

ICPAK SUBMISSIONS ON THE PPP PETITION COMMITTEE REGULATIONS 2014

February 2015

1. Background

The Public Private Partnerships Act 2013 provides for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements. It further provides for the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects.

Section 67 of the Act establishes a Petition Committee to consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement.

The objective of this position paper therefore, is to review and make various proposals on the draft Petition Committee Regulations 2014, which aims at guiding the proceedings of the Petition Committee as established in section 67 of the PPP Act 2013.

2. Constitutional provisions on Dispute Resolution and Access to Justice

Petition rules and regulations should be tandem with Article 50 of the Constitution that guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Further, the State is obligated under Article 48 to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Of particular importance is Article 159(2)(d) which provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional resolution mechanisms shall be promoted.

It is imperative to note that disputes mean delay which in turn causes escalation of costs and for a private investor it would mean loss of earning.

3. Table: Summary of Issues raised on the Petition Committee Regulations 2014

Regulation		Issue of Concern	Proposal(s)	Justification
1	Interpretation	<p>The interpretation is not conclusive.</p> <p>Definition of "petitioner" and "register" have been left out</p>	<p>Include the following in the interpretation section</p> <p>"Petitioner" means a person who petitions the Committee under Section 67 of the Act;</p> <p>"Register" means register maintained by the Committee under Regulation 3</p>	Provides clarity in the application of these regulations

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2	Register	<p>Regulation (3) provides that the Committee shall establish a Petition Register into which the Petition Committee shall cause to be entered the details of each petition.</p> <p>However, there is no provision on accessibility to this register by the public and any other interested party.</p>	<p>Include sub-regulation 3(3) – The register of petitions under sub-regulation (1) shall be accessible to the public during working hours.</p>	<p>This ensures transparency and accountability in the entire process through access to the Petitions Register by members of the public and other interested parties. This is also in line with Article 35 of the Constitution of Kenya.</p>
2	Forms and Fees	<p>Regulation (8) prescribes the form and fees of filing petitions. However its limiting since it doesn't provide room for Alternative Dispute Resolution Mechanism and any other relevant channels</p>	<p>Amend to add sub-regulation (3) to read</p> <p>(3) The petition shall indicate-</p> <p>a) whether any efforts have been made to have the matter addressed by a relevant body and whether there has been any response from that body or whether the response has been unsatisfactory;</p> <p>b) whether the issues in respect of which the petition is made are pending before any court of law or other constitutional or legal body;</p>	<p>This ensures that all avenues have been exhausted before arriving at the Petition to the Committee.</p> <p>In addition, the amendment will ensure that Article 159(2)(d) in respect to Alternative Dispute Resolution mechanisms is promoted.</p>
3	Language	<p>Regulation 20(1) provides that the language of hearings shall be English but where a party is unable to communicate in English, the Petition Committee shall provide a translator, <u>at the party's cost</u>.</p> <p>This is in direct contravention to Article 50(2)(m) of the Constitution that guarantees the right to have the assistance of an interpreter <u>without</u></p>	<p>Amend Regulation 20(1) by deleting the cost element</p>	<p>To respect Article 50(2)(m) of the Constitution that guarantees the right to have the assistance of an interpreter <u>without payment</u></p>

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		payment if the accused person cannot understand the language used at the trial		
4	Second Schedule Fees for Petition	<p>The Second Schedule stipulates the fees for filing a petition.</p> <p>Though we are in support of levying fees, consideration should be made to ensure the fees are reasonable and shall not impede access to justice as per Article 48 of the Constitution</p>	<p>We propose a consultative rethink on the fees to ensure that they are reasonable and do not impede access to justice.</p>	<p>This ensures access to justice for all persons as stipulated by Article 48 of the Constitution.</p>

CPA Benson Okundi

Chairman, Institute of Certified Public Accountants of Kenya