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THE PUBLIC PRIVATE PARTNERSHIP ACT, 2014

ARRANGEMENT OF SECTIONS

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SCHEDULE-ILLUSTRATIVE PUBLIC PRIVATE PARTNERSHIP
ARRANGEMENTS

No.



Sierra Leone

2014

A BILL ENTITLED

The Public Private Partnership Act, 2014.

Short title.

Being an Act to promote, facilitate and streamline conclusion and implementation of public private partnership agreements by a contracting authority; to establish a Public Private Partnership Unit; to establish private partner selection procedures in PPP Agreements; and to provide for matters incidental thereto.

[] Date of commencement.

ENACTED by the President and Members of Parliament in this present Parliament assembled.

PART 1—PRELIMINARY

Interpretation.

1. In this Act, unless the context otherwise requires-

“**affordable**” means an arrangement where a contracting authority is able to meet any financial commitment which is reasonably likely to be incurred under the PPP Agreement from the contracting authority’s existing or future budgetary funds;

“**asset**” means an existing movable or immovable property, including the rights and intellectual property, of a relevant contracting authority or a new property to be acquired or created for the purposes of entering into a PPP Agreement;

“**bid**” means a tender, an offer, a proposal or price quotation, given in response to an invitation to participate in a PPP Project;

“**bidder**” means any person, including a group of persons (consortium), corporate body or joint venture that participates in selection proceedings relating to a PPP Project;

“**bidding documents**” means the tender solicitation documents or other documents for solicitation of bids for a PPP Project, on the basis of which bidders are to prepare their bids;

“**bidding consortium**” means a situation where a proposal for a PPP Project is made by more than one person, and “bidding consortia” shall be construed accordingly;

“**Cabinet**” has the meaning assigned to it in the Constitution of Sierra Leone, 1991, or the respective sub-committee of the Cabinet, formed under the regulations governing Cabinet activities, for the purposes of this Act;

“**commercial close**” means the event that occurs when a contracting authority and a private partner have reached agreement on all terms of the PPP Agreement and the PPP Agreement has been approved by the Cabinet, with the finalisation of the PPP Agreement being subject only to the private partner obtaining financing for the proposed PPP transaction, where such financing is required;

“**complex PPP Project**” means a PPP Project involving a proposed capital expenditure in excess of an amount specified by the Cabinet;

“**contract finalisation phase**” means the phase of concluding a PPP Agreement, which takes place following the issuance, by the Cabinet, of the approval required by Section 53(1), and prior to the commencement of the implementation phase, and shall include the achievement of both the commercial close and, where financing is required, the financial close of the PPP Agreement;

“**contracting authority**” means a ministry, local council, public agency, authority or entity, which has legal capacity to enter into contractual obligations;

“**Director**” means the Director appointed under Section 29;

“**feasibility study**” means a study commissioned or undertaken by the Unit for submission to the Cabinet in accordance with Section 37(3);

“**financial close**” means the event that occurs, subsequent to commercial close, when a private partner has obtained the financing for a PPP Agreement;

“**implementation phase**” means that phase of a PPP transaction which takes place following the achievement of the financial close of the PPP transaction;

“**local authority**” has the meaning assigned to it under the Local Government Act, 2004;

“**material default**” means material failure of a private partner to perform his duty as defined under a PPP Agreement which remains unsatisfied after the private partner has received written notice of the failure from the contracting authority;

“**Ministries, Department and Agencies or MDAs**” means all public authority organisations, including local government bodies.

“**Minister**” means the minister responsible for finance;

“**Ministry of Finance**” means the ministry responsible for finance;

“**Ministry of Justice**” means the ministry responsible for justice;

“**NPPA**” means National Public Procurement Authority, as defined in the Public Procurement Act, 2004 (as amended).

“**parties**” means the contracting authority and the private partner in a PPP Agreement;

“**Public Private Partnership Agreement**” or “**PPP Agreement**” means a written agreement between a contracting authority and a private partner, in relation to any activity in which the private partner:

- (a) performs a public function on behalf of the public authority; and / or
- (b) designs, develops, operates or uses an asset for its own commercial purposes; and / or
- (c) forms a joint venture with the contracting authority (by way of divestiture, new establishment or otherwise); and

(d) assumes financial, technical or operational risks in connection with the performance of a public function, use of an asset or running the joint venture; and

(e) receives consideration for performing a public function, utilising public asset or running the joint venture, by way of:—

(i) a fee from any revenue fund or budgetary fund of the Government;

(ii) user levies collected by the private partner or joint venture from the end-users or customers for a service provided by the private partner or the joint venture or otherwise; or

(iii) a combination of the consideration paid under sub-paragraphs (i) and (ii).

“**PPP Project**” means an activity, project or any other subject matter in relation to which a contracting authority enters or intends to enter into a PPP Agreement pursuant to this Act;;

“**PPP Project proposal**” means a summary outline of a proposed PPP project as required by Section 37(3) which shall:

- (a) identify the contracting authority;
- (b) describe the activities to be undertaken by the private partner and the contracting authority;
- (c) set out the anticipated timeline for the project;
- (d) describe the mechanism whereby the private partner will receive compensation;

- (e) identify the key allocations of risk between contracting authorities, the private partner, end-users and other parties; and
- (f) describe the expected financial implications for the Government over the lifetime of the project, including liabilities to be assumed by the Government;

“pre-feasibility study” means a study commissioned or undertaken by a contracting authority for submission to the Unit in accordance with Section 37(2);

“preferred bidder” means a bidder, including any bidding consortium, selected as a successful bidder during the procurement phase;

“private partner” means a person or an entity from the private sector which undertakes a PPP Agreement;

“procurement phase” means that phase of concluding a PPP Agreement which takes place following the issuance, by the Cabinet, of the approval required by Section 37;

“project identification phase” means the initial phase of concluding a PPP Agreement prior to the issuance, by the Cabinet, of the approval required by Section 37(4);

“public authority” means a Ministry, Government department, local authority or other statutory body;

“public function” means a function lying within the area of responsibility of a contracting authority;

“regulator”(or **“statutory utility regulator”**) is a public authority or government agency responsible for exercising autonomous authority over some area of human activity in a regulatory or supervisory capacity and is generally independent from other branches or arms of the government.

“risk transfer” means allocation of the probability of losses or other harmful consequences to the Project between the parties of PPP Agreement .

“service level” means a specific, measurable, attainable, relevant and time-bound deliverable by the private partner under the PPP Agreement.

“Sierra Leone Investment and Export Promotion Agency or SLIEPA” has the meaning assigned to it in the Sierra Leone Investment and Export Promotion Agency Act, 2007;

“Swiss Challenge” is a part of the project procurement phase of the PPP Project, whereby the contracting authority, which has received an unsolicited proposal for a PPP project, under the agreed conditions and procedures (which might include the first-mover incentives) can invite the third parties on a competitive basis to match or exceed the conditions of the unsolicited proposal;

“Unit” means the Public Private Partnership Unit established by Section 27;

“unsolicited proposal” means any proposal relating to the conclusion of a PPP Agreement that is not submitted in response to a request or solicitation issued by a contracting authority under Sections 39 to 53 and 61;

“**user levy**” means the right or authority granted to a private partner by a contracting authority to recover investment and a fair return on investment through collections from the end-users of an asset or services provided under PPP Agreement, and includes tolls, fees, tariffs, charges or any other benefit whatsoever called; and

“**value for money**” means the carrying out of the public function of a contracting authority, the use of an asset by a private partner, or running a joint venture pursuant to a PPP Agreement, in a manner which results in a net benefit to the public interest, defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

Application. 2. (1) This Act shall apply to the facilitation, conclusion and implementation of any PPP Agreement undertaken between a contracting authority and a private partner.

(2) Cabinet shall approve simplified regulations for the conclusion and implementation of PPP Projects for local councils and PPP projects where the anticipated investment value is below a minimum amount prescribed in such a regulation from time to time.

(3) A PPP Agreement may be in the form of a concession transaction, a lease transaction, a management contract transaction, a long-term service contract transaction, as described in the Schedule, a joint venture transaction, or may be in such other forms as may be prescribed by the Cabinet.

(4) Where this Act conflicts with the procurement rules of a donor organisation or funding agency the application of which is mandatory under an obligation entered into by the Government, the requirements of those rules shall prevail; but in all other respects, the provisions of this Act shall apply to all PPP Agreements other than those which have been expressly excluded from the provisions of this Act.

Act No.
of 2004

3. (1) This Act does not apply to the purchase of goods, services and works pursuant to the Public Procurement Act, 2004, nor does it apply to the full privatization or full divestiture of public infrastructure or publicly owned enterprises as prescribed by the National Commission for Privatisation Act, 2002.

Public procurements, privatizations and exclusion or granting of mineral or petroleum rights.

Act No.
of 2002

(2) For all other forms of divestiture or privatisation, the National Commission for Privatisation shall be considered a contracting authority for the purposes of this Act.

Act.... of.....

(3) This Act does not apply to the granting of any mineral rights pursuant to the Mines and Minerals Act, 2009 or the granting of petroleum rights pursuant to the Petroleum Exploration and Production Act, 2001.

(4) This Act only applies to such mineral resources and mining projects which are already sufficiently explored and controlled by the Government and which are not already subject to the existing exploration or mining rights.

(5) PPP Agreements shall not be concluded in relation to any military installations or the administration of justice without previous consideration and approval by the Parliament.

PART II - PUBLIC PRIVATE PARTNERSHIP AGREEMENTS

4. A PPP Agreement shall provide for such matters as the parties consider appropriate, and shall include-

Contents of PPP Agreements.

- (a) the nature and scope of works to be performed and service levels to be provided by the private partner in a form of the output specification;

- (b) the conditions for provision of services and carrying out any works and the extent of exclusivity, if any, of the private partner's rights under the PPP Agreement;
- (c) the assistance that a contracting authority must provide to the private partner in obtaining licences and permits to the extent necessary for the performance of the PPP Agreement;
- (d) ownership, use, management and return of assets, if any, to a contracting authority, at the termination or expiration of the PPP Agreement as provided under Section 7;
- (e) in the case of a PPP Agreement for infrastructure, procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, if any, and the procedures for commissioning during testing and final inspection, approval and acceptance of the works performed under PPP Agreement;
- (f) private partner performance measurement system, and the conditions and extent to which the contracting authority may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the PPP Agreement is properly implemented and the service level provided in accordance with the applicable legal and contractual requirements;
- (g) the extent of the private partner's obligation to provide the contracting authority, as appropriate, with reports and other information on its operations;

- (h) mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority, including any compensation to which the private partner might be entitled;
- (i) any rights of the contracting authority to review and approve major contracts or their material amendments to be entered into by the private partner, in particular with the private partner's own shareholders or other affiliated persons;
- (j) guarantees of performance to be provided and insurance policies to be maintained by the private partner in connection with the PPP Agreement (including reinstatement of the assets under the PPP Agreement following an insurance event);
- (k) remedies available in the event of default by either party;
- (l) the extent to which either party may be exempt from liability for failure or delay to comply with any obligation under the PPP Agreement owing to circumstances of force *majeure*;
- (m) the duration of the PPP Agreement and the rights and obligations of the parties upon its expiry or termination;
- (n) the manner for calculating compensation in case of termination of the PPP Agreement, as provided under Section 23;
- (o) the governing law between the parties, as provided under section 6 is Sierra Leone law, with the option for the parties to adopt the dispute procedures of section 62 as a mechanisms for the settlement of disputes

- after initial mediation supported by the PPP Unit and failing which the process following will be binding international arbitration, if applicable;
- (p) the rights and obligations of the parties with respect to confidential information;
 - (q) the relevant financial terms and payment mechanisms;
 - (r) the sharing of risks between the contracting authority and the private partner;
 - (s) the payment to the private partner by way of compensation or of user levies collected by the private partner of the joint venture formed with contracting authority for a service provided by it as provided under section 10; and
 - (t) such other information as may be indicated in the Agreement;
 - (u) PPP Agreements may be subject to the review procedure every five years by the PPP Unit and the statutory sector utility regulator based on the overall performance, delivery of service level and fulfilment of parties' obligations as agreed by the parties and specified in the Agreement.

Governing law.

6. A PPP Agreement shall be governed by and construed in accordance with the laws of Sierra Leone, unless agreed otherwise expressly by the parties in the PPP Agreement.

Ownership of assets.

7. (1) A PPP Agreement shall specify which assets are or shall be in the ownership of contracting authority during the term of the PPP Agreement, which assets will be transferred to the use or management of the private partner and which assets are or shall be the ownership of the private partner.

(2) A PPP Agreement shall, in particular, identify which assets belong to the following categories-

- (a) assets, if any, that the private partner is required to return or transfer to the contracting authority in accordance with the terms of the PPP Agreement;
- (b) assets, if any, that the contracting authority, at its option, may purchase from the private partner; and
- (c) assets, if any, that the private partner may retain or dispose of upon the expiration of the PPP Agreement.

8. (1) A contracting authority, shall make available to the private partner or, as appropriate, shall be authorised to request from another relevant public authority pursuant to any relevant legislation, for the private partner to obtain the rights related to the site indicated in the PPP Agreement, including the title thereto or utility connections, as may be necessary for the performance of the PPP Agreement.

Acquisition of rights related to PPP Project site.

(2) Any compulsory acquisition of land that may be required for the performance of a PPP Agreement shall be carried out in accordance with the applicable law.

(3) In addition to the PPP Agreement, a government support agreement, dealing with the matters that are outside of a contracting authority's control or responsibility, maybe concluded with the private partner.

9. A contracting authority or other public authority under the terms of any law and a PPP Agreement shall make available and assist the private partner to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties required for the performance of the PPP Agreement.

Easements.

Financial arrangements

10. (1) A PPP Agreement may permit a private partner or a joint venture formed with the contracting authority to have the right to charge, receive or collect user levies for the use of an asset or services under the PPP Agreement in accordance with the terms indicated therein, which shall provide for methods and formulas for the establishment and adjustment of user levies in accordance with any applicable legislation.

(2) A contracting authority may agree to make direct payments to the private partner according to the invoices, as a substitute for, or in addition to, the user levies as provided in the PPP Agreement.

Security interest.

11. (1) Subject to any restrictions that may be contained in a PPP Agreement, a private partner shall have the right to create security interests over any of its own property, rights or interests, including the private partner's own property covered under the PPP Agreement, as shall be required to secure any financing needed for the PPP Project, including, in particular, the following:

- (a) security over movable or immovable property owned by the private partner or its interests in PPP Agreement; and
- (b) a pledge of the proceeds of, and receivables owed to, the private partner in the PPP Agreement.

(2) The shareholders of a private partner's company shall have the right to pledge or create any other security interest in their shares in the private partner's company.

(3) No security under subsections (1) and (2) may be created over public property or other property, assets or rights needed for the provision of a public service.

Assignment of a PPP Agreement

12. (1) Except as otherwise provided in Section 11, the rights and obligations of the private partner under a PPP Agreement may not be assigned to a third party without the prior written consent of the contracting authority.

(2) A PPP Agreement shall set out the conditions under which a contracting authority shall give its consent to an assignment of the rights and obligations of the private partner under the PPP Agreement, including the acceptance by the new private partner of all obligations thereunder and evidence of the new private partner's technical and financial capability as shall be necessary for undertaking the PPP Agreement obligations.

13. (1) A controlling interest in a private partner's company may be transferred to third parties only with the consent of the contracting authority, given in accordance with the terms of the PPP Agreement. Transfer of controlling interest in private partner

(2) A PPP Agreement shall set forth the conditions under which the consent of the contracting authority shall be given pursuant to subsection (1).

14. (1) A PPP Agreement shall set out, among other things, the extent of a private partner's and the contracting authority's obligations to ensure- Operation of a PPP Project

- (a) the modification of the PPP Agreement so as to meet the public demand for the purpose of the PPP Agreement;
- (b) the continuity of the PPP Agreement;
- (c) the provision of the assets or services under the PPP Agreement under essentially the same conditions for all users; and
- (d) the non-discriminatory access, as appropriate, of other service providers to any assets or services under the PPP Agreement operated or provided by the private partner.

(2) Subject to the applicable legislation, a private partner shall have the right to issue and enforce rules governing the use of the assets or services under the PPP Agreement, subject to the approval of the contracting authority.

Compensation for specific changes in legislation

15. A PPP Agreement shall set out the extent to which a private partner is entitled to compensation in the event that the cost of the private partner's performance of the PPP Agreement has substantially increased or that the value that the private partner receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation specifically applicable to the PPP Agreement.

Revision of a PPP Agreement

16. (1) Without prejudice to Section 15, a PPP Agreement shall set out the extent to which a private partner is entitled to a revision of the PPP Agreement with a view to providing compensation in the event that the costs of the private partner's performance of the agreement has substantially increased or that the value the private partner receives for such performance has substantially diminished as compared with the costs and the value of performance originally foreseen, as a result of -

- (a) changes in economic or financial conditions of such a nature and scale that they could not be attributed to the management, operation or other project risks already undertaken by the private partner under the conditions of the PPP Agreement; or
- (b) changes in legislation not specifically applicable to the PPP Agreement; provided that the economic, financial, or legislative changes after the conclusion of the PPP Agreement;
 - (i) are beyond the control of the private partner; and
 - (ii) are of such a nature that the private partner could not reasonably be expected to have taken them into account at the time the PPP Agreement was negotiated or have avoided or overcome their consequences.

(2) A PPP Agreement shall establish procedures for revising the terms of the PPP Agreement following the occurrence of the circumstances described in subsection (1).

(3) A PPP Agreement shall specify rights of the contracting authority to make changes to the works or services which private partner must perform under the PPP Agreement and any compensation payable in such circumstances.

17. (1) A contracting authority shall have the right, under the prescribed circumstances set out in a PPP Agreement, to take over the PPP Project, for the purpose of ensuring the effective and uninterrupted delivery or timely completion of the PPP Project in the event of-

Takeover of a PPP Project

- (a) a material default by the private partner in the performance of its obligations; and
- (b) a failure by the private partner to rectify the breach within a period of time, as provided by the PPP Agreement, after having been given notice by the contracting authority to do so.
- (c) a clear and present danger to life, liberty, health, the environment, or national security, having obtained approval of the President or the Cabinet.

(2) The duration of a takeover referred to in subsection (1) and the residual rights (if any) of the private partner shall be as set out in the PPP Agreement.

(3) When a contracting authority elects to take over a PPP Project under subsection (1), the contracting authority, in accordance with the terms of the PPP Agreement-

- (a) shall collect and pay any revenues that are subject to lien to satisfy any obligation;

- (b) may perform works and provide services, impose user levies and comply with any existing service contracts; and
- (c) may solicit proposals, as appropriate, for the construction, maintenance or operation of the assets under the PPP Agreement.

Substitution
of private
partner

18. (1) A contracting authority may agree with any entity extending financing for a PPP Agreement to provide for the substitution of the private partner with another person appointed to perform under the existing PPP Agreement, upon a material default by the private partner or other event that could otherwise justify the termination of the PPP Agreement under conditions indicated therein.

(2) A contracting authority may facilitate a private partner to securitize any receivables and assets under the PPP Agreement in favour of a lender (security agent or trustee, or other agents or trustees of those providing financing), subject to such terms as the contracting authority may determine in order to safeguard the successful implementation, completion, working, management and control of the PPP Agreement.

Duration and
extension of a
PPP Agree-
ment

19. The PPP Agreement shall indicate its duration based on reasonable return on the private partner's investment or service delivery requirements, and the contracting authority may not agree to extend its duration, except as a result of the following circumstances-

- (a) delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;
- (b) suspension of the PPP Agreement brought about by acts of the contracting authority or other public authority;

- (c) increase in costs arising from requirements of the contracting authority not originally foreseen in the PPP Agreement, if the private partner would not be able to recover such costs without such extension;
- (d) on agreement with the private partner, for reasons of national or public interest, as justified in the record to be kept by the contracting authority; or
- (e) as otherwise provided in the PPP Agreement.

20. A contracting authority on the authorisation of the Cabinet or delegated role to the PPP Unit may terminate a PPP Agreement-

Termination
of a PPP
Agreement

- (a) when it can no longer be reasonably expected that the private partner will be able or willing to perform its obligations, owing to insolvency, material default or otherwise, as agreed in the PPP Agreement; or
- (b) for compelling reasons of national or public interest, subject to payment of compensation to the private partner, as agreed in the PPP Agreement.
- (c) as otherwise provided in the PPP Agreement.

21. A private partner shall not terminate a PPP Agreement except under the following circumstances:-

Termination
of a PPP
Agreement by
private
partner

- (a) when there is material default by the contracting authority of its obligations under the PPP Agreement;
- (b) if the conditions for a revision of the PPP Agreement under subsection (1) of Section 16 and respective PPP Agreement provisions are met, but the parties have failed to agree on a revision of the PPP Agreement and the PPP Agreement becomes impossible to perform.

Termination of a PPP Agreement by either party. 22. Either party has the right to terminate a PPP Agreement for the reasons set out in sections 18, 20 and 21.

Compensation upon termination of a PPP Agreement. 23. A PPP Agreement shall stipulate how compensation due to either party shall be calculated in the event of termination of the PPP Agreement and shall provide, where appropriate, for compensation for the fair value of works performed under the PPP Agreement, costs incurred or losses sustained by either party, including, as appropriate; lost profits subject to independent assessment pursuant to section 62 of this Act.

Management of PPP Agreement. 24. The PPP Unit and, where appropriate, the statutory utility sector regulator (being delegated by the Cabinet), shall have the responsibility for oversight of PPP Agreements to ensure they are properly implemented, managed, enforced, monitored and reported on by the private partner.

Winding up and transfer measures 25. A PPP Agreement shall provide for-

- (a) mechanisms and procedures for the transfer of assets to a contracting authority in case of a winding up;
- (b) the compensation to which the private partner may be entitled in respect of assets transferred to a contracting authority or to a successor private partner or purchased by a contracting authority;
- (c) the transfer of technology or industrial property rights required for the PPP Agreement;
- (d) the training of a contracting authority's personnel or of a successor private partner in the operation and maintenance of the assets or performance of services under the PPP Agreement; and

(e) the provision by the private partner of continuing support services and resources, including the supply of tools, spare parts and required materials, for a reasonable period after the transfer of the PPP Agreement to a contracting authority or to a successor private partner.

PART III-APPROVAL OF PPP PROJECTS AND OTHER FUNCTIONS OF THE CABINET

26. (1) The minister will initiate and direct PPP Projects within the ministries in accordance with this Act. With regard to all PPP Projects, it shall be the function of the President or the Cabinet to consider for approval, modification or rejection of the following: Approval of PPP Projects and other functions of Cabinet

- (a) initial PPP Project proposals prepared pursuant to section 37(3), taking into account the results of the required feasibility study and the recommendations of the Unit made pursuant to section 28 (2) (h) as well as the recommendations of the Minister;
- (b) revised PPP project proposals prepared pursuant to section 38;
- (c) negotiated PPP Agreements prepared prior to commercial close pursuant to sub section 53 (1); and
- (d) in the event that there is a revision to a negotiated PPP Agreement prior to financial close, the revised PPP Agreement prepared pursuant to subsection (1) of section 53;

(2) With regard to complex PPP Projects, it shall also be the function of the Cabinet, to consider for approval, modification or rejection -

- (a) draft requests for proposals prepared pursuant to Section 45 (4), prior to delivery to pre-selected bidders;
 - (b) evaluation reports prepared pursuant to Section 52 (2);
- (3) It shall also be the function of Cabinet to-
- (a) approve or reject any requests for negotiation of a PPP Agreement submitted pursuant to Section 54;
 - (b) review the annual reports of the Unit submitted pursuant to Section 28 (2) (o);
 - (c) resolve, on an emergency basis, any issues relating to the PPP Projects, as may be raised by the Unit or as may be raised by Cabinet on its own initiative, and take such decisions as may be required;
 - (d) refer any unsolicited proposals received by it to an appropriate contracting authority for examination and evaluation pursuant to section 61, once the proponents have submitted an independent feasibility report;
 - (e) refer all unsolicited proposals to the agreed 'Swiss Challenge' or similar market test procedures, except under Section 26 (3) (f);
 - (f) Swiss Challenge or similar market test procedures may be deemed unnecessary by the Cabinet on the grounds of and for the reasons that: the project was advanced at the time the Act came into force or there would be undue delay in project delivery; or the clear competitiveness of the private sector investment plan; or acceptable track

record of delivery of similar projects; or proven value for money. In any of these cases to support transparency the contracting authority will set out the basis for the decision to the public.

PARTIV-ESTABLISHMENT OF THE PUBLIC PRIVATE PARTNERSHIP UNIT AND RELATED PROVISIONS

27. (1) For the purposes of this Act, the Public Private Partnership Unit is hereby established within the Office of the President which shall be responsible for managing the process to conclusion of PPP Agreements for the PPP Projects, and for providing technical and legal support in pursuance of PPP Agreements by contracting authorities, as well as performance of other functions, as indicated in Section 28. Establishment of the Unit.

(2) The Unit shall not be a body corporate, and shall have the capacity of an agency under the Office of the President.

28. (1) The functions of the Unit shall be as follows: Functions of the Unit.
- (a) develop public awareness, education and sensitization about PPP Projects;
 - (b) initiate PPP Projects from time to time as required;
 - (c) conduct implementation reports for PPP Projects and appoint appropriate advisers to produce them;
 - (d) in close consultation with the relevant contracting party carry through the procurement process specified in Part VII for the selection of private partners for PPP Agreements and provide support and advice to the contracting authority on the tender process, selection of private partners, corporate social responsibility and other aspects of PPP Projects;

- (e) liaise with the contracting authority at all stages of the PPP Agreement, but particularly with respect to the PPP Projects proposals, value for money assessment, the output specification, the performance measurement system and the payment mechanism, prequalification criteria in private partner selection process, assessing technical proposals, negotiating and drafting the PPP Agreements, continued monitoring of the PPP Agreements by the contracting authority, and analysing the lessons learnt;
- (f) liaise with NPPA, pursuant to Section 39, to ensure transparency and compliance with private partner selection process;
- (g) coordinate activities of the Government of Sierra Leone in relation to PPP Projects, including promotion of the social PPP projects in the area of corporate social responsibility;
- (h) manage the private partner selection process for PPP Projects;
- (i) support negotiations of PPP Agreements for PPP Projects with the contracting authority;
- (j) ensure continued monitoring and evaluations of PPP Agreements by the PPP Unit if there is no statutory utility sector regulator;
- (k) Process all unsolicited proposals for PPP Projects, in accordance with Section 26 (d), (e) and (f).

(2) In the light of the above, the Unit will further be required to undertake the following activities:-

- (a) develop, for consideration by the Cabinet, decisions relating to this Act;
- (b) develop technical and best practice guidelines in relation to PPP Agreements;
- (c) provide assistance to contracting authorities in respect of PPP Agreements;
- (d) provide training for contracting authorities in respect of PPP Agreements;
- (e) consider for approval, modification or rejection all pre-feasibility studies regarding PPP Projects submitted by contracting authorities pursuant to Section 37(2);
- (f) assist the contracting authority with the preparation of the feasibility study for a proposed PPP Project as required by Section 37(3);
- (g) consider each PPP Project proposal developed by a contracting authority, with the accompanying feasibility study, and give recommendations to the applicable contracting authority as to whether the proposed PPP Project-
 - (i) is affordable to the contracting authority;
 - (ii) ensures value for money;
 - (iii) the appropriate transfer of risk and
 - (iv) is otherwise feasible;

- (h) make recommendations for the consideration of Cabinet in respect of PPP Project proposals and feasibility studies submitted by contracting authorities pursuant to section 37(3);
- (i) provide recommendations for approval, modification or rejection of requests for written authorization to issue a request for submission of expressions of interest;
- (j) consider for approval, modification or rejection all pre-selection reports;
- (k) in regard to complex PPP Projects, make recommendations for the consideration of the Cabinet in respect of requests for proposals, based on a full legal, technical and financial analysis of each proposed PPP Agreement, including an analysis of any investment incentives offered to a private partner by or on behalf of a contracting authority;
- (l) make recommendations for the consideration of the Cabinet in respect of proposed PPP Agreements;
- (m) monitor all on-going PPP Projects managed by contracting authorities, and provide advice and support to contracting authorities in relation thereto;
- (n) monitor that each contracting authority develops and implements a public awareness strategy pursuant to Section 28 (a) on the objectives, structure and progress of each PPP Project being undertaken by the contracting authority;
- (o) provide annual reports for the consideration of the Cabinet regarding the management by contracting authorities of all on-going PPP Projects;

- (p) provide emergency reports, as required, to the Cabinet regarding the management by a contracting authority of any PPP Projects under stress;
- (q) prepare, when appropriate, standardised terms of reference for consultants engaged by contracting authorities, standardised bidding documents for selection of the private partner in the PPP Agreement and standard PPP Agreement provisions;
- (r) in liaison with the Sierra Leone Investment and Export Promotion Agency, facilitate and market investment into PPP Projects;
- (s) perform due diligence exercises on the potential private partners in the PPP Projects, as appropriate; and
- (t) perform such other functions provided for under this Act, or as may be assigned by the President.

29. (1) The Unit shall have a Director who shall be appointed ^{Director.} by the President and subject to the approval of parliament for an initial term of 5 years (renewable) and on such terms and conditions as the President may determine.

(2) The Director of the Unit shall be a person with-

- (a) formal qualifications in any profession relevant or appropriate to the functions of the Unit;
- (b) demonstrated comprehension of issues related to public administration and management; and
- (c) extensive financial and related experience in complex commercial transactions.

(3) The Director of the Unit shall, subject to the general or specific directions of the President or his designee-

- (a) be responsible for the day-to-day administration of the Unit; and
- (b) exercise such other duties as may be determined by the President / Cabinet.

Other staff of Unit.

30. There shall be appointed by Director, after consulting the President and on such terms and conditions as the President may determine, other staff of the Unit as the Unit may require for the efficient discharge of its functions under this Act.

Consultants and experts.

31. The Unit may engage the services of such consultants or experts as it may consider necessary for the proper and efficient performance of its functions under this Act.

PART V- FINANCIAL PROVISIONS

Funds of Unit.

32. The activities of the Unit shall be financed by funds consisting of -

- (a) monies appropriated by the Parliament for the purposes of the Unit through the Office of the President; and
- (b) monies accruing to the Unit in the course of its activities as transaction management expense recovery, as well as other revenues approved by the President or his designee.
- (c) monies and technical assistance of the PPP Projects transaction advisory support fund, established to provide a technical assistance during the PPP Project preparation and negotiation process, supported by development partners, expense recovery proceeds, MDAs and the Government of Sierra Leone.

33. (1) The Unit shall keep proper books of accounts and proper records in relation to them in a form approved by the Auditor-General. Accounts and audit.

(2) The books of accounts referred to in subsection (1), shall be audited by the Auditor-General or an auditor appointed by him within three months after the end of each financial year.

34. The financial year of the Unit shall be the same as the financial year of Government. Financial year of Unit.

35. (1) The Director shall as soon as possible but not later than three months after the end of each financial year, submit to the Cabinet a report of the activities, operations, undertakings, properties and finances of the Unit for that year, including the Auditor-General's report. Annual report.

(2) The Minister shall lay a copy of the report referred to in subsection (1) before Parliament within thirty days of receipt of the report.

PART VI- CONTRACTING AUTHORITIES

36. (1) A contracting authority shall have primary responsibility for the management of PPP Project identification phase and implementation phase;. Responsibilities of contracting authority

(2) The Unit, in close cooperation with the contracting authority, shall facilitate and guide the procurement phase of the priority PPP Projects, to be identified by the President.

(3) The contracting authority shall have primary responsibility for managing the procurement phase of any other PPP Project. In such a case, the contracting authority shall use its existing procurement committee in the execution of the procurement phase pursuant to Part VII of this Act.

37. (1) A contracting authority shall collaborate with the Unit in commissioning or undertaking a feasibility study for a PPP Project. Cabinet approval following PPP Project feasibility study

(2) A contracting authority shall commission or undertake, and submit to the Unit, a pre-feasibility study for each proposed PPP Project to a standard set by the Unit.

(3) A contracting authority shall submit a PPP Project proposal, including the completed and evaluated feasibility study, to the Cabinet for approval, modification or rejection, after-

- (a) completion of the feasibility study, to a standard set by the Unit; and
- (b) consultation with the Unit and the Minister regarding the feasibility study.

(4) A contracting authority shall obtain the approval of the Cabinet before proceeding to the procurement phase of any proposed PPP Project, following determination by the President if it is a priority PPP Project.

(5) If a contracting authority proposes, prior to the commencement of the procurement procedure, to make a significant revision to the parameters of an approved PPP Project, the contracting authority shall immediately-

- (a) provide the Unit with a revised PPP Project proposal, including details of the intended revision, and a statement regarding the purpose and impact of the intended revision on the affordability, value for money, technical specifications and risk transfer evaluation contained in the original feasibility study; and
- (b) provide the Unit with a revised feasibility study and other relevant information for commencement of the procurement procedure.

38. (1) If the Unit receives a revised PPP Project proposal in accordance with Section 37 (5), the Unit shall submit it to Cabinet for approval, modification or rejection. The Cabinet shall give direction to a contracting authority and the Unit in respect of the management of any phase of a PPP Project after consultation with the minister responsible for the sector affected by the PPP Project. Directions given by the Cabinet

(2) A contracting authority shall adhere to any directions given by the Cabinet following the submission referred to in subsection (1).

PART VII - COMPETITIVE SELECTION PROCESS AND AWARD PROCEEDINGS

39. The PPP project procurement procedure for selection of private partner in PPP Agreements shall be as follows: Procurement principles

- (a) the procurement procedure shall be non-discriminatory, transparent and cost effective; and
- (b) notwithstanding any provision in any other legislation, the procurement procedure shall be in accordance with this Act and any regulations made thereunder.
- (c) the NPPA shall have the authority to monitor all procurement procedures for transparency and compliance with the provisions of this Act and any regulations made thereunder. The Public Procurement Act 2004 (as amended) shall apply to the rights and enforcement powers of the NPPA in the implementation of its monitoring duties hereunder.

Requests for expressions of interest and pre-selection bidding documents.

40. (1) A contracting authority, in conjunction with the Unit shall prepare a request for submission of expressions of interest and the associated pre-selection bidding documents, and when applicable, after approval from the Cabinet pursuant to Section 26(1)(a) has been obtained.

(2) The request for submission of expressions of interest shall be published in accordance with the regulations issued under this Act.

(3) The request for submission of expressions of interest shall include at least the following-

- (a) a description of the proposed PPP Project and contracting authority;
- (b) an indication of the essential elements of the PPP Project, such as the-
 - (i) services to be delivered by the private partner; and
 - (ii) financial arrangements envisaged by the contracting authority;
- (c) a summary of the main required terms of the PPP Agreement to be entered into;
- (d) the manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their expressions of interest;
- (e) the manner and place for solicitation of the pre-selection bidding documents; and
- (f) an appropriate statement to the effect that the contracting authority reserves the right to request proposals upon completion of the

pre-selection proceedings only from a limited number of bidders that best meet the pre-selection criteria.

(4) The pre-selection bidding documents shall include at least the following information:

- (a) the pre-selection criteria set out in Section 41 of this Act;
- (b) whether the contracting authority intends to waive any limitation on the participation of consortia in accordance with Section 42;
- (c) whether the contracting authority intends to request only a limited number of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings and, if applicable, the manner in which this selection shall be carried out; and
- (d) whether the contracting authority intends to require the preferred bidder to establish an independent legal entity under any other law in accordance with Section 60.

41. Any person who meets the criteria stated in the pre-selection bidding documents shall qualify for the pre-selection proceedings, which criteria shall include the following: ^{Pre-selection criteria.}

- (a) adequate professional and technical qualifications, human and physical resources as may be necessary to carry out all aspects of the PPP Project;
- (b) appropriate managerial and organisational capability, reliability and experience, including, if applicable, previous experience in operating similar PPP Projects;

- (c) adequate financial capacity to fund, or experience in arranging financing, for the investment required for the PPP Project, and
- (d) no involvement in litigation that could materially affect the ability to carry out the PPP Project.

Participation of consortia.

42. (1) A contracting authority, or the Unit, when requesting the submission of expressions of interest, may allow bidders to form bidding consortia in accordance with the terms and conditions imposed by the contracting authority and, in such a case, the bidding consortium shall demonstrate its qualifications, in accordance with Section 41 relating to the consortium as a whole as well as to its individual members.

(2) Unless otherwise indicated in the pre-selection bidding documents, each member of a consortium may participate, either directly or indirectly, in only one consortium at the same time.

(3) When considering the qualifications of bidding consortia, the contracting authority or the Unit shall consider the capabilities of each of the consortium's members and assess whether the combined qualifications of the consortium's members are adequate to meet the needs of all aspects of the PPP Project.

Evaluation of qualifications.

43. (1) A contracting authority, in conjunction with the Unit, shall evaluate the qualifications of each bidder that has submitted an expression of interest for pre-selection, applying only the criteria that are set forth in the pre-selection bidding documents and this Act.

Pre-selection report.

44. (1) After the evaluation of the pre-selection bids pursuant to section 43, the contracting authority, in conjunction with the Unit, shall prepare its pre-selection report, demonstrating how the pre-selection criteria have been met.

(2) The pre-selection report shall contain the following statements-

- (a) that the pre-selection bids explain the capacity of the private partner to effectively implement,

manage, enforce, monitor and report on the proposed PPP Project;

- (b) that a satisfactory due diligence analysis has been completed by the Unit, in consultation with the concerned contracting authority, in relation to the capacity and qualifications of the pre-selected private partners to complete the proposed PPP Project; and
- (c) that the contracting authority has developed and is implementing a public awareness strategy to educate the public on the objectives, structure and progress of the PPP Project.

45. (1) A contracting authority, or the Unit, shall prepare a request for proposals after preparation of the pre-selection report. ^{Requests for proposals.}

(2) A request for proposals shall include the following-

- (a) general information as may be required by the bidders in order to prepare and submit their proposals;
- (b) criteria for evaluating technical offers, and the thresholds, if any, for identifying non responsive proposals, the relative weight to be accorded to each evaluation criterion and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals;
- (c) the date by which the bidders' proposals must be submitted, expressed as specific date and time, allowing sufficient time for bidders to prepare and submit their proposals in response to the final version of the request for proposals;

- (d) a set of tender documents emphasizing functional requirements and performance criteria of the PPP Project, rather than input specifications for the PPP Project and a draft of the proposed PPP Agreements for the PPP Project; and
- (e) the requirements with respect to the issue of, and the nature, form, amount and other principal terms and conditions of, the required bid security.
- (3) A request for proposals shall request the submission of both a technical offer and a financial offer, which shall be two separate envelopes:
- (a) The emphasis of the technical offer shall be on the overall design of the PPP Project as well as on the related quality and conditions of delivery, including the contracting authority's requirements regarding safety and security standards and environmental protection.
- (b) The emphasis of the financial offer will be based on the criteria set from the final approved feasibility study.
- (4) For complex PPP Projects, the contracting authority, in conjunction with the Unit, shall submit the request for proposals to the Cabinet for review, prior to issuing the request for proposals to the pre-selected bidders.
- (5) For complex PPP Projects, the contracting authority, in conjunction with the Unit, shall not issue a request for proposal to any pre-selected bidder unless it receives approval from the Cabinet to issue the request for proposals.
- (6) In support of a request for approval by Cabinet, of the issuance of a request for proposals for a complex PPP Project, the contracting authority, in conjunction with the Unit, shall provide the Cabinet with a full legal and financial analysis of the proposed PPP Agreement to be attached to the final request for proposals.

46. (1) A contracting authority, in conjunction with the Unit, may use a two-stage bidding procedure when it is not feasible to describe fully the characteristics of the PPP Project in the initial request for proposals. ^{Two-stage bidding procedure.}
- (2) A two-stage bidding procedure shall take the following steps -
- (a) a pre-selected bidder may submit suggestions and amendments relating to all aspects of the initial request for proposals, including a mark-up of draft PPP Agreements, on a specified date prior to bid submission
- (b) the Unit, in consultation with the contracting authority, shall-
- (i) review the comments of the pre-selected bidders on the initial request for proposals;
- (ii) assist the contracting authority in preparation of the final version of the request for proposals;
- (iii) issue the final version of the request for proposals to the pre-selected bidders; and
- (iv) submit relevant technical and financial reports to the Cabinet for consideration.
47. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of- ^{Bid securities.}
- (a) withdrawal or modification of a proposal after a specified deadline;
- (b) failure to sign the PPP Agreement, if required by the contracting authority to do so, after the proposal has been accepted; or

- (c) failure to provide the required security for the fulfilment of the PPP Agreement after the proposal has been accepted or to comply with any other condition prior to signing the PPP Agreement as specified in the request for proposals.

Clarifications and revisions of the request for proposals.

48. (1) A contracting authority, in conjunction with the Unit, may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, clarify or revise any element of a request for proposals.

(2) A contracting authority and the Unit shall indicate in the record of the selection proceedings to be kept pursuant to Section 58 the nature of, and the justification for, any clarification or revision to the request for proposals, which shall be communicated to all bidders, in the same manner as the request for proposals, at a reasonable time prior to the deadline for submission of proposals.

Evaluation of proposals.

49. (1) A contracting authority, in conjunction with the Unit, shall establish an evaluation committee to evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such proposal criterion and the evaluation process set out in the request for proposal.

(2) An evaluation committee shall include representatives of the contracting authority, the Unit, the Ministry of Finance and the Ministry of Justice.

(3) For the purposes of subsection (1), a contracting authority, in conjunction with the Unit, may establish thresholds with respect to minimum acceptable technical and financial offers.

Evaluation criteria.

50. (1) The criteria for evaluating technical offers shall include the following:

- (a) technical soundness;
- (b) compliance with environmental standards under any law;
- (c) operational feasibility;
- (d) quality of services and measures to ensure their continuity;

- (e) timetable and work plan for the delivery of the PPP Project; and

- (f) any other prescribed criteria.

(2) The criteria for evaluating financial offers shall include-

- (a) the present value of proposed user levies, unit prices, and other charges over the full term of the PPP Agreement, if applicable;

- (b) the present value of proposed direct payments by the contracting authority, if any;

- (c) the present value of the costs for design and construction activities plus annual operation and maintenance costs;

- (d) the extent of financial support, if any, expected from a public authority in Sierra Leone;

- (e) the soundness of the proposed financial arrangements;

- (f) the social and economic development potential offered by the proposals; and

- (g) any other prescribed criteria.

51. (1) A contracting authority, in conjunction with the Unit, may require any bidder that has been pre-selected to reconfirm its qualifications in accordance with the same criteria used for pre-selection.

Reconfirmation of qualifications.

(2) A contracting authority, in conjunction with the Unit shall disqualify any bidder that fails to reconfirm its qualifications if requested to do so.

52. (1) A contracting authority, in conjunction with the Unit shall rank all responsive proposals on the basis of the evaluation criteria and prepare an evaluation report, identifying the preferred bidder.

Preparation of the evaluation report.

(2) For complex PPP Projects, a contracting authority, in conjunction with the Unit shall submit its evaluation report to the Cabinet for approval.

Contract finalisation phase.

53. (1) After completing the evaluation report, and after obtaining any necessary approvals required by Section 52 (2), the contracting authority, in conjunction with the Unit, shall begin negotiations with the preferred bidder, and then submit the proposed negotiated PPP Agreement to the Cabinet for approval, modification or rejection.

Circumstances authorizing award without competitive procedures.

54. Subject to the approval of Cabinet and with the support of the Unit a contracting authority may negotiate a PPP Agreement, subject to subsection (2) of section 5 without using the procedure set out in sections 39 to 53, in the following exceptional circumstances-

- (a) when there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set out in this Part VII would be impractical; provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority or the Unit nor the result of any dilatory conduct on the part of the contracting authority or the Unit;
- (b) where the PPP Project involves national defence or national security;
- (c) where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
- (d) where pre-selection bidding documents or a request for proposals has been issued but no responses were received, or all proposals failed to meet the evaluation criteria set out in the request for proposals, and if, in the opinion of the contracting authority, issuing new pre-selection bidding documents and

a new request for proposals is not likely to result in an award within the required time frame, or

- (e) in any other case where the Cabinet authorises such an exception for compelling reasons of national or public interest .

55. Where a PPP Agreement is negotiated without using the procedures set out in sections 39 to 53, the Unit shall-

Negotiation of PPP Agreements not competitively procured.

- (a) undertake or commission a pre-feasibility study and a feasibility study, in accordance with section 37;
- (b) except for an agreement negotiated pursuant to paragraph (c) of section 54, cause a notice of its intention to commence negotiations in respect of the PPP Agreement, to be published in the prescribed manner;
- (c) engage in negotiations with as many persons as the Unit considers capable of carrying out the PPP Project, as circumstances permit;
- (d) establish evaluation criteria against which proposals shall be evaluated and ranked;
- (e) in all cases of non-competitive procedures, good governance and transparency will prevail and the public and stakeholders shall be informed by the Government the reasons applied in the exception to the procurement rules in this Act.

56. (1) A contracting authority, the Cabinet and the Unit shall treat proposals in such a manner as to avoid the disclosure of commercially sensitive content to competing bidders, and any discussion, communication or negotiation between the contracting authority and a bidder shall be confidential, save for communications concerning the clarification of a request for submission of expressions of interest, a pre-selection bidding document or a request for proposals.

Confidentiality.

(2) Unless required by law or by a court order or permitted by the request for proposals, a party to a negotiation shall not disclose to any other person any technical or financial matter or any other information in relation to any discussion, communication or negotiation submitted, received or done, as the case may be, under this Act, without the consent of the other party.

Notice of
PPP Agree-
ment award.

57. (1) Except for a PPP Agreement awarded pursuant to paragraph (b) of Section 54, the contracting authority, in conjunction with the Unit, shall cause a notice of the PPP Agreement award to be published in the prescribed manner.

(2) A notice issued under subsection (1) shall identify the private partner, contracting authority and include a summary of the essential terms of the PPP Agreement.

Record of
selection and
award
proceedings.

58. A contracting authority, in conjunction with the Unit, shall keep an appropriate record of information pertaining to the selection and award proceedings in the prescribed manner.

Review
procedures.

59. A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on a contracting authority or the Unit under this Act or any other enactment, may seek a review of the matter through the complaints procedure provided for in the Public Procurement Act, 2004.

Organization
of private
partners.

60. (1) A contracting authority, in conjunction with the Unit, may require that the preferred bidder establish a legal entity incorporated under the laws of Sierra Leone.

(2) Where a preferred bidder establishes a legal entity in accordance with subsection (1), the bidder shall make a statement to that effect in the pre-selection bidding documents or in its technical proposal, as appropriate.

(3) Any requirement relating to the minimum capital of a legal entity established under subsection (1) and the procedures for obtaining the approval of a contracting authority to the legal entity's articles of association or any significant changes in the articles shall be set out in the PPP Agreement in a manner consistent with the terms of the request for proposals.

61. A contracting authority may receive, consider, evaluate and accept unsolicited proposals for PPP Projects, which shall be considered and implemented, upon approval of Cabinet, in accordance with section, 26 (3) (e) and (f) and sections 54 and 55, only after the submission of an independent feasibility study and compliance with good governance transparency obligation and procurement provisions and the laws of Sierra Leone.

Unsolicited
proposals.

PART VIII - SETTLEMENT OF DISPUTES AND GENERAL PROVISIONS

62. (1) Any disputes between the contracting authority and the private partner shall be settled through the dispute settlement mechanisms agreed by the parties or, in the event of a failure of such mechanisms, in accordance with the applicable Sierra Leone legislation.

Disputes
between the
contracting
authority and
the private
partner.

(2) The parties may agree to binding international arbitration, which will form part of PPP Agreements, mediation facilitated by the Unit or a statutory utility sector regulator, if established.

63. The Unit will require private and public partners to establish efficient mechanisms for handling claims submitted by its customers or users of the PPP Project where the private partner provides services to the public or operates a PPP Project which is accessible to the public.

Disputes
involving
customers or
users.

PART IX - MISCELLANEOUS

64. (1) Subject to the approval of Cabinet, the Minister may, by statutory instrument after consulting with NPPA, make regulations for carrying out the purposes of this Act.

Regulations.

(2) Without prejudice to the generality of subsection (1), the Minister with the approval of Cabinet, may make regulations for-

- (a) any thresholds relating to the procurement process;
- (b) any matter relating to competitive public bidding and direct negotiations;
- (c) mechanisms for settling of disputes under Section 62;

- (d) the imposition, revision and collection of user levies; and
- (e) anything that is required to be prescribed under this Act.

Unenforceability of PPP Agreements entered into without authorization.

65. If a contracting authority -

- (a) enters into a PPP Agreement with a private partner without having received the required approval from Cabinet, as set out in Parts VI and VII or;
- (b) enters into a PPP Agreement with a private partner in contravention of a direction given by Cabinet, the PPP Agreement shall be null and void and unenforceable as against either the contracting authority or the private partner.

Offences.

66. (1) A person shall not publish or disclose to any unauthorised person, otherwise than in the course of that person's duties, the contents of any documents, communication or information which relates to or which has to come to the knowledge of that person in the course of his duties under this Act unless with the written consent of the Cabinet, or under the provisions of the Access to Information Act, 2013.

(2) A person who contravenes subsection (1) commits an offence and is liable, to a fine not less than one hundred million leones and not exceeding one billion Leones.

(3) A person who, having any information which to the knowledge of that person has been published or disclosed in contravention of sub-paragraph (1), unlawfully publishes or communicates the information to any other person, commits an offence and is liable, upon conviction, to a fine not exceeding thirty million Leones.,

(4) A person or private partner who provides false information or documentation during the PPP Project procurement phase commits an offence and is liable on conviction to a fine not less than thirty million in Leones and such person or private partner shall be prohibited from taking part in any other form of government procurement for a period of 5 years.

67. (1) Where an agreement was entered into before the commencement of this Act, and that agreement or arrangement would have been a PPP Agreement if this Act was in operation on that date, then that agreement shall have effect as if this Act was in operation when that agreement or arrangement was entered into, and shall be deemed to have complied with this Act. Transitional provisions.

(2) A PPP Agreement entered into or amended after the commencement of this Act shall comply with this Act.

(3) A PPP Project that has been initiated before the commencement of this Act, but has not reached the financial close on the day of commencement of this Act, in all the remaining procedures shall comply with this Act.

68. (1) The National Public Procurement Act, 2004 is amended by the insertion of the following subsection at the end of section 1:- Consequential amendments.

"(6) This Act shall apply to NPPA rights and enforcement powers in the implementation of the NPPA regulatory and monitoring duties under the Public Private Partnership Act, 2014.

(6A) This Act shall not apply to the selection process of private partners in PPP Agreements made under the Public Private Partnership Act, 2014".

(2) The National Public Procurement Act, 2004 is amended in subsection (10) of section 18 as follows:

"Additional rotating members may be drawn to provide necessary technical, legal and business expertise to the procurement committee."

(3) The National Public Procurement Act, 2004 is amended by amending subsection (2) of section 20 as follows:

"The Panel shall consist of four members appointed by the Minister from among eminent Sierra Leoneans with a background in public procurement and public private partnerships, the Sierra Leone Chamber of Commerce, Financial Services Sector, Industry and Agriculture, the business community, university, the legal profession and other relevant fields."

SCHEDULE-
ILLUSTRATIVE PUBLIC PRIVATE PARTNERSHIP
ARRANGEMENTS

The following PPP Agreement, with variations and combinations, may be entered into by a contracting authority for undertaking a PPP Project. The transactions enumerated in this Schedule are for illustration only, and do not constitute an exhaustive list of potential PPP Agreements.

Concession
transaction.

1. An arrangement whereby a contracting authority defines and grants specific rights to a private partner to build and operate a facility, or otherwise provide a public service, for a fixed period of time. In certain concession arrangements, ownership of the facility may revert to the contracting authority at the end of the contractual period, as is the case in Build-Operate-Transfer (BOT) or Rehabilitate-Operate-Transfer (ROT) transactions. Alternatively, ownership of the facility may remain with the private partner, as is the case in a Build-Own-Operate transaction. In concession transactions, payments can take place in either direction, in that a private partner may make payments to the contracting authority for the concession rights, including the right to charge end-users, or the contracting authority may make payments to the private partner to compensate the private partner for the cost of providing the facility or service.

Lease
transaction.

2. An arrangement whereby a contracting authority leases a project owned by the Government to a private partner, who is permitted to operate and maintain the project for the period specified in the PPP Agreement. Pursuant to the terms of the lease, the private partner makes lease fee payments to the contracting authority, and is entitled to charge end-users for the service provided.

Management
contract
transaction.

3. An arrangement whereby a contracting authority entrusts the operation and management of a project to a private partner for the period specified in the agreement, on payment by the contracting authority of a specified fee to the private partner, which may involve incentive payments.

Long-term
service
contract
transaction.

4. An arrangement whereby a contracting authority outsources the supply of a specific service to a private partner for an extended period of time, in excess of three years. The service may be provided either to the contracting authority or directly to the end-users.

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to provide the legislative and legal framework for the introduction in Sierra Leone of the new development practice in which governments are increasingly partnering with the private sector to design, build, finance and operate infrastructure facilities hitherto provided exclusively by the public sector. Accordingly, when enacted, the Bill will -

- (a) establish a clear policy framework that will help both the public and the private sector to understand the core rationale for public private partnerships and how the Government will go about making them happen;
- (b) create the necessary environment for successful implementation of public private partnerships in Sierra Leone;
- (c) establish a Public Private Partnership Unit and identify institutions required for implementation of public private partnerships in Sierra Leone; and
- (d) create confidence in the private sector to do business with the Government in the area of providing infrastructure and other service provision.

The Bill is divided into nine parts.

Part I, the Preliminary Part, sets out and defines a number of terms and expressions used widely in the Bill

Part II defines and sets out in a comprehensive manner the nature and contents of a public private partnership agreement.

Part III provides for the role of the Cabinet to approve public private partnership projects in Sierra Leone.

Part IV provides for the establishment of a Public- Private Partnerships Unit to deal with matters relating to the PPP Projects and provide logistical support for the Cabinet in relation thereto.

Part V deals with the financial provisions for the PPP Unit.

Part VI provides for the responsibilities of contracting authorities.

Part VII deals with competitive selection process and award proceedings.

Part VIII contains provisions dealing with settlement of disputes.

Part IX is concerned with the miscellaneous provisions of the Bill.

FRANKLYN BAI KARGBO,
Attorney-General and Minister of Justice.

FREETOWN,
SIERRA LEONE
JUNE, 2014.