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I assent

DR. LAZARUS MCCARTHY CHAKWERA
PRESIDENT
12th May, 2022

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An Act to provide for partnerships between the public sector and the private sector for the supply of infrastructure and delivery of services as means of contributing towards sustainable economic growth, social development and infrastructure development; to provide for the development and implementation of public-private partnership arrangements in Malawi for the delivery of infrastructure and services; to provide for the establishment of the Public-Private Partnership Commission; to provide for privatization of state-owned enterprises, commercial entities and commercial assets; and to provide for matters connected with or incidental thereto

ENACTED by the Parliament of Malawi as follows—

PART I—PRELIMINARY

Short title

1. This Act may be cited as the Public-Private Partnership Act, 2022.

Interpretation

2. In this Act, unless the context otherwise requires—

"affordable" means the financial commitments created by a PPP Arrangement are sustainable and do not impose an unreasonable burden to the Government, Contracting Authority or end users;

"bank" has the meaning ascribed thereto in the Banking Act; Cap. 44:01

"business associate" means any person with whom a member or employee of the Commission carries on a business in whatever manner and for a common purpose;

"Chairperson" means the Chairperson of the Commission appointed in accordance with section 7;

"Chief Executive Officer" means the Chief Executive Officer of the Commission appointed under section 22;

"commercialization" means the re-organization of specified Government departments into commercialized enterprises which shall operate as profit making commercial ventures;

"Commission" means the Public-Private Partnership Commission established under section 6;

Cap. 46:03

"company" means a company within the meaning of section 2 of the Companies Act;

"concession" means an obligation to invest in, and right to use, an existing Public Infrastructure or a Public Infrastructure that is to be created, granted to a Private Party under a PPP contract for the performance, by the Private Party, of agreed business activity for which the Private Party may charge user fees, receive availability payments or both such fees and such payments during the term of the concession;

"consultant" means any person employed by the Commission to undertake any work of a specialized nature connected with the work of the Commission and includes banks, public accountants, economists, investment banks, doctors, architects, quantity surveyors, engineers, communication experts, lawyers and valuers;

"construction" includes building, refurbishment, rehabilitation, maintenance, repair, improvement, demolition, extension and replacement;

"Contracting Authority", means a Ministry, Government department, agency, parastatal organization, state-owned enterprise or Local Authority which intends to enter or has entered into a PPP contract with a Private Party;

"direct agreement" means an agreement entered into between a Contracting Authority and a person who has arranged or provided funding for a Private Party for the carrying out of a particular public-private partnership arrangement;

"divestiture" means the disposing of the whole or part of the assets and shares of a state-owned enterprise;

"equity" means any financial interest resulting from the purchase of shares for consideration;

"established fund" includes a pension fund, contributory social security scheme, compensation fund and superannuation fund;

"feasibility study" means a study undertaken to explore the viability of a project on technical, financial, legal, social and environmental, as a PPP project;

"financial institution" has the meaning ascribed thereto in the Financial Services Act;

Cap. 44:05

"Government" unless the context otherwise requires, means the Government of Malawi;

"immediate family member", in relation to any member or

employee of the Commission, means a spouse of the member or of the employee and any person who is related to that member or employee or their spouses by blood or marriage;

"infrastructure facility" includes an existing asset or an asset to be developed under a public-private partnership arrangement and means physical facilities and systems that directly or indirectly provide services to the public;

"investor" means an individual, a company, an established fund, a mutual fund, a financial institution or any other institution, entity or commercial venture whether local or foreign, and in any format of enterprise recognized as a legal entity under the laws of Malawi or under the laws from the jurisdiction of the Investor if not from Malawi, intending to invest in a state-owned enterprise or in an infrastructure facility under a public-private partnership arrangement, but does not include the Government, a local authority or a state-owned enterprise whether foreign or local;

"local authority" means a City, Town, District, or Municipal Council, established under the Local Government Act; Cap. 22:01

"market value" means the market value of a state-owned enterprise or a PPP project at the completion of the sale or transfer of the same;

"mutual fund" means an investment fund which purchases shares in a portfolio of companies and subdivides such portfolio into individual units for sale of such units to investors;

"operation" means the act of putting the PPP infrastructure to its intended use or the process of providing a service by the Private Party and includes management and maintenance of the infrastructure or any part thereof during the subsistence of a PPP contract;

"PPP Arrangement" means any project implemented under a PPP contract;

"PPP contract" means any formal written agreement entered into between the Contracting Authority and a Private Party under this Act for the implementation of a PPP Project or PPP arrangement;

"Private Party" means a private sector entity that enters into a PPP contract with a Contracting Authority and is responsible for undertaking the PPP project on behalf of the Contracting Authority under this Act;

"proceeds account" means the account established by section 86 of this Act;

"professional associate" means any person with whom a member or employee of the Commission has direct professional interaction which may unduly influence the decisions or actions of such member or employee;

"property" means all property, movable or immovable, and all estates, interests, easements and rights, whether legal or equitable into or out of property, choses-in action, money or good-will;

"public infrastructure" means any physical structure, facility, or system which is owned by the Government, a government department or agency, parastatal organization or a state-owned enterprise used for the provision of goods, services or amenities to members of the general public;

"public investments projects" includes projects involving public-private partnership arrangements;

"Public-Private Partnership (PPP)" means a contractual relationship in which a Contracting Authority partners with a Private Party to build, expand, improve, or develop infrastructure or service wherein the Contracting Authority and Private Party contribute one or more of the following—

(*a*) technical know-how;

(*b*) financial support:

(*c*) facilities;

(*d*) logistical support;

(*e*) operational management;

(*f*) investment; or

(*g*) such other input required for the successful deployment of a product or service,

for which the Private Party is compensated in accordance with a pre- agreed plan, typically in relation to the risk assumed and the value of the result to be achieved;

"share" in relation to a state-owned enterprise means a share in the capital of a body corporate and unless the context requires otherwise includes loans, stocks, debentures and debenture stock and options on any stocks, loan, debentures or debenture stock and rights;

"Special Purpose Vehicle" means a Company incorporated for the purpose of implementing a public-private partnership

arrangement including for raising finance for public-private partnership arrangements under this Act;

"state-owned enterprise" with respect to divestiture of state ownership or its interests, means a corporation, board, commission, company, parastatal organization or similar body, incorporated or unincorporated, in which the Government has direct or indirect ownership, equity or interest and includes partnerships, joint ventures or any other form of business arrangement or organization or any commercial entities or commercial assets howsoever held or created in which the Government has direct or indirect interest but does not include a Government department or a local authority;

"stocks" has the same meaning as shares;

"stock broker" means a person who carries on the business of buying and selling stocks or shares for and on behalf of other persons under the provisions of Part IV of the Securities Act; Cap. 44:06

"unsolicited bid" means an expression of interest for unsolicited public- private partnership project by a prospective Private Party to a Contracting Authority;

"user fee" means the rate, toll, fee, or other charge imposed for the use of all or part of an infrastructure or development facility or service; and

"value for money" means a net benefit of a PPP arrangements accruing to the Contracting Authority and members of the public in terms of cost, price, quality, quantity, timeliness or risk transfer and economic benefits.

PART II—OBJECTIVES

Overall objective

3. The overall objective of this Act is to make provision for the development and implementation of public-private partnership arrangements and the privatization and commercialization of public enterprises, public commercial entities and public commercial assets for purposes of efficient delivery of public goods and services in order to achieve sustainable economic growth and social development.

Specific objectives with respect to Public-Private Partnerships

4. Without derogating from the generality of section 3, the objectives of the Act with respect to public-private partnerships are to—

(*a*) improve the delivery of public infrastructure and services in Malawi through the promotion of private sector participation in the procurement of public infrastructure and the provision of public goods and services;

(*b*) assist in achieving better value for procurement of infrastructure and public expenditure by the Government through efficient and optimal risk identification and transfer to the private sector;

(*c*) leverage on private sector financing, management, technical know-how and technological innovation for delivery of efficient and affordable public infrastructure and services;

(*d*) encourage participation by resource owners in public private partnerships and providing assurance for private interests in those partnerships;

(*e*) encourage competitive and efficient markets for the provision of public infrastructure and services in Malawi;

(*f*) minimize the fiscal burden of providing infrastructure development and service delivery through the public treasury and thereby allowing resources to be freed for social services; and

(*g*) promote private sector contribution towards the attainment of positive social indicators associated with optimal access to infrastructure and services.

Specific objectives with respect to divestiture

5. Without derogating from the generality of section 3, the objectives of the Act with respect to divestiture of state-owned enterprises are to—

(*a*) foster increased efficiency in the economy;

(*b*) increase competition and reduce monopoly in the economy;

(*c*) promote participation by the Malawian public in state-owned enterprises; and

(*d*) raise revenue for the Government through divestiture of state-owned enterprises.

PART III—THE PUBLIC-PRIVATE PARTNERSHIP COMMISSION

Establishment of the Commission

6.—(1) There is hereby established a body to be known as the Public-Private Partnership Commission (in this Act otherwise referred to as the "Commission").

(2) The Commission shall—

(*a*) be a body corporate with perpetual succession;

(*b*) be capable of suing and being sued in its corporate name; and

(*c*) have power, subject to this Act, to do or perform all such acts and things as a body corporate may by law do or perform.

Composition of the Commission

7.—(1) The Commission shall consist of—

(*a*) a Chairperson and four other members appointed by the President by notice published in the *Gazette*, and

(*b*) the following members *ex-officio* or their designated representatives—

(i) the Secretary to the Treasury;

(ii) the Solicitor General;

(iii) the Principal Secretary responsible for economic planning and development; and

(iv) the Principal Secretary responsible for industry.

(2) In appointing members under subsection (1), the President shall have regard to the need for continuity of service on the Commission, so that at least two members appointed thereunder shall be re-appointed for the next term of office.

(3) A member of the Commission appointed under subsection (1) (a) shall be a person who—

(*a*) is a citizen of, and resident in, Malawi; and

(*b*) possesses qualifications, expertise and experience in the fields of economics, accountancy, law, engineering, project finance, public administration, public-private partnerships, mergers and acquisitions, business management, or such other qualifications, expertise and experience in a relevant field that the President, on recommendation of the Minister, may deem fit.

Tenure of office and vacancies

8.—(1) A member of the Commission appointed under section 7 (1) (*a*) shall hold office for a period of three years and shall be eligible for re-appointment.

(2) The office of a member of the Commission appointed under section 7 (1) (*a*) shall become vacant—

(*a*) if the member resigns by giving one-month notice, in writing to the President;

(*b*) upon the member's death;

(*c*) if the member is absent, without the written consent of the Chairperson, or without any valid excuse, from three consecutive meetings of the Commission of which the member has had notice;

(*d*) if the member is convicted by a competent court of law of a crime which is punishable with imprisonment without an option of a fine;

(*e*) if the member is adjudged to be bankrupt by a court of competent jurisdiction; or

(*f*) if the member participates, directly or indirectly, in a public-private partnership arrangement or acquires shares or

other interests in a state-owned enterprise in contravention of this Act.

Allowances of members

9.—(1) A member of the Commission shall not be entitled to receive a salary for his services to the Commission, but shall be paid such allowances as the Minister may determine.

(2) A member of the Commission shall be reimbursed out of the funds of the Commission for any reasonable expenses incurred by him for attending a meeting of the Commission or in the discharge of his functions, responsibilities and duties under this Act.

Authority and functions of the Commission

10.—(1) The Commission shall facilitate the implementation of public-private partnership arrangements and shall be the sole authority to implement the divestiture of direct and indirect interests in state-owned enterprises.

(2) Without derogation from the generality of subsection (1), the Commission shall—

(*a*) facilitate the procurement of private sector investors in public-private partnership arrangements and other forms of undertaking relating to public investment projects in Malawi;

(*b*) implement divestitures in direct or indirect Government ownership of, or interest in, any state-owned enterprise; and

(*c*) provide technical support to Contracting Authorities in the identification, initiation and development of public-private partnership projects.

(3) The Commission shall have such other powers as are necessary or expedient for the performance of its functions, including the engagement, from time to time, of consultants, advisers and other service providers.

Functions of the Commission in relation to public-private partnerships

11. Without derogating from the generality of section 10, the Commission shall have the following functions in relation to public-private partnerships—

(*a*) to perform pre-feasibility and viability assessment in conjunction with a Contracting Authority, of a project submitted to it and give its recommendations to the Cabinet through the Minister, as to whether the project—

(i) is affordable to the Government, the Contracting Authority and ultimate users;

(ii) delivers value for money; and

(iii) presents optimum transfer of technical, operational and financial risks to the private party;

(*b*) in conjunction with a Contracting Authority, to conduct full

legal, technical and financial feasibility studies on public-private partnership projects;

(*c*) to plan and manage the procurement process of a Private Party, from receipt of expressions of interest to selection of the Private Party;

(*d*) to advise the Minister on administrative procedures in relation to public-private partnership projects;

(*e*) to develop best practice guidelines in relation to all aspects of public-private partnerships;

(*f*) to propose to the Minister policy considerations in relation to accelerating bankable public-private partnership projects;

(*g*) to build public-private partnership awareness in the country;

(*h*) to implement the public-private partnership programme in accordance with the policy guidelines approved by the Cabinet;

(*i*) to advise the Minister on the optimal means of financing the cost of public investment projects in order to achieve value for money;

(*j*) to implement public-private partnership arrangements in accordance with this Act and any regulations made hereunder;

(*k*) to provide advice to any Contracting Authority on all aspects of financing, refinancing and insurance of public investment projects to be duly undertaken by means of public-private partnership arrangements; and

(l) to monitor, in conjunction with Contracting Authorities, progress of the implementation of public-private partnership arrangements in Malawi and report the same to the Cabinet through the Minister, at least once every three months.

Functions of the Commission in relation to divestiture

12. Without derogation to section 10, the Commission shall have the following functions in relation to divestiture of state-owned enterprises—

(*a*) to prepare an annual working plan, annual budget, and a Corporate Strategic Plan;

(*b*) to oversee all aspects of private sector participation in state-owned enterprises and infrastructure;

(*c*) to monitor the impact and progress of the divestiture programme and to prepare the long-term divestiture sequence plan in relation to enterprises designated for divestiture and submit such plan to the Cabinet through the Minister for approval;

(*d*) to report the sale of each state-owned enterprise to the Cabinet, through the Minister, specifying the method of sale used and the reasons why such method was considered appropriate, the proceeds realized and other particulars;

(*e*) to carry out or cause to be carried out, for guidance purposes, an assessment of the market value of the state-owned enterprise that is to be divested;

(*f*) subject to any existing rights, to ensure that the divestiture of each state-owned enterprise is carried out according to the following—

(i) each transaction is fully transparent to the public at large;

(ii) participation is competitive by making it open to all investors;

(iii) the process is fair and efficient;

(iv) the transaction is such as to reduce concentration of ownership and marketing;

(*g*) to set pre-qualification criteria for the selection of potential buyers of, or investors in, a state-owned enterprise to be divested, and evaluate offers from them, in accordance with such criteria, with regard to—

(i) the ability and commitment of buyers to develop the enterprise;

(ii) the track record of buyers and their expertise in the type of enterprise on offer, and

(iii) the price;

(*h*) to ensure that monopolies are not created nor maintained in the process of divestiture in relation to consumer markets, provided that concentrated production does not in itself constitute a monopoly for the purposes of this Act;

(*i*) to prepare or cause to be prepared the relevant documentation necessary to effect the divestiture of any state-owned enterprise;

(*j*) to seek potential investors in state-owned enterprises;

(*k*) to maintain records, safeguard information and establish such administrative procedures as shall ensure confidentiality of information;

(*l*) to maintain close liaison with all relevant institutions in the process of divestiture;

(*m*) to publicize activities of the divestiture programme; and

(*n*) to do all such things as are necessary or incidental or

conducive to the better carrying out of the functions of the Commission specified in this Act.

Provision of advice

13.—(1) In providing advice under this Act, the Commission shall have regard to—

(*a*) such policy directions as the Minister may issue for this purpose to Contracting Authorities from time to time in relation to the financing of public investment projects; and

(*b*) such policy guidance as the Minister may issue to Contracting Authorities from time to time in relation to the process, procedures and regulations generally of public-private partnership arrangements.

(2) The Minister shall cause a copy of every policy direction and policy guidance issued under subsection (1) to be sent to the Commission.

(3) The provision of advice by the Commission under this Act may include, where appropriate, advice on the engagement of consultancy services across the range of technical and other relevant expertise necessary to undertake public-private partnership projects.

(4) Every Contracting Authority shall seek the advice of the Commission as soon as it is practicable before undertaking any public investment project, and on the basis of a pre-feasibility assessment, evaluate the feasibility of a public-private partnership approach in implementing the project.

Meetings of the commission

14.—(1) Members of the Commission shall meet to conduct the business of the Commission at least once every three months, at such places and times as the Chairperson may, in consultation with the Chief Executive Officer, determine.

(2) A meeting of the Commission shall be convened by the Chairperson upon giving the members at least fourteen days written notice, stating the agenda, venue, date and time of the meeting.

(3) The Chairperson shall preside over all Commission meetings, provided that where the Chairperson is unable to attend the meeting, or it is not desirable that the Chairperson should preside over any particular meeting, members present and forming a quorum shall, for purposes of that meeting only, nominate one of the members, other than ex-officio members, to preside.

(4) No member of the Commission, except ex-officio members, shall attend to the business of the member's office by representation, and where a member is unable to attend any meeting of the Commission, the member may request that the member's apologies for failure to attend be recorded.

Special meetings

15.—(1) A special meeting of the Commission may be called by the Chairperson at short notice where there is urgent business of the Commission.

(2) At least four members of the Commission may call for a special meeting of the Commission where the Chairperson is, for any reason, unable or has, upon being requested by such members, refused to call for such meeting.

Quorum

16.—(1) The quorum at all meetings of the Commission or any of its committees, shall be constituted by the presence of at least half of the total number of members entitled to attend such meeting.

(2) If, after one hour from the time scheduled for the meeting to start, the quorum has not been achieved, then the meeting shall stand adjourned to another date, venue and time to be communicated to the members by notice.

(3) If, at the beginning of the subsequent meeting envisaged by subsection (2) a quorum has not been achieved, the members present shall constitute a quorum for purposes only of discussing the reasons for not being able to achieve a quorum at the two consecutive meetings.

(4) A meeting convened by virtue of subsection (3) shall pass a resolution for purposes of specifically addressing the problem causing lack of quorum.

Procedure at meetings of the Commission

17.—(1) Members of the Commission shall adopt their own procedure for the conduct of the proceedings and making of decision at meetings of the Commission.

(2) The procedure adopted by the members shall not in any way confer powers on them greater than those provided for by this Act.

(3) Except where otherwise agreed, the decisions of the members at meetings of the Commission shall be arrived at by consensus or by a majority of the votes of the members present and voting.

(4) In the event of a tie of votes, the Chairperson shall have a casting vote in addition to the deliberative vote, and the Chairperson's casting vote shall be final in determining the matter at hand.

(5) The Commission shall cause minutes of the proceedings of every meeting of the Commission to be kept in such manner as the members may determine from time to time.

Power to appoint Committees

18.—(1) The Commission may, for the purpose of performing its functions under this Act, establish such committees as it may deem necessary.

(2) The Commission may delegate to any committee some of its functions as it considers necessary based on the exigencies of its work.

(3) The Commission may appoint, as members of a committee established under subsection (1), persons who are or are not members of the Commission and such persons shall hold office for such period not exceeding the term of the members of the Commission.

(4) Subject to any special or general directions of the Commission, any committee established under subsection (1) may regulate its own procedure.

Disclosure of interest

19.—(1) Every member of the Commission or of any committee shall, if present at a meeting of the Commission or committee, declare any interest which such member may have in any business, discussion, decision or any subject matter forming part of the agenda of a meeting which is due for deliberation and unless the Commission or the committee otherwise directs, that person shall not take part in such business, discussions or decision.

(2) A member of the Commission shall be deemed to have an interest in a matter if that person or that person's immediate family member, or that person's professional or business associate, is directly or indirectly interested in a private or professional capacity in the outcome of the decision of the Commission in that matter.

(3) Failure by a member of the Commission to make any declaration of interest under subsection (1) shall be an act of misconduct for which such member may be disciplined but such failure shall not, unless the Commission decides otherwise, render the decision of the Commission void or ineffectual.

Co-opted persons

20.—(1) The Commission may, in its discretion at any time and for any period, invite any person to attend any meeting of the Commission or of any of its committees and take part in the deliberations of the meeting, but such person shall not be entitled to vote at the meeting.

(2) Section 19 shall apply, mutatis mutandis, to a person attending a meeting of the Commission pursuant to subsection (1).

PART IV—SECRETARIAT

Secretariat of the Commission

21. The Secretariat shall consist of the Chief Executive Officer and such other employees of the Commission as may be appointed under this Part.

Appointment and duties of the Chief Executive Officer

22.—(1) The Commission shall appoint a Chief Executive Officer, on such terms and conditions as it may determine, subject to the approval of the Minister.

(2) The Chief Executive Officer shall perform such duties as the Commission shall assign to that office and shall ensure the effective administration and implementation of the provisions of this Act.

(3) Without derogation from the generality of subsection (2), the duties of the Chief Executive Officer shall include the following—

(*a*) to formulate and submit to the Commission proposals and recommendations including programme strategies, selection criteria and annual targets for—

(i) public-private partnership arrangements;

(ii) financing of public-private partnership projects; and

(iii) divestiture and reform of state-owned enterprises;

(*b*) to prepare and update a database of state-owned enterprises that are subject to divestiture;

(*c*) to establish operational guidelines and transparent procedures and carry out studies for implementation of—

(i) public-private partnership arrangements;

(ii) financing of public-private partnership projects; and

(iii) the divestiture and reform of state-owned enterprises;

(*d*) to ensure that the functions of the Commission are being performed effectively;

(*e*) to prepare for approval by the Commission, the strategic objectives and targets to be met by the Commission; and

(*f*) any other functions and duties as the Commission may assign to him from time to time for the purposes of the implementation of the Act.

Attendance of meetings of the Commission by the Chief Executive Officer and other officers

23.—(1) The Chief Executive Officer or in the absence of the Chief Executive Officer, such other officer of the Commission as the Chief Executive Officer may designate from time to time, shall attend meetings of the Commission and participate in the deliberations of the meetings of the Commission but shall not have a right to vote on any matter.

(2) The Chief Executive Officer may designate other senior officers of the Commission as officers eligible to attend a commission meeting

(3) In accordance with the provisions of section 19, members of the Commission may, for good cause, require the Chief Executive

Officer or such other officers allowed to attend the meeting to withdraw from any meeting.

(4) For purposes of this section, the provisions of section 19 shall apply, mutatis mutandis, to the Chief Executive Officer and to such other officer referred to in subsection (2).

Recruitment of other employees

24.—(1) The Commission may delegate to the Chief Executive Officer the recruitment, on such terms and conditions as the Commission may determine, such other employees, subordinate to the Chief Executive Officer, as the Commission considers necessary for the performance of the functions of the Commission.

(2) The salary, any allowance and other employment benefits of employees of the Commission shall not be reduced or taken away during his or her period of employment but shall be increased at intervals so as to retain its original value.

Disclosure of interest by employees, etc

25.—(1) An employee of the Commission or a consultant to the Commission shall be required to disclose interest in any matter relating to the divestiture programme or public-private partnership arrangement undertaken by the Commission.

(2) A disclosure of interest made under this section shall be made to the Chief Executive Officer who shall take such decision as may be considered appropriate in each case and submit a report thereon to the Commission.

(3) An employee of the Commission or the consultant shall be deemed to have an interest in a matter if that person or that person's immediate family member, or that person's professional or business associate, is directly or indirectly interested in a private or professional capacity in the outcome of the decision of the Commission in that matter.

(4) Failure to make any declaration of interest under subsection (1) shall be an act of misconduct for which such employee or consultant may be disciplined, but such failure shall not, unless the Commission decides otherwise, render the decision of the Commission void or ineffectual.

Oath of secrecy and non-disclosure of information

26.—(1) A member of the Commission or a member of committee of the Commission or an employee of the Commission or a consultant in the service of the Commission, shall take such oath of secrecy as may be approved by the Commission or as may otherwise be prescribed under this Act.

(2) No person shall, without the consent in writing given by or on behalf of the Commission, publish or disclose to any person, otherwise than in the course of the person's duties, the contents of

any document, communication or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act.

(3) Any person who knowingly contravenes the provision of subsection (2) commits an offence.

PART V—PUBLIC-PRIVATE PARTNERSHIP ARRANGMENTS

Legal entity for implementing PPP arrangements

27.—(1) A public-private partnership arrangement may be implemented through a—

(*a*) Special Purpose Vehicle incorporated under the Companies Act specifically for this purpose; or

(*b*) Joint Venture Agreement between the Contracting Authority and the Private Party.

(2) The decision on whether a PPP project may be implemented through a Special Purpose Vehicle or a Joint Venture Agreement shall be made by the Commission and communicated to prospective bidders during the bidding process.

(3) The Government, through the Minister may, after taking into account the nature of the PPP arrangement, be a shareholder in the Special Purpose Vehicle.

Powers, functions and duties of Contracting Authorities

28. Without prejudice to any powers or functions which a Contracting Authority may have under any written law, for purposes of this Act, a Contracting Authority shall, with the assistance of the Commission, have and exercise the following powers, functions and duties in relation to PPP arrangements—

(*a*) identify, conceptualize, appraise, develop and monitor a project to be implemented under this Act;

(*b*) prepare periodic and advance list of proposed PPP arrangements in accordance with Part VI of this Act;

(*c*) undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under a PPP arrangement in accordance with Part VI;

(*d*) enter into a PPP contract with private Parties in accordance with the provisions of Part IX of this Act;

(*e*) provide oversight and supervision with respect to the implementation of a PPP arrangement, including—

(i) the design and construction of an infrastructure facility, together with the operation of services relating to it and the provision of finance, if required, for such design, construction and operation; and

(ii) the provision of services relating to an infrastructure facility and the provision of finance, if required, for such service;

(*f*) arrange or provide for payments to a Private Party;

(*g*) transfer, assign, convey or lease any interest or part thereof in an infrastructure facility or any part thereof to the Private Party in accordance with a PPP contract; and

(*h*) take a transfer, conveyance, surrender of lease etc., of any interest from the Private Party in an infrastructure facility or any part thereof in accordance with a PPP contract.

Power to transfer property

29.—(1) For purposes of facilitating the implementation of a PPP arrangement, a Contracting Authority may transfer, convey or assign its interest in any real or personal property to a company formed under section 27.

(2) A Contracting Authority shall not convey, assign or transfer any property under this section to any such company without the prior consent of the Minister and the Minister responsible for the Contracting Authority.

(3) A Contracting Authority may, with the approval of its responsible Minister, attach such terms and conditions as it considers appropriate to any transfer, conveyance or assignment envisaged in subsection (1).

(4) Unless otherwise expressly provided for in a PPP contract, any property transferred, assigned or in any way conveyed to the company shall be transferred back, reassigned or reconvened to the Contracting Authority at the termination or expiry of the PPP contract.

Delegation of powers of the Contracting Authority to a Private Party

30.—(1) Once a Contracting Authority has entered into a PPP Contract, it shall have the power to delegate to the Private Party, some of the functions of the Contracting Authority as may be specified in the PPP Contract.

(2) A function conferred on a Private Party by virtue of subsection (1) may be performed by the Private Party in its own name, subject to the general superintendence and control of the Contracting Authority.

(3) Notwithstanding the delegation of a function to a Private Party, the function shall continue to be vested in the Contracting Authority concurrently with the Private Party and where necessary, the Contracting Authority may intervene in the exercise of such function, in accordance with terms of the PPP contract.

(4) The conferral of a function ordinarily exercisable by a Minister on a Private Party shall not affect the Minister's responsibility to Parliament or as a member of the Government for the performance of that function.

(5) In this section, the term "function", in relation to a Contracting Authority, includes functions of any other Contracting Authority to be performed by it pursuant to a statutory provision or contractual obligation between the Contracting Authority with any Authority, public body or third party, as the case may be.

Duty to conduct periodic PPP infrastructure needs assessment

31.—(1) Every Contracting Authority shall, annually, identify public infrastructure and facility projects that have a potential of being implemented through public private partnership arrangements under this Act.

(2) In carrying out the assessment, a Contracting Authority shall be guided by Malawi's Public Sector Infrastructure Policy, the Malawi Growth and Development Strategies, Malawi's Public Sector Investment Plans or such other Policies, Strategies and Plans as the Government may adopt from time to time aimed at achieving sustainable economic growth and social development.

(3) Contracting Authorities shall ensure that the assessment under this section is conducted in the manner provided for under Part VI of this Act.

Duty to include PPP project costs in annual budgets

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32.—(1) Subject to the provisions of the Public Finance Management Act, a Contracting Authority shall be under an obligation to budget for all foreseeable costs associated with the conceptualization and implementation of PPP arrangements envisaged in section 28.

(2) In arriving at the cost estimates for purposes of subsection (1), the Contracting Authority may seek guidance from the Commission on the potential PPP project activities which may require public funding such as feasibility studies, environmental and social impact assessments and such other costs as the Commission may advise.

Minimum terms of PPP contracts

33. Without prejudice to the rights of the Parties to agree such terms and conditions of the PPP Contract as they may deem necessary, every PPP contract, at the minimum and in addition to any other terms and conditions, shall—

(*a*) state the nature and scope of works to be performed and services to be provided by the Private Party and the duration thereof;

(*b*) set out the assistance that a Contracting Authority may provide to the Private Party in obtaining licenses, wayleaves,

easements and permits which may be necessary for the implementation of the project;

(*c*) provide for the return of assets, if any, to a Contracting Authority, at the termination or expiry of the PPP contract;

(*d*) set out procedures for the review and approval of engineering designs, construction plans and specifications by the Contracting Authority and the procedures for testing and final inspection, approval and acceptance of the project;

(*e*) provide for the Contracting Authority's right to monitor the works to be performed and services to be provided by the Private Party and the conditions and extent to which the Contracting Authority or any regulatory authority may order variations in respect of the works and conditions of service to ensure that the project is properly operated and the services are provided in accordance with the applicable legal and contractual requirements;

(f) state the extent of the Private Party's obligation to provide the Contracting Authority or any regulatory authority with reports and other information on its operations;

(*g*) provide for mechanisms for dealing with additional costs and other consequences that might result from any order issued by the Contracting Authority or another public authority including any compensation to which the Private Party might be entitled;

(*h*) set out the rights of the Contracting Authority to review and approve major contracts to be entered into by the Private Party, in particular with the Private Party's own shareholders or other affiliated persons;

(*i*) provide for guarantees of performance to be provided and insurance policies to be maintained by the Private Party in connection with the implementation of the project;

(*j*) state acts and omissions which will constitute breach of the PPP contract, their effects and remedies to the innocent party;

(*k*) provide for the duration of the agreement and the rights and obligations of the Parties upon its expiry or termination; and

(*l*) expressly provide for the mode of payment to the Private Party, the method and formula for determining such payment, the formula for adjustments and grounds on which the same may be adjusted;

(*m*) provide for reporting obligations; and

(*n*) any other information as may be necessary.

Types of PPP arrangements

34.—(1) Without prejudice to any other PPP arrangements which a Contracting Authority may enter into with a Private Party for the implementation of a PPP project, the Contracting Authority, in consultation with the Commission, may use any one or a combination of the following modes of private sector involvement—

(*a*) Build Own Operate Transfer;

(*b*) Build Operate Transfer;

(c) Build Own Operate;

(*d*) Design Finance Refurbish Operate Transfer;

(*e*) Design Finance Build Operate Transfer;

(*f*) Concession or Leases; and

(*g*) any other mode as the Commission shall determine.

(2) The Minister may, by regulations made under this section, establish the criteria to be used by Contracting Authorities in determining the most suitable PPP arrangement for a particular PPP project.

Governing law for a PPP contract

35.—(1) Every PPP contract entered into under this Act shall, unless agreed otherwise between the parties, be governed by the Laws of Malawi and by entering into the contract, the Parties automatically submit to the jurisdiction of the Courts of Malawi for purposes of enforcement of any dispute resolution order.

(2) Where the circumstances of the particular case may otherwise require, the Minister responsible for justice, in consultation with the Minister responsible for finance, may authorise a departure from the provisions of subsection (1).

(3) Every PPP contract shall provide for dispute resolution mechanisms in the event of breach of the contract or misunderstanding between the Parties.

(4) Without derogation from the generality of subsection (3), the Parties to a PPP contract shall make every attempt to resolve any disputes in any of the following ways—

(*a*) amicable conciliation;

(*b*) mediation through a mutually agreed third party; or

(*c*) arbitration in accordance with the terms of the PPP contract.

PART VI—PROCEDURES FOR PPP PROJECT IDENTIFICATION

Criteria for project identification

36.—(1) Once a Contracting Authority has identified a potential project, it shall proceed to assess the best option of carrying out the project between the PPP arrangement or the traditional procurement.

(2) The Contracting Authority shall determine project viability by—

(*a*) demonstrating comparative advantage in terms of strategic and operational benefits for implementation of the project under a PPP arrangement;

(*b*) describing the nature of the Contracting Authority's functions, the extent to which those functions can lawfully and effectively be performed by a Private Party and the most appropriate form by which the Contracting Authority may implement the project under a PPP contract;

(*c*) demonstrating that the agreement shall be affordable, deliver value for money and transfer appropriate technical, operational or financial risk to the Private Party; and

(*d*) explaining the capacity of the Contracting Authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the Partner in terms of the agreement.

(3) At the end of the options analysis envisaged in subsections (2), the Contracting Authority shall indicate the comparative projections of—

(*a*) the full cost of the project, if the project is not carried out as a public private partnership; and

(*b*) the full cost of the project, if the project is carried out as a public private partnership.

Project pre-feasibility assessment

37. If a Contracting Authority determines that a particular project is best be carried out under a PPP arrangement, it shall proceed to carry out an internal project viability assessment which shall include—

(*a*) the identification of possible project location;

(*b*) alignment of the project to the Contracting Authority's public infrastructure priorities;

(*c*) estimation of broad project costs; and

(*d*) an initial assessment of the project's viability and affordability.

Submission of proposed PPP arrangements

38.—(1) On completion of the processes set out in sections 36 and 37, a Contracting Authority shall submit to the Ministry responsible for economic planning, a list of proposed PPP arrangements for approval.

(2) The list of proposed PPP arrangements shall clearly state the order of priority in which the Contracting Authority wishes to implement the projects, replete with suggested timeframes.

(3) The Contracting Authority shall attach a comprehensive report on the institutional needs assessment, the options analysis and a pre-feasibility assessment for each proposed PPP project when submitting the list of proposed PPP arrangements to the Ministry responsible for economic planning.

(4) Where the Contracting Authority is a Local Authority, and subject to section 38 (5), the list of proposed PPP arrangements shall be submitted to their respective Councils for review and approval before submission to the Commission.

(5) The Minister shall, by notice published in the *Gazette*, determine size and nature of PPP arrangements to be approved by local authorities in accordance with section 38 (4).

Technical project assessment

39.—(1) On receipt of the list of proposed PPP arrangements from a Contracting Authority, the Ministry responsible for economic planning shall, in addition to conducting a cost benefit analysis of each project, confirm, in consultation with the Commission, the PPP prefeasibility assessment carried out by the Contracting Authority.

(2) In assessing the suitability of any proposed project as a PPP project, the Ministry responsible for economic planning shall take into account the following factors—

(*a*) the strategic importance of the project to national policies and the statutory mandate of the Contracting Authority;

(*b*) the comparative estimated cost of the project and expected outcomes;

(*c*) the relative benefits that the project would bring to the Contracting Authority and end users of the goods or services to be generated thereby;

(*d*) the extent to which the proposed project meets the social and economic development goals of Malawi;

(*e*) the proposed manner in which the project will be implemented by the Contracting Authority;

(*f*) the financial capability and technical capacity of the

Contracting Authority to implement such a project as a PPP project; and

(g) the comparative cost of undertaking the project through a PPP arrangement as opposed to traditional project procurement.

(3) After assessing the proposed projects, the Ministry responsible for economic planning shall categorize the projects into projects which can be implemented through a PPP arrangement and projects which can be implemented through traditional public procurement.

Publication of approved PPP arrangements

40.—(1) The Minister shall cause all the approved projects to be published in the *Gazette*.

(2) Except with the written consent from the Minister, no Contracting Authority shall be allowed to implement any PPP project unless the same has been approved in accordance with subsection (1).

Preparation of PPP arrangements compendium

41.—(1) The Minister shall, upon gazetting the approved PPP arrangements, submit the projects to the Commission.

(2) The Commission shall, upon receipt of the approved PPP arrangements, conduct or cause to be conducted, feasibility study for each project, in conjunction with the responsible Contracting Authority in accordance with section 42.

(3) The Commission shall publish a compendium of viable PPP arrangements in such a manner as the Minister may approve and shall share the compendium with the authority responsible for promotion of investment for promotion to potential investors.

(4) The Commission may sell copies of the Compendium at such prices as the Commission may determine from time to time.

PART VII—PROCEDURES FOR PPP PROJECT PROCUREMENT

Feasibility studies for PPP arrangements

42.—(1) The Commission shall assess each PPP project and determine the nature of feasibility study which may be required and the manner in which such feasibility study may be conducted.

(2) Without derogation to the generality of subsection (1), at the minimum, a feasibility study shall—

(*a*) demonstrate comparative advantage in terms of strategic and operational benefits in favour of implementing the project under a PPP arrangement;

(*b*) describe in specific terms—

(i) the nature of the Contracting Authority's functions, the

specific functions to be considered in relation to the project, and the expected inputs and deliverables;

(ii) the extent to which those functions can lawfully and effectively be performed by a partner in terms of an agreement; and

(iii) the most appropriate form by which the Contracting Authority may implement the project under an agreement;

(*c*) demonstrate that the agreement shall—

(i) be affordable to the Government, Contracting Authority and end users, if any;

(ii) deliver value for money; and

(iii) transfer appropriate technical, operational or financial risk to the Partner; and

(iv) bankability of the project.

(*d*) explain the capacity of the Contracting Authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the Private Party in terms of the agreement.

(3) Every feasibility report shall be approved by the Minister prior to its implementation or use for purposes of this Act.

(4) Any changes in the feasibility report on fiscal contingent liabilities that come after negotiations of the PPP contract shall be clearly presented to, and approved by, the Minister prior to signing of the PPP contract

Delegation of feasibility study to a Private Party

43.—(1) The Commission may consider engaging an interested Private Party to carry out the whole or part of a feasibility study for a PPP project where the project is highly technical and the Private Party possesses the necessary technical expertise to carry out the feasibility study.

(2) Where the Commission decides that a feasibility study must be carried out by an interested Private Party, it shall put in place all necessary measures to avoid conflict of interest or unfair advantage in the tender process of the PPP project.

(3) A Private Party who carries out a Feasibility Study under this section shall be compensated by the successful Private Party for the cost of the feasibility study, if the successful Private Party is not the Private Party that carried out the feasibility study.

(4) The feasibility Study conducted by a Private Party shall be reviewed by the Commission and the Contracting Authority and if acceptable, it shall be adopted as a Government feasibility study for the PPP Project and for purposes of this Act.

Procurement of a Private Party

44.—(1) The Commission shall be responsible for the procurement of a Private Party for a PPP project but the Commission may, where it deems appropriate so to do, taking into account the size and nature of the PPP project delegate the procurement to a Contracting Authority, if in the opinion of the Commission, the Contracting Authority has capacity to carry out the procurement.

(2) The Contracting Authority shall submit to the Commission for its approval, copy of the evaluation report together with all necessary documents used during the evaluation.

(3) The Commission shall consider carrying out a pre-qualification exercise of bidders.

(4) The invitation to bidders to submit bids shall be done in accordance with the provisions of section 45 irrespective of whether the procurement is being done by the Commission or by the Contracting Authority.

(5) Where the Commission is of the view that it is not necessary for a particular PPP project procurement to go through the pre-selection phase, it may proceed to directly solicit technical proposals in terms of section 48.

Advertisement of PPP arrangements

45.—(1) An advertisement for a PPP project procurement shall be published in at least two newspapers of national circulation and such other electronic media as the Commission may determine, requesting for expressions of interest from Private Parties to undertake the project.

(2) An advertisement issued under subsection (1) shall clearly specify the following—

(*a*) the nature of the PPP project in question;

(*b*) the minimum eligibility criteria for bidders;

(*c*) the types of supporting information which a bidder must submit together with the expression of interest;

(*d*) the prescribed manner in which the expression of interest must be made and submitted to the Commission; and

(*e*) the last date and time on which the Commission shall close receipt of expressions of interest.

(3) The advertisement issued shall, in addition to the information under section 45 (2) mention that a bidder may include additional information over and above the information required in the advertisement such as documents, designs or such other graphic information as the bidder may deem necessary and relevant to the expression of interest.

Expression of interest by eligible bidders

46.—(1) A bidder who is interested to participate in the bidding for a PPP project following the advertisement in section 45, shall express such interest by fulfilling the requirements set out in the advertisement.

(2) All bidders shall ensure that they provide accurate information to the Commission which proves that—

(*a*) the bidder meets the minimum criteria specified in the request for expression of interest;

(*b*) has the technical capability and financial capacity to undertake the project;

(*c*) has the legal capacity to enter into a PPP contract with the Contracting Authority;

(*d*) is not insolvent, in receivership, bankrupt or in the process of being wound up; and

(*e*) is not blacklisted by any authority in Malawi from supplying any goods or services to the Government under any law.

Selection of preferred bidders

47.—(1) At the close of receiving expressions of interest, the Commission or the Contracting Authority shall assess all expressions of interest received in order to determine the bidders who meet the minimum eligibility criteria.

(2) A bidder may be disqualified from proceeding to the next stage on any of the following grounds—

(*a*) submission of false, inaccurate or incomplete information in relation to the expression of interest;

(*b*) proof of collusion, corrupt practices or commission of any act of deception or dishonesty;

(*c*) failure to meet the minimum eligibility criteria; or

(*d*) contravention of the provisions of this Act or any other written law in order to have an unfair advantage over other bidders in the award of the tender.

(3) At the end of the assessment of the bids, successful bidders shall be shortlisted and pre-qualified to take part in the submission of detailed proposals.

(4) In the exercise of its powers under this section, the Commission or the Contracting Authority shall act with the utmost transparency, accountability, fairness and impartiality to ensure that all bidders are afforded equal opportunity and similar treatment throughout the entire process.

Request for and submission of proposals

48.—(1) The Commission or the relevant Contracting Authority, as the case may be, shall prepare tender documents for the procurement of investors for the PPP project in question and shall invite bidders to submit their proposals in accordance with the tender document instructions.

(2) The tender document prepared under subsection (1) shall, at the minimum, contain the following information:

(*a*) general description and nature of project in question;

(*b*) technical specifications of the project and financial conditions that should be met by a bidder;

(*c*) specifications of the final product, level of services, performance indicators and such other requirements as the Contracting Authority and relevant regulatory bodies may consider necessary including the safety, security and environmental preservation requirements to be met by a bidder;

(*d*) basic terms and conditions of the project agreement including mandatory requirements;

(*e*) the criteria and method to be used in the evaluation of the bid;

(*f*) prescribed forms and documents that are required to be filled and submitted by a bidder;

(*g*) the value of the bid security required to be submitted by a bidder, if any;

(*h*) conditions under which bidders may submit request for clarifications; and

(*i*) the deadline and place for submission of the tender documents by a bidder.

(3) A bidder who intends to bid for the project shall complete and submit a technical and financial proposal in accordance with the instructions contained in the tender documents provided by the Commission or the Contracting Authority for this purpose.

Evaluation of proposals by the Commission

49.—(1) For purposes of evaluating a proposal, the Commission or the Contracting Authority shall empanel an Evaluation Committee comprising persons who possess the requisite technical knowledge and skills in the area of the PPP project under consideration.

(2) Prior to the commencement of bid evaluation, the Evaluation Committee may invite the bidders who submitted proposals to attend a meeting to witness the opening of the proposals.

(3) The Evaluation Committee shall evaluate all the proposals submitted and received based on the evaluation criteria prepared by the Commission and contained in the bid and tender documents.

(4) Where the Evaluation Committee is of the view that bidders who have submitted proposals should be allowed to make oral representations of their proposals and be interviewed by members of the Committee, it shall hold a competitive dialogue with all bidders and allow them to define the technical or financial aspects of the proposals.

(5) The discussions held during a competitive dialogue shall be minute and shall form part of the record of the evaluation proceedings provided that members of the Evaluation Committee shall not be at liberty to disclose such information to other bidders or third Parties.

(6) After concluding the evaluation of both the technical and financial proposals, the Evaluation Committee shall assign a score to each proposal in accordance with its competitiveness against the agreed assessment criteria and scores shall form the basis of the selection of the preferred bidder.

Selection of preferred proposal

50.—(1) The selection of a preferred bidder shall be based on the overall score obtained by each bidder and the Technical Evaluation Committee shall rank the bidders from the highest to the lowest score.

(2) At the conclusion of ranking the bidders in order of their scores, the Technical Committee shall prepare an Evaluation Report together with the copies of the proposals received from the bidders and shall submit the same to the Commission within Thirty days from the last date of the evaluation proceedings.

Cancellation of PPP tender

51.—(1) The Commission, in consultation with a Contracting Authority, may cancel a tender process at any time before the execution of the contract upon becoming aware of fundamentally serious adverse consequences which may occur if the tender process is allowed to go on.

(2) Where the Commission cancels any tender, it shall communicate to all bidders who took part in the bidding process and such communication shall give the reasons for the cancellation.

(3) A bidder who is adversely affected by the cancellation of a tender shall not be entitled to compensation for any expenses incurred in the course of preparing, submitting or attending bid-opening meetings in respect of the cancelled tender.

PART VIII—DIRECT NEGOTIATION, UNSOLICITED BIDS AND INITIATION OF PPP PROJECT PROCUREMENT BY A PRIVATE PARTY

Direct negotiation

52.—(1) Where a PPP project has been approved in accordance with this Act, the Commission may, upon request from a Contracting Authority, consider implementation of the PPP Project through direct negotiation with a Private Party in any of the following circumstances—

(*a*) where there is need for continuity in the construction, development, maintenance or operation of a facility or provision of a service;

(*b*) where there is only one person or firm capable of undertaking the project, maintaining the facility or providing the service;

(*c*) where the project requires the use of intellectual property, trade secrets or other exclusive rights which are exclusively owned by a particular person or firm;

(*d*) where the cost of buying intellectual property rights in relation to the proposed design of the project is substantially higher if the project is carried out by another person or firm;

(*e*) where the project involves matters of national defence or security;

(*f*) where an invitation to the pre-selection proceedings or a request for technical proposals has been issued but no proposals were submitted or all proposals failed to meet the evaluation criteria and in the opinion of the Commission re-advertisement of the PPP project would not yield different results;

(*g*) where the country is facing unforeseeable natural or man-made disaster within the meaning of the Disaster Preparedness and Relief Act; or Cap. 33:05

(*h*) where the project is a regional project affecting or cutting across a number of countries.

(2) Where a Contracting Authority seeks to rely on the provisions of this section, the Contracting Authority shall prove to the Commission the circumstances giving rise to the request.

(3) The Commission shall, before commencing negotiations with the Private Party under this section, seek the approval of the Minister.

(4) The Commission shall not implement a project under this section unless a feasibility study is conducted and approved by the Minister upon being satisfied that the project is a viable PPP project.

Right to initiate a PPP project procurement

53.—(1) A Private Party may initiate a bid for a PPP project based on the list of approved PPP arrangements published in the PPP arrangements Compendium provided for in section 41.

(2) A Private Party who wishes to initiate a bid under this section shall do so in writing to the Commission, stating details of the Private Party similar to those required by section 46 and such communication shall be treated as an expression of interest.

(3) Upon receipt of the communication under subsection (2), the Commission shall, within a period of seven days, acknowledge receipt of the communication and advise the Private Party of the steps to be taken by the Commission.

(4) The Commission shall, in consultation with the relevant Contracting Authority, publish a public notice in at least two newspapers of mass circulation, inviting any person or body to submit a proposal to the PPP project proposed by the Private Party, within such time frame as shall be determined by the Commission, taking into account the nature and complexity of the proposed project.

(5) The Commission shall make sure that the Private Party that initiated the PPP Project under this section is informed of the publication of the notice and is invited to submit a proposal for the PPP Project.

(6) For avoidance of any doubt, the provisions under section 56 shall not apply to PPP arrangements initiated under this section.

Unsolicited bids

54.—(1) Any Unsolicited Bid shall be referred to the Commission and shall not be responded to by the Contracting Authority.

(2) Once the Commission receives the Unsolicited Bid, it shall consult with the relevant Contracting Authority for a preliminary assessment whether the public-private partnership of the type proposed is acceptable or not.

(3) If the assessment and consultation in subsection (2) determines that the public-private partnership type is acceptable, the Contracting Authority shall seek the approval of the Ministry responsible for economic planning to conduct a feasibility study.

Processing of unsolicited bids

55.—(1) Where a feasibility study is conducted following the approval obtained under section 54 (3) and the feasibility study report is approved by the Minister, the Commission shall publish a public notice in at least two newspapers of mass circulation, inviting any person or body to submit an alternative and competitive

proposal to the PPP project proposed by the unsolicited bidder, within such time frame as shall be determined by the Commission, taking into account the nature and complexity of the proposed project.

(2) Upon receipt of proposals solicited under subsection (1), the Commission shall inform the unsolicited bidder that it has received proposals from other bidders on the proposed PPP Project and shall give the unsolicited bidder an opportunity to submit a revised bid if necessary, within a specified time frame determined by the Commission.

(3) Where other bidders submit alternative and competitive proposals to the unsolicited proposal, the Commission shall assess all the proposals received including the unsolicited proposal and the selection of a preferred bidder shall be based on the overall score obtained by each bidder.

(4) Where no alternative and competitive proposals have been submitted after the public notice published under subsection (1), the Commission shall proceed to evaluate the unsolicited proposal on its own merits and may approve or reject it.

(5) Unsolicited bids may be implemented through direct negotiation under section 52.

Award of extra score

56.—(1) The Commission may award an extra score to a Private Party who initiated a successful unsolicited PPP project under section 54, during the bid-evaluation stage.

(2) In awarding the extra score, the Commission shall take into account the following factors:

(*a*) the ingenuity in the conceptualization and proposed design of the project;

(*b*) the degree to which the project provides innovative and affordable solutions to the provision of the public infrastructure and public services in question; and

(*c*) such other factors as the Commission, in consultation with the Contracting Authority may determine.

(3) Without derogating from the generality of subsection (1), the Commission shall not award any such Private Party a score of more than 10% of the Private Party's actual score under section 56 of this Act.

PART IX—PROCEDURES FOR AWARDING AND EXECUTION OF PPP CONTRACTS

Contract negotiation

57.—(1) The Commission shall, in liaison with the Contracting Authority and unless otherwise agreed between the Commission and the Contracting Authority, initiate contract negotiations with the preferred Private Party.

(2) During the contract negotiations, the Commission shall, in good faith, discuss the financial proposal submitted by the preferred Private Party in order to identify areas where the proposed cost may be reduced or removed from the proposal altogether.

(3) In agreeing on the final PPP contract price for the purpose of determining the cost of delivering the project, the Parties shall be guided by the prevailing market rates based on competition.

(4) Where, owing to the unique nature of the particular PPP project, it is not possible to determine the prevailing market rates envisaged by subsection (3), the setting of the price shall be based on the full allocation of cost of such facilities or services or on international best practices.

(5) Without derogation from the generality of subsections (2), (3) and (4), both the Contracting Authority and the preferred Private Party shall ensure that the cost of delivering the facility or service in question shall—

(*a*) be affordable to the Government;

(*b*) provide value for money to the Contracting Authority and end users;

(*c*) enable the Private Party to maintain its financial integrity, attract capital, operate efficiently; and

(*d*) reasonably compensate the Private Party for any assumed risks.

(6) Prior to the signing of a PPP contract, the Commission shall obtain the written approval of the Minister.

Contract negotiations by a Contracting Authority

58.—(1) Where the Commission has delegated the procurement of the PPrivate Party to a Contracting Authority under section 44, the Contracting AAuthority may, with the approval of the Commission, conduct contract n negotiations with the preferred Private Party and shall submit to the CCommission for its approval, the final draft PPP contract, including—

(*a*) minutes of the contract negotiations;

(*b*) all the annexes to the draft contract;

(*c*) copies of the Evaluation Report; and

(*d*) such other information as the Commission may deem necessary.

(2) On receipt of the final draft contract, the Commission shall review it and assess whether the draft contract—

(*a*) conforms to the minimum PPP contract requirements as provided under section 33;

(*b*) is in compliance with the tender documents and the provisions of this Act or any written law applicable in Malawi;

(3) The Commission shall carry out the review and assessment of the draft contract under subsection (2) and communicate its decision in writing replete with proposed amendments to the contract, if any, within Thirty (30) days from the date of receipt of the final draft contract.

(4) Where the Commission has made any proposed amendments, the Contracting Authority shall discuss and agree with the Private Party on the proposed amendments.

(5) Where the Private Party refuses to accept any proposed amendment from the Commission, the Contracting Authority shall inform the Commission and the Commission shall directly engage the Private Party to find common ground in accordance with the provisions of section 57.

Post execution amendments to PPP contracts

59.—(1) Once the PPP contract has been signed by the parties, it shall become immediately binding upon them and enforceable against either party in accordance with terms of the PPP contract.

(2) If, in the course of implementing the contract, a party thereto or the Commission shall become aware of any issue that was not adequately provided for or not provided for at all in the PPP Contract, the party shall bring the issue to the attention of the other party and the Commission or in the case of the Commission, to the attention of the parties thereto.

(3) Upon being made aware of any shortfalls in the PPP Contract, the Parties shall negotiate, in good faith, such amendments as would correct the problem so identified.

(4) Where the proposed amendments will alter the rights and obligations of the parties to the contract or change the capacity of any or both Parties thereto, the amendments shall not be made without the written consent of the Minister responsible for finance.

Registration and publication of PPP contracts

60.—(1) The Contracting Authority shall submit to the Commission a copy of the duly executed PPP Contract together with all annexes and addenda, if any, for its records and registration.

(2) All duly executed PPP Contracts together with all annexes thereto which are integral to the contracts and all changes to the contract and annexes thereto, shall be entered in the Register which is kept by the Commission.

Payment of transaction fees

61. A Private Party shall, within the period specified in the PPP Contract, pay a transaction fee to the Commission which shall be a Percentage of the initial total capital investment of the PPP project, as shall be provided in the PPP Contract.

PART X—CONTRACT PERFORMANCE AND SUPERVISION

Employment of advisors or project managers

62.—(1) A Contracting Authority may, for purposes of effective supervision and enforcement of the PPP contract, employ such advisors or project managers as the nature of the project may require subject to the approval of the minister responsible for the Contracting Authority.

(2) Prior to the employment of such advisors or project managers, the Contracting Authority shall seek the advice of the Commission on the need for such employment and the required technical skills, experience and qualifications of any such advisors or project managers.

Submission of progress reports

63.—(1) Every Contracting Authority shall prepare and submit progress reports with respect to the construction or such other work undertaken or required to be undertaken by the Private Party under the PPP contract to the Minister responsible for the Contracting Authority and the Commission.

(2) If the Commission, receiving any progress report, forms the opinion that the terms of PPP contract are not being followed by either party to the contract, may engage both the Contracting Authority and the Private Party with a view to iron out any problems affecting the progress of the project.

(3) For purposes of subsection (2), the Commission may require the Private party to make written representations to it with respect to any issue raised against the Private party by the Contracting Authority in the progress report.

(4) Where, after undertaking the processes in subsections (2) and (3), the progress of the project continues to be hampered, the Commission shall make such recommendations to the Minister

responsible for the Contracting Authority with respect to the resolution of the problems affecting progress of the project.

Contracting Authority's right of temporary project takeover

64.—(1) A Contracting Authority may temporarily take over the operation of an infrastructure project or facility in any of the following circumstances as shall be clearly stipulated in the PPP contract—

(*a*) to ensure the effective and uninterrupted delivery of a service or timely completion of the project, in the event of a material default by the Private Party;

(*b*) to rectify any breach which the Private Party, after being required to do so, has failed to rectify at the expiry of the requisite notice;

(*c*) to deal with matters of emergency which can only be handled by the contracting authority

(*d*) to carry out a statutory duty that cannot be carried out by the Private Party; or

(*e*) any other circumstances which may justify intervention from the Contracting Authority, the circumstances of which shall always be provided in the PPP contract.

(2) The terms of the temporary take over shall be clearly spelt out in the PPP Contract and in the agreement signed between the Contracting Authority and the Private Party with respect to the temporary take over if any.

Duty to monitor and oversee implementation of a PPP contract

65.—(1) A contracting Authority shall, at all times during the subsistence of a PPP contract, be responsible for the strict enforcement of the terms and conditions of the contract to ensure that the contract is duly implemented, managed, monitored and supervised.

(2) Without derogating from the generality of subsection (1), the Contracting Authority shall, with the assistance of the Commission, ensure that the PPP Contract is properly implemented by—

(*a*) carrying out continuous monitoring of activities of the Private Party required to be undertaken;

(*b*) measuring the project outputs against the pre-agreed benchmarks;

(*c*) submission of progress reports to its line Minister and the Commission;

(*d*) requiring the Private Party to take such measures as are necessary to correct any challenges being faced by the PPP project:

(*e*) overseeing the management and operation of the public infrastructure and the provision of goods and service by the Private Party;

(*f*) discharging its contractual obligations timeously, effectively and efficiently;

(*g*) resolving any disputes which may arise with utmost speed and commitment; and

(*h*) taking such necessary and pre-emptive measures to avert, avoid or prevent delays, disruptions or interference with the implementation of the contract.

(3) A controlling officer of a Contracting Authority who fails to discharge its obligations under this section may be liable to disciplinary action for such failure.

(4) Notwithstanding the provisions of subsections (1) and (2), a regulatory authority for the sector in which the PPP project is implemented may exercise all its statutory functions with respect to any PPP project including monitoring the extent to which the project complies with regulatory requirements.

Vesting of primary obligations in the Contracting Authority

66.—(1) Where the PPP project involves the performance, by the Private Party, of a statutory function vested in the Contracting Authority, such function shall continue to vest in the Contracting Authority and the Contracting Authority shall have the primary obligation to ensure that the Private Party performs such function as required by law and the terms of the PPP contract.

(2) The use of a Contracting Authority's property by the Private Party shall not absolve the Contracting Authority from the responsibility of ensuring that the property is appropriately protected against any adverse factors which may affect the property such as levy of execution, seizure and sale, forfeiture, theft, loss and wastage.

PART XI—DIVESTITURE AND COMMERCIALIZATION OF STATE-OWNED ENTERPRISES

Divestiture of state -owned enterprises

67. A state-owned enterprise shall be divested in accordance with the divestiture sequence plan or as the Cabinet may otherwise determine through the Minister.

Special rights of the Government

68. In any agreement for the sale of a state-owned enterprise, the parties may agree that the Minister responsible for Finance may retain, or at any time after the date of the agreement acquire, a share in the divested enterprise, which share shall confer special rights to enable the Government in the national interest to intervene in the

operations of the enterprise where such intervention is necessitated by the Specific actions or undertakings of the enterprise.

Allotment of shares and obligations of shareholders

69.—(1) The shares of a state-owned enterprise shall be allotted by the Commission but members of the Commission that have interest in the allotment shall not be allowed to participate in the allotment after declaring the interest.

(2) The shareholders in any state-owned enterprise, when so requested by the Commission, shall provide to the Commission such information as the Commission may reasonably require, subject to any prohibition or restrictions contained in any written law on the provision of such information.

Obligations of State-Owned Enterprises

70.—(1) A state-owned enterprise scheduled for divestiture, and in which there is no private ownership, shall—

(*a*) carry out any recommendations, made by the Commission, for preparing the enterprise for divestiture;

(*b*) keep up to-date all business records and books of accounts;

(*c*) make available to the Commission its manpower development, investment or financing plan if any has been developed;

(*d*) prepare the accounts and a financial statement of the enterprise for every financial year and cause them to be audited not later than Four months after each financial year;

(*e*) maintain a register of its fixed assets, which register shall be reconciled with the financial statement;

(*f*) not perform any action that would result in the assets of the company being dissipated;

(*g*) not undertake any new capital investment programmes, unless a project appraisal report approved by the Commission, is prepared showing that—

(i) routine plant, equipment and vehicle renewal is required;

(ii) rehabilitation expenditure is essential to keep the operations of the state-owned enterprise running or to improve the marketability of the enterprise;

(iii) the new capital investment has a payback period of less than two years;

(iv) the new capital investment will contribute to the promotion of export or import substitution;

(v) the state-owned enterprise demonstrates that the new capital investment will not result in deterioration of its operations;

(vi) as far as possible, establish and document all contractual, legal and other obligations;

(vii) not give any person information which might give undue advantage to that person or to any potential investor; and

(viii) if so, requested by the Commission, disclose all of any information whatever about the enterprise.

(2) Any person who knowingly contravenes the provisions of subsection (1) commits an offence.

Valuation of state-owned enterprises

71.— (1) Save as may otherwise be provided in regulations made under this Act, the Commission shall ensure that each state- owned enterprise is sold at its market value.

(2) The valuation of state-owned enterprises shall be performed by independent valuers who shall issue a certificate of valuation or an opinion of the value, for guidance purposes only.

Modes of divestiture

72. The Commission may employ the following modes of divestiture—

(*a*) public offering of shares;

(*b*) private sale of shares through negotiated or competitive bids;

(*c*) offer for sale of additional shares in a state-owned enterprise to reduce Government shareholding;

(*d*) sale of the assets and business of the state-owned enterprise;

(*e*) re-organization of the state-owned enterprise before the sale of the whole or any part of the enterprise;

(*f*) buy outs of a state-owned enterprise by management or employees in that enterprise; and

(*g*) any other-method the Commission may consider appropriate.

Eligible shares of members

73. The shares in a state-owned enterprise shall be liable to be sold to any person whether or not such person is a citizen of Malawi and the Commission will make every effort to encourage Malawian participation in state- owned enterprise through various schemes approved by the Minister.

Sale of shares to members of Cabinet, etc.

74. No member of the Cabinet or of the Commission or of a committee of the Commission and no employee of the Commission or consultant to the Commission or their Immediate Family Members or business associate, shall purchase shares or assets in a state-owned enterprise, unless the sale is by public offer of shares.

75. An established fund may purchase shares in a state-owned enterprise on behalf of the contributors. Established funds

76. Where the purchasers are citizens of Malawi, shares may be offered at a discount which shall be in accordance with prescribed guidelines, and it shall be a condition of every sale of shares at a discount that the shares so purchased shall not be disposed of within two years of the date of purchase. Purchase of shares by citizens of Malawi

77.—(1) The Commission shall appoint a competent negotiating team for each sale to act on behalf of the Commission. Negotiations of sale

(2) A person appointed on the negotiating team shall—

(*a*) have proper professional qualifications and experience and shall not be a person held in bad business standing;

(*b*) take an oath of secrecy as approved by the Commission or as may be prescribed; and

(*c*) disclose any personal or professional interest the person may have, whether direct or indirect, before accepting the appointment.

78. The Commission may convert a state-owned enterprise scheduled for divestiture, which is not a company, into a private or public company in accordance with the provisions of the Companies Act. Conversion of private companies to public companies Cap.46:03

79. The Commission may liquidate a state-owned enterprise in accordance with the provisions of the Insolvency Act. Liquidation Cap. 11:01

80.— (1) The final sales agreement to transfer shares in a state- owned enterprise to the successful bidder shall be signed by— Completion of sale

(*a*) the Minister responsible for finance or the Commission, where the shares sold were directly owned by the Government; or

(*b*) the respective shareholder, where the shares sold were not directly owned by the Government.

(2) The transfer of shares shall be in accordance with the provisions of the Companies Act. Cap. 46:03

(3) The final sale or transfer of assets-owned by a state-owned enterprise to the successful bidder shall be signed by the Commission on behalf of the state-owned enterprise.

81.—(1) The Minister, in consultation with the Minister responsible for the Government department to be commercialized, may specify, by notice in the *Gazette*, any Government department for purposes of commercialization under this Act. Commercialization of specified Government departments

(2) A specified Government department shall be incorporated under the Companies Act. Cap. 46:03

(3) A Government department specified under this section may, subject to the approval of the Minister responsible for finance—

(*a*) fix its own rates, prices and charges for goods and services provided;

(*b*) capitalize assets; and

(*c*) borrow debenture stocks.

PART XII—PUBLICATIONS, INFORMATION AND REPORTS

Publication and records of certain information

82.—(1) The Commission shall publish by notice in the *Gazette* and in at least two newspapers in general circulation in Malawi, or in any media, the names of the state-owned enterprises approved to be divested.

(2) The Commission shall keep and maintain proper records of—

(*a*) the names of the state-owned enterprises approved to be divested as published under subsection (1);

(*b*) public-private partnership arrangement transactions that have been undertaken;

(*c*) the registered consultants dealing with the divestiture process;

(*d*) the bidders and bid prices;

(*e*) the successful bidders and the reason for selecting such bidders;

(*f*) the cost of transactions and any other special conditions of the public-private partnership arrangement;

(*g*) the price of shares and any other special conditions of the sale of shares; and

(*h*) any other matters as the Commission may deem appropriate.

(3) Any person having or claiming to have an interest in a state- owned enterprise to be divested shall make a claim in writing to the Commission within a period of sixty days after the notice referred to in subsection (1) is published, and if the person fails to do so, the person shall be deemed to have relinquished all interests in the state-owned enterprise.

(4) The Commission may not be sued in relation to actions or debts incurred by state-owned enterprises.

(5) The Government shall be responsible for the debts and actions of state-owned enterprises.

Unauthorized persons not to publish or disclose information

83.—(1) Save as otherwise provided by law, a person shall not disclose confidential information obtained by that person while performing, or as a result of having performed, duties under this Act as —

(*a*) a member of the Commission;

(*b*) an employee of the Commission; or

(*c*) a consultant or an adviser to the Commission, or an employee of such person whilst performing duties relating to such advice or consultation, or obtained while in performance of a service contract, unless such person is duly authorized by the Commission to do so.

(2) A person who contravenes subsection (1) commits an offence and shall be liable, on conviction, to a fine of five hundred thousand Kwacha and to imprisonment for two years.

(3) Nothing in subsection (1) shall prevent disclosure of information to the Commission, the Chief Executive Officer or the Minister.

Public-Private Partnership Arrangements report

84.—(1) The Commission may in consultation with a Contracting Authority in the case of PPP contracts, annually publish a report of public-private partnership arrangements and list of state–owned enterprises that have been divested to the public.

(2) The report published under section 84 (1) shall include the following information—

(*a*) information memorandum of the PPP project or divestiture transaction;

(*b*) procurement information;

(*c*) summary and update of the PPP project;

(*d*) summary and update of the divestiture transaction

(*e*) information relating to renegotiation if any;

(*f*) project documents or divestiture documents; and

(*g*) performance information.

(3) No confidential information as provided in the relevant

contracts or specified in any applicable law shall be included in the report.

Funds of the Commission

85.—(1) The funds of the Commission shall consist of such moneys as may—

(*a*) be appropriated by Parliament for the purposes of the Commission;

(*b*) be paid to the Commission by way of grants or donations or otherwise received by the Commission;

(*c*) be retained by the Commission out of the proceeds of sales of state-owned enterprises and concession fees paid by a private party under a public private partnership arrangement, as may be approved by the Minister;

(*d*) be received by the Commission under subsection (2);

(*e*) constitute proceeds of the sales of the annual progress reports of the Commission;

(*f*) be paid by a Private Party as transaction fees under section 61 of the Act; and

(*g*) otherwise vest in or accrue to the Commission.

(2) The Commission may charge and collect fees in respect of programmes, publications, seminars, documents, consultancy services and other services provided by the Commission.

Establishment of Proceeds Account

86.—(1) The proceeds from sale of state-owned enterprises and concession fees paid by Private Parties under a PPP contract shall be paid into a fund to be known as the Proceeds Account to be established by the Minister and to be held at the Reserve Bank of Malawi or at such other bank or place as that Minister, on the advice of the Commission, may direct.

(2) With the prior approval of the Minister, the funds held in the Proceeds Account maybe-used for—

(*a*) funding the Commission;

(*b*) funding the cost of divestiture under this Act;

(*c*) funding the cost of public-private partnership development; or

(*d*) meeting such costs and expenses as the Minister may direct from time to time.

Application of the funds of the Commission

87.—(1) The funds of the Commission shall be applied towards the recurrent costs of the Commission in discharge of its mandate, including—

(*a*) in payment or discharge of the expenses, charges, obligations and liabilities incurred or undertaken by the

Commission in the performance of its functions and the exercise of its powers;

(*b*) in payment of remuneration, emoluments and allowances to its employees payable under this Act; and

(*c*) in making any other payments required or permitted to be made by the Commission within the general principles of public finance management.

(2) The Commission may invest in such manner as it thinks fit such of its funds as it does not immediately require for the performance of its functions.

Accounting records and external audits
Cap. 37:02

88.—(1) The Commission shall cause to be kept proper books of accounts and other records for recording all financial transactions in respect of its funds and shall, in every respect, comply with the provisions of the Public Finance Management Act.

(2) All cheques, promissory notes, drafts, bills of exchange and other negotiable instruments, and all receipts for monies paid to it, shall be deposited into the designated account for the operations of the Commission.

(3) The Commission shall appoint independent auditors at the end of each financial year to examine and audit the accounts and all relevant documents in accordance with the provisions of the Public Audit Act.

Cap. 37:01

(4) For purposes of this Part, the financial year of the Commission shall be in line with the financial year of the Government.

Annual financial reports

89.—(1) As soon as practicable, but not later than six months after the expiry of each financial year, the Commission shall submit to the Minister a report concerning its activities during that financial year.

(2) The report referred to in subsection (1) shall be in such form as the Minister shall approve and shall include information on the financial affairs of the Commission, and there shall be appended to the report—

(*a*) an audited balance sheet;

(*b*) an audited statement of income and expenditure; and

(*c*) such other information as the Commission may consider appropriate or as the Minister may direct.

(3) The Minister shall, during the meeting of the National Assembly next following receipt by the Minister of the report referred to in subsection (1), lay the report before the National

Assembly, but otherwise the Commission may publish the report for sale to the public.

Establishment of a Project Financing Fund

90.—(1) The Minister shall establish a fund to be known as the PPP Project Financing Fund (herein after referred to as the "Fund"), which shall consist of such monies as shall be appropriated by Parliament, given to the Fund by way of donations, contributions and grants.

(2) Monies in the Fund may be used for financing of PPP arrangements and divestiture of state-owned enterprises in accordance with this Act, including—

(*a*) feasibility studies;

(*b*) public awareness;

(*c*) payment of transaction advisors;

(*d*) provision of viability gap finance to PPP arrangements that are economically viable but cannot be implemented in the absence of financial support from the Government;

(*e*) provision of source of liquidity to meet any contingent liabilities arising from a PPP project.

(3) The Fund shall operate in accordance with regulations made by the Minister by notice published in *Gazette*.

Additional funds for PPP arrangements and divestiture

91.—(1) Without derogation from the generality of section 90, the Commission may—

(*a*) accept money by way of grants or donations from any source in or outside Malawi:

Provided that such source and their principals, immediate family members, related entities, representatives or affiliated parties of any type, have not participated directly or indirectly in any public-private partnership arrangement or divestiture of state-owned enterprise in Malawi;

(*b*) subject to the approval of the Minister and the Minister responsible for finance, raise, by way of loans from any source in or outside Malawi, such money as it may require for the discharge of its functions: Provided that such source shall comply with the restraints in paragraph (a); and

(*c*) charge and collect fees in respect of programmes, facilitating public-private partnership arrangements, publications, seminars, documents, consultancy services and other services provided by the Commission.

(2) The Commission may invest in such manner as it thinks fit such of its funds as it does not immediately require for the

performance of its functions.

Commission or Contracting Authority to keep record of cost of transactions

92. To the extent possible, the Commission or the Contracting Authority, as the case may be, shall prepare a statement of its costs up to and including closing related to a particular public-private partnership arrangement, in addition to anticipated post-transaction costs based on the obligations and commitments of the Contracting Authority entering into such a public-private partnership arrangement.

PART XIV—MISCELLANEOUS PROVISIONS

Prohibition against exerting undue influence on officers

93.—(1) A person who communicates with a member of the Commission, the Chief Executive Officer, an employee of the Commission, a consultant, or an adviser or other person engaged by the Commission, for the purpose of influencing improperly that person's consideration of any matter which falls to be considered or decided by the Commission, commits an offence.

(2) If a person referred to in subsection (1) to whom a communication is made of the opinion that the communication may be in contravention of subsection (1), it shall be the duty of that person not to entertain the communication further and the person shall inform the Chairperson forthwith of the substance of such communication, and the Chairperson shall acknowledge, in writing, receipt of such information.

Falsification of information

94.—(1) A person who knowingly—

(*a*) falsifies any information;

(*b*) does not disclose any material facts when lawfully required to do so; and

(*c*) solicits for use by any person not authorized under this Act any confidential information, relating to the divestiture of a state-owned enterprise or relating to a public- private partnership transaction, commits an offence.

(2) A person convicted of an offence under subsection (1) shall not thereafter be eligible to participate in any public sector investment programme in Malawi.

Administrative penalties

95.—(1) If the Commission is satisfied on reasonable grounds that a person has contravened this Act or regulations made under it, the Commission may impose administrative penalties on the person by doing one or more of the following –

(*a*) giving the person a written warning;

be contracts awarded by the Contracting Authority or the Commission in accordance with this Act.

Passed in Parliament this fifth day of April, two thousand and twenty two.

FIONA KALEMBA
Clerk of Parliament