oversight and guidance on the implementation of each project.

In order to strengthen the oversight role, stakeholders stated that there was need for a comprehensive sub-clause which should clearly outline the scope of oversight, establish procedures for intervention, and establish mechanisms for continuous monitoring.

Further, stakeholders also recommended that the Bill should include a requirement for the PPP to undertake quarterly or annual reporting requirements, site visits and audits depending on the duration of the PPP agreement in order to ensure that projects were delivered on time, within budget, and to the required quality standards.

PART XI

GENERAL PROVISIONS

Clause 90 – Appeals

- a. Clause 90(3) provided that an aggrieved bidder was required to submit an appeal to the PPP Office within ten working days from the date of receipt of a decision of the Council.

Stakeholders were of the view that the timeframe was too short for a bidder to lodge an appeal to the PPP Office if aggrieved by the Council's decision.

They, therefore, recommended that the timeframe for the aggrieved bidder to appeal the Council's decision should be increased to fifteen working days.

- b. Clause 90(6) provided that the decision of the Council on an appeal was final. Based on the sub-clause, stakeholders were of the view that this was unfair to the appellant. They recommended that a bidder aggrieved by the decision of the Council on appeal should be allowed to appeal to the High Court and the decision of the High Court would be final.

They further recommended that the clause should also provide for mitigation against the risk of corruption in the handling of appeals.

Clause 95 – Regulations

Stakeholders observed that the Bill provided for several approval processes under Part IV and V from the PPP Council and the Technical Committee. Further, the *Public Procurement Act, No. 8 of 2020* also provided for approval processes required to be obtained from the Zambia Public Procurement Authority (ZPPA), Treasury and the Attorney General. The provisions in

the PPP Bill appeared to be a duplication of the provisions in the *Public Procurement Act of 2020* and would further lengthen the approval processes.

Therefore, stakeholders recommended that the two above-mentioned laws be harmonised in order to simplify the processes involved prior to the execution of the PPPs. This measure would ensure that lead time was reduced, especially for capital intensive and complex arrangements that required the involvement of various experts including financial, legal, and sectorial expertise as well as transaction advisory.

Further, some stakeholders were of the view that since PPPs were just one of the options that the Government could use to procure public infrastructure, the creation of the PPP Office and its structures would only increase the approval processes required and would burden the Treasury. They, therefore, recommended that the PPP Office be incorporated with the Zambia Public Procurement Authority (ZPPA) and expand its mandate for the effective implementation of PPPs.

Second Schedule

Under clause 2 (2) of the Second Schedule, stakeholders were of the view that the words, "including a reasonable profit" be inserted so as to recast the clause to read as "a contracting authority shall reimburse the total project investment, *including a reasonable profit*, on the basis of an agreed schedule. That would prevent a concessionaire from overcharging the Government and obtaining abnormal profits.

General Observations

Stakeholders noted the need to include a clause to protect the private sector by stating that the "Council shall not approve any other project deemed to be a competing project" for a reasonable period of time once a project had been approved by the Council and a contracting authority had entered into a PPP Agreement with a concessionaire.

The proposed clause would protect the concessionaire from failing to recover the anticipated profit before the PPP agreement's expiration.

5.0 COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

While supporting the Bill, the Committee, makes the observations and recommendations set out hereunder.

Clause 2 – Interpretation

- i. The Committee in agreeing with stakeholders observes that meaning of bidder under clause 2 does not include a consortium of investors bidding for a big project under a PPP agreement.

The Committee, therefore, recommends that the definition should be widened to provide for local investors under a consortium to vie for a project under a PPP agreement, as a concessionaire for big projects that will normally be taken by foreign investors with huge capital base.

Clause 3 – Application

- ii. The Committee notes that PPP projects referred to under this clause appear to be skewed towards infrastructure projects.

The Committee, therefore, recommends that a sub-clause be added to the Bill which will provide for other sectors such as a service, research, innovation, tourism, culture, sports and other relevant sectors which ordinarily will not attract high end unsolicited for project proposals, if not included in the Bill. With that inclusion, it will be easier for specific sectors to develop their own regulations regarding PPP implementation.

Clause 4 - Continuation and Renaming of Public-Private Partnership Unit

- iii. The Committee notes that the PPP Office will be domiciled under the Ministry of Finance and National Planning and headed by the Director General as proposed under clauses 4(2) and 6(1), respectively.

Whilst these provisions are welcome, the Committee recommends that the Government should ensure that the autonomy of the PPP Office is guaranteed.

The Committee also notes that the PPP Office will be functioning within the framework of the Ministry of Finance and National Planning, and, therefore, recommends that measures should be put in place to avoid inefficiencies and delays that will arise from not having its own finance, planning and human resource units, given the time-sensitive nature of PPP projects.

The Committee additionally urges the Government to strike a balance between maintaining accountability under the Ministry and fostering operational independence, so as not to unnecessarily delay the implementation of PPP agreements due to political interference.

Clause 6 – Director-General and Other Staff

- iv. The Committee notes that in order to guarantee autonomy for the PPP Office, dependence on mainstream staff at the Ministry of Finance and National Planning should not be encouraged.

In this regard, the Committee recommends that the staff structure that ensures operational autonomy be put in place the PPP Office. This will prevent ad-hoc recruitments which can lead to operational challenges or over-recruitment. This over recruitment will result in blotted staff levels and causing financial pressure on the Treasury.

Clause 9 – Constitution of Technical Committee

- v. The Committee notes that the Technical Committee will be comprised of representatives from statutory institutions named in clause 9(1)(c).

However, the Committee is of the view that the clause needs to predefine the level of experience and qualifications for members of the Technical Committee to avoid the listed institutions submitting names of persons without prerequisite qualifications needed for such strategic undertaking.

Clause 39 - Termination or Cancellation of Procurement Proceedings

- vi. In agreeing with stakeholders, the Committee notes that clause 39(1)(d) provides for cancellation of procurement proceedings when there is evidence of collusion among

bidders without indicating the role of the Competition and Consumer Protection Commission.

The Committee recommends that the Bill should the need for the Competition and Consumer Protection Commission to monitor any attempts by bidders to collude.

Clause 40 - Submission of Unsolicited Proposal

- vii. The Committee notes that clause 40 introduces the requirement to conduct preliminary evaluations for unsolicited proposals in order to ensure that due diligence is undertaken in ascertaining the viability of the project.

The Committee, therefore, recommends that in considering the unsolicited proposal, there is need to include provisions that will make it mandatory for a contracting authority to undertake feasibility studies for unsolicited proposals. This will ensure that a contracting authority ascertains viability of a PPP project prior to making any commitments, which will essentially benefit both the Government and the private partner by ensuring that only viable PPP projects are referred to the PPP Office.

- viii. The Committee notes that clause 40(6) mandates a contracting authority and the PPP Office to take appropriate action to protect the confidential or proprietary information that a bidder provides as part of unsolicited proposal.

However, the Committee recommends that the requirement for confidentiality should be strengthened and broadened by making it mandatory for a contracting authority and PPP Office to enter into a non-disclosure agreement with the bidder for unsolicited proposal for purposes of protecting the private sectors' business ideas.

Further, the Committee recommends that evaluation of the unsolicited proposal against a competition proposal need to include a guideline which offers some incentive to the unsolicited proposal for the initiative and innovation in order to encourage high value unsolicited proposals.

Clause 45 – Due Diligence

- ix. The Committee notes that clause 45 seems to exclude other competing bidders from being subjected to a due diligence.

The Committee, in this regard, recommends that the clause be rephrased to allow for flexibility on the timing when to undertake a due diligence, either during or before the evaluation stage of competing bids, after approval of the unsolicited proposal.

Clause 46 - Procurement of Unsolicited Proposal

- x. The Committee notes that clause 46(1) and (2) states that *“where the PPP Council approves an unsolicited proposal and the due diligence report, it will direct a contracting authority to advertise for competitive proposals”*.

In view of that, the Committee recommends that in directing a contracting authority to advertise for competitive proposals, caution must be taken so as not to discourage innovative and high value unsolicited bids by providing incentives to a proposer of unsolicited bid that is approved by the Council. The Committee, further, recommends

for inclusion of another sub-clause that will provide incentives for the unsuccessful unsolicited bidder for the innovation of high value unsolicited bid.

Clause 48 - Circumstances Authorising Award without Competitive Procedures

- xi. The Committee notes that clause 48, which provides for circumstances that can necessitate the use of direct bidding or procuring a PPP project without a competitive bidding process is too general and open to abuse.

The Committee, therefore, recommends that sub-clauses (d), (e), (g), and (h) be refined and streamlined further to provide more clearly for circumstances that can give rise to direct bidding in order to limit opportunities for abuse.

Clause 53 - Technical Expertise of Contracting Authority

- xii. The Committee welcomes the involvement of technical experts under clause 53(1) when dealing with complex PPP agreements to avoid unfair agreements entered into by non-expert Government representatives.

However, the Committee notes with concern that the criterion used for selecting the technical experts including experience and qualifications have not been stated in the Bill. This can result in biased selection which might also result in having experts who are not well vested in the field of a particular PPP project, for instance, an agricultural expert being engaged in a mining PPP project.

To avoid wrong selection of experts for another field and to avoid suspicions of corrupt practices when selecting such experts, the Committee recommends that the sector based qualifications be outlined in the Bill so that the selection criterion is as transparent as possible to reduce avoidable losses for the State.

Clause 55 – Contents and Implementation of Public-Private Partnership Agreement

- xiii. Under clause 55 on the contents of the PPP agreement, which includes obligations of the parties to the PPP agreement, the Committee is of the view that there is need for a sub-clause which will provide explicitly the financial contributions or assets of each party. This is necessary for purposes of enhancing transparency.

The Committee recommends that the Technical Committee or contracted experts should workout the net present values, payback period and return on investments independently as that will ensure that both the contracting authority and concessionaire does not exaggerate their contributions, thereby resulting in inflated costs of the project.

Clause 60 – Sub-contracting

- xiv. The Committee notes that clause 60 provides for a concessionaire to subcontract at least 10 per cent of the total works of the project to citizen contractors. The Committee welcomes this requirement as it will enhance skills transfer to local contractors.

In view of this, the Committee recommends increasing the threshold for subcontracting to at least 15 per cent to allow for more participation of local contractors in projects under the PPP agreements.

Clause 71 – Revision of Concessionaire Agreement

- xv. The Committee notes that clause 71 (1) (2) and (3), sets out conditions for revision and compensation for a concessionaire if the performance of a PPP agreement diminishes, as compared with the costs and the value of performance.

The Committee, further, recommends that care should be taken to ensure that possible losses from projects are avoided, especially those that can be categorised as high risk projects.

The Committee, therefore, recommends that a definition of high risk projects be included in clause 2, together with the criterion to be used for identifying high risk projects such as those that involves high cost of exploration.

Clause 74 - Winding-up and Hand-back

- xvi. The Committee notes that clause 74(1) requires a public-private partnership agreement to provide, among other things, compensation to which the concessionaire may be entitled in respect of assets transferred to a contracting authority or to a new concessionaire or purchased by a contracting authority.

In light of this, the Committee recommends that adequate measures should to be taken to ensure that the obligation for cancelled or partly implemented contracts does not create a huge debt burden for the State. The Bill should, therefore, provide a clause or sub clause, which will carter for insurance of PPP agreements in case of failure or where the issues of compensation may arise.

Clause 76 - Project Implementation

- xvii. The Committee notes that under clause 76(3), the PPP Office is mandated to provide oversight and guidance on the implementation of PPP projects.

In order to strengthen the oversight role, the Committee recommends for a comprehensive sub-clause which should clearly outline the scope of oversight by the PPP Office, which will establish procedures for intervention and continuous monitoring.

Further, the Committee recommends that the Bill should have a requirement to provide annual reports to National Assembly for further scrutiny and oversight.

Clause 90 – Appeals

- xviii. The Committee notes that clause 90(3) provides that an aggrieved bidder is required to submit an appeal to the PPP Office within ten working days from receipt of a decision of the Council.

In agreeing with stakeholders' submission, the Committee observes that the timeframe is too short for a bidder to lodge an appeal to the PPP Office if aggrieved by the Council's decision. The Committee, therefore, recommends that the timeframe

for the aggrieved bidder to appeal the Council's decision should be increased to fifteen working days. This will reduce the number of appeals being rejected by the PPP Office on account of late submission.

- xix. The Committee notes that clause 90(6) provides that the decision of the Council on an appeal is final. Based on the sub-clause, the Committee is of the view that this is unfair to the appellants as they are not given any appeal avenues outside the structures formed under the PPP Office.

In this vein, the Committee recommends that a sub-clause be included in the Bill that allows a bidder aggrieved by the decision of the Council on appeal to seek redress from the courts of law.

Further, the Committee also recommends that the clause should also provide for mitigation against the risk of corruption in the handling of appeals.

Clause 95 – Regulations

- xx. The Committee notes that the Bill provides for several approval processes under Part IV and V from the PPP Council and the Technical Committee. Further, the *Public Procurement Act, No. 8 of 2020* also provides for approval processes required to be obtained from the Zambia Public Procurement Authority (ZPPA), Treasury and the Attorney General.

The Committee, therefore, recommends the harmonisation of any conflicting provisions to ensure that there is no delay in the implementation of PPP projects.

6.0 CONCLUSION

The Committee is in support of the Bill as it seeks to replace and repeal the *Public Private Partnership Act No. 14 of 2009*. The Committee is of the view the Bill is commendable and a positive move because it will help address the problems associated with PPP implementation in Zambia.

Additionally, the Bill will encourage and promote the delivery of projects involving sustainable public-private partnerships that are cost-effective. The Bill will also stimulate competition, and inspire investor confidence.

Additionally, the proposed Bill will enhance the PPP Office's mandate and functions in the execution of its duties since it will serve as a resource hub and a catalyst for capacity building in addition to serving as Zambia's principal technical advisor and regulator of Public-Private Partnerships.

The Committee supports the provision for technical experts' inclusion in the Bill because it will prevent the Government from making unjust or poorly negotiated agreements, which have occasionally resulted in losses for the Government. This provision will ensure that all PPP agreements entered into will bring value to the State and ultimately, benefit citizen.

The Committee wishes to pay tribute to all stakeholders who appeared before it and tendered both oral and written submissions. The Committee further wishes to thank you, Madam Speaker, for the opportunity granted to it to study the Bill. It also appreciates the services rendered by the Office of the Clerk of the National Assembly during its deliberations.

We have the honour to be, Madam Speaker, the Committee on Transport, Works and Supply mandated to consider the Zambia Public Private Partnership Bill, N.A.B No. 18 of 2023.

A handwritten signature in blue ink, consisting of several vertical strokes on the left and a horizontal line extending to the right, ending in a small loop.

Mr Mubika Mubika, MP
CHAIRPERSON

November, 2023
LUSAKA

APPENDIX I

LIST OF WITNESSES

Anti Corruption Commission of Zambia Ministry of Justice
Bankers Association of Zambia Ministry of Finance and National Planning
Consumer Unity & Trust Society
Centre for Trade Policy and Development
Engineering Institution of Zambia
Industrial Development Corporation
Ministry of Infrastructure Housing and Urban Development
Ministry of Local Government and Rural Development
Ministry of Agriculture
Ministry of Lands and Natural Resources
Ministry of Transport and Logistics
National Road Fund Agency
National Council for Construction
Road Development Agency
Road Transport and Safety Agency
The Copperbelt University
The University of Zambia
Workers' Compensation Fund Control Board
Zambia Chamber of Commerce and Industry
Zambia Development Agency
Zambia Institute for Policy and Research
Zambia Public Procurement Authority

APPENDIX II

LIST OF NATIONAL ASSEMBLY OFFICIALS

Mr Charles Haambote, Principal Clerk of Committees (FC)
Mrs Angela M Banda, Deputy Principal Clerk of Committees (FC)
Ms Chitalu R Mulenga, Senior Committee Clerk (FC2)
Mr Darius Kunda, Committee Clerk
Ms Anita Mulale, Administrative Assistant
Mr Daniel Lupiya, Committee Assistant
Miss Ruth Phiri Horemans, Intern