

Public Private Partnership Bill, 2016

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ENTITLED

PUBLIC PRIVATE PARTNERSHIP ACT, 2016

AN ACT to provide for the development, implementation and regulation of public private partnership arrangements between public authorities and private entities for the provision of infrastructure and services; to establish institutional arrangements for the regulation of public private partnerships; and to provide for related matters.

PASSED by Parliament and assented to by the President:

Preliminary Provisions

Object of the Act

1. (1) The objects of this Act are to
 - (a) promote private sector participation in the economic development of the country through public private partnership arrangements; and
 - (b) foster the use of private sector resources for the provision of infrastructure and services through public private partnerships.

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(2) For the purpose of subsection (1), the object shall encompass the

- (a) creation of an environment and framework to enable private entities to participate in partnership projects and offer value for money to the public sector and users of the partnership projects;
- (b) delivery of efficient infrastructure and services with assured quality;
- (c) establishment of efficient institutional arrangements for the identification, structuring, procurement, implementation and monitoring of partnership projects;
- (d) leverage of public assets to encourage private sector investment in the provision of infrastructure and services;
- (e) protection of the interests of public and private sector stakeholders and end users;
- (f) establishment of a framework for optimal risk sharing in partnership projects;
- (g) promotion of local participation in partnership projects;
- (h) establishment of a regulatory framework for persons acting on behalf of public authorities for the purpose of partnership arrangements; and
- (i) establishment of a framework for the management of financial commitments in respect of partnership arrangements.

Application

2. (1) This Act applies to

- (a) public sector projects undertaken in the form of partnership arrangements between a public authority and a private entity;
- (b) the forms of partnership arrangements set out in the First Schedule;
- (c) public authorities that undertake or intend to undertake partnership projects under this Act;
- (d) functions that relate to the identification, studies, document preparation, structuring, bidding, evaluation, award, implementation and monitoring of partnership arrangements;

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- (e) commercial arrangements carried out through partnership arrangements in respect of state-owned enterprises including the military, police, defence and justice institutions; and
 - (f) not-for-profit partnership arrangements between public authorities and other parties.
- (2) This Act does not apply to
- (a) the outsourcing of government services without the transfer of financial and operational risks to a private entity for a sufficiently long period of time;
 - (b) the grant of a mineral right under the Minerals and Mining Act, 2006 (Act 703) or any applicable enactment on mining;
 - (c) the grant of any right for exploration, development or production under the applicable enactment on petroleum;
 - (d) the divestment of ownership or equity of a state owned enterprise;
 - (e) the procurement of goods, works and services primarily with the use of public funds by any public authority under the Public Procurement Act, 2003(Act 663), except as otherwise provided under this Act; and
 - (f) non-commercial activities that are the exclusive preserve of the military, police, defence and justice institutions.
- (3) Subsection (2) (f) shall not be construed to grant an exemption from the effect of subsection (1) (e) to a partnership arrangement entered into for activities referred to in subsection (2) (e).

Guiding Principles

Compliance and safeguards

3. (1) A public authority shall ensure that persons assigned a responsibility under this Act keep records and account for the decisions made.

(2) A public authority shall ensure that the partnership arrangements of that public authority contain measures designed to safeguard the interests of the general public and affected persons.

(3) A public authority shall specify the expected outcomes of the partnership project engaged in by that public authority.

Risk allocation

4. A public authority shall ensure that
- (a) the documents comprising a partnership arrangement show the allocation of risks to the party best able to control and manage the risks; and
 - (b) optimal risk transfer is made to the private entity in order to achieve greater value for money for the public sector.

Affordability and sustainability

5. (1) A public authority shall conduct a feasibility study of a potential partnership project to determine
- (a) the capital and operational costs of the partnership project based on efficiency and economy in project operations;
 - (b) long-term affordability for the end users;
 - (c) sustainability of the budgetary commitments of the Government;
 - (d) the potential for returns on private sector investment; and
 - (e) other factors that that public authority may consider necessary.
- (2) To ensure affordability and sustainability of the budgetary commitments of the Government, the Minister shall
- (a) conduct a review of the overall exposure of public authorities to partnership projects on an annual basis;
 - (b) advise Cabinet on steps required to be taken to mitigate any adverse potential impact that a partnership project may have on the finances of the State; and
 - (c) report to Parliament in accordance with section 70.

Fairness and transparency

6. (1) The procurement process relating to a partnership project shall be fair, transparent and competitive.
- (2) Without limiting subsection (1), the procurement of a partnership project shall be based on the following factors:
- (a) a well defined bidding process;
 - (b) clear instructions to bidders and interested persons to prevent manipulation or abuse of the process; and
 - (c) the requirements of the bidding documents under this Act.

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(3) Except as otherwise provided in this Act, the procurement methods for partnership projects shall be based on a competitive selection criteria.

(4) Each qualified and short-listed bidder who complies with the bidding process provided under this Act has a right to equal opportunity and access to information.

(5) Subject to this Act and any other applicable enactment, each aspect of the partnership process shall be accessible to the public.

(6) A public authority or public official shall consider an unsolicited proposal only if that proposal meets the requirements of this Act.

(7) A public authority shall state the reasons in support of the decision of that public authority or public official in respect of an unsolicited proposal.

Stakeholder consultation by public authority

7. A public authority shall ensure that adequate stakeholder consultation is carried out in respect of each partnership arrangement it engages in.

Application of procurement procedures

8. (1) Despite a provision to the contrary contained in any other enactment the procurement procedure for all partnership arrangements shall be consistent with this Act, the Regulations and Guidelines.

(2) Where this Act, the Regulations or Guidelines or the standardised documents approved by the Agency do not expressly provide for any matter or procedure in respect of procurement, the provisions of the Public Procurement Act, 2003 (Act 663) shall apply.

Establishment, Functions and Governing Body

Establishment of the Ghana Partnerships Agency

9. (1) There is established by this Act an Agency to be known as the Ghana Partnerships Agency.

(2) The Agency may acquire, hold, manage or dispose of any movable or immovable property in connection with the discharge of its functions and may enter into contracts and transactions that are reasonably related to its functions.

(3) Where there is a hindrance to the acquisition of property, the property may be acquired for the Agency under the State Lands Act, 1962 (Act 152) and the cost shall be borne by the Agency.

Object of the Agency

10. The object of the Agency is to promote and regulate the development and implementation of partnership arrangements for the provision of infrastructure and services.

Functions of the Agency

11. (1) For the purpose of achieving its object under section 10, the Agency shall perform the following functions:

- (a) coordinate and oversee the implementation and operation of partnership processes and procedures established under this Act;
- (b) provide technical support and guidance to public authorities in the structuring, bidding, procurement and implementation of partnership projects;
- (c) promote investment in partnership projects;
- (d) evaluate proposals of public authorities for inviting investment in partnership projects;
- (e) review the reports and proposals referred to the Agency in pursuance of the provisions of this Act;
- (f) grant approvals required under this Act;
- (g) formulate standardised bidding documents, partnership agreements and manuals for adoption and use by public authorities;
- (h) explore and develop innovative mechanisms for financing investment in infrastructure;
- (i) recognise and promote best practice in partnership arrangements;
- (j) guide and support public authorities in the selection of experts or transaction advisors;
- (k) undertake the registration of potential partnership projects proposed by public authorities;
- (l) implement capacity building programmes for public authorities and relevant stakeholders;
- (m) undertake measures to enhance the ability of public authorities to protect the public interest in the preparation and implementation of partnership projects;

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- (n) promote awareness of public private partnerships in the country generally;
 - (o) publish and disseminate information in respect of standardised documents for partnership arrangements;
 - (p) upon receiving a request, provide advice and assistance to local government authorities in matters relating to partnership arrangements;
 - (q) grant exemptions from application of any specified procedures in respect of
 - (i) small projects; and
 - (ii) not-for-profit private entities;
 - (r) liaise with the Ministry, public authorities and private entities to enhance the delivery of partnership projects; and
 - (s) perform any other functions assigned to or required to be performed by the Agency under this Act.
- (2) For the purpose of achieving the object of this Act, the Agency shall advise the Minister in respect of
- (a) the current and future needs of the country relating to infrastructure of national importance;
 - (b) policy, pricing and regulatory matters relating to infrastructure and partnership processes;
 - (c) reform and restructuring, including the removal of impediments or barriers affecting the utilisation and development of infrastructure; and
 - (d) the functions of the Minister under this Act.
- (3) The Agency shall, in performing the functions of the Agency, undertake consultations with any of the following stakeholders:
- (a) Ministries, Departments, Agencies and local government authorities;
 - (b) state owned enterprises and other organisations;
 - (c) commercial, industrial, consumer, professional, academic and other relevant bodies and organisations;
 - (d) financial institutions;
 - (e) other potential investors in partnership projects; and
 - (f) end users.

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- (4) In the performance of its functions, the Agency may
- (a) commission any study necessary or useful for making a decision;
 - (b) require a public authority, regulatory authority, private entity or any other body or person to furnish information, details, documents and particulars required in connection with or relating to any partnership project;
 - (c) seek professional or technical assistance from an appropriate body or person within or outside the country;
 - (d) engage additional professional or technical experts as may be required; and
 - (e) advise the Minister to investigate the performance of a public entity in respect of any partnership project.

(5) In discharging its duties under this Act, the Agency shall act expeditiously.

Governing body of the Agency

12. (1) The governing body of the Agency is a Board consisting of
- (a) a chairperson with professional experience in finance or infrastructure;
 - (b) the chairperson of the National Development Planning Commission as vice chairperson;
 - (c) the Minister responsible for Finance or a representative not below the rank of a Director;
 - (d) the Minister responsible for Trade and Industry or a representative not below the rank of a Director;
 - (e) the Attorney-General and Minister responsible for Justice or a representative not below the rank of Chief State Attorney;
 - (f) the Chief Executive of the Ghana Investment Promotion Centre;
 - (g) the Chief Executive of the Public Procurement Authority;
 - (h) the Chief Executive of the Agency; and
 - (i) one other person who is a woman from the private sector with the requisite professional experience in finance or infrastructure.

(2) The chairperson and other members of the Board shall be appointed by the President in accordance with article 70 of the Constitution.

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(3) The Board shall ensure the proper and effective performance of the functions of the Agency.

Tenure of office of members of the Board

13. (1) A member of the Board shall hold office for four years and is eligible for re-appointment but a member shall not be appointed for more than two terms.

(2) Subsection (1) does not apply to

(a) the Chief Executive appointed under section 20; and

(b) the member of the Board referred to in paragraph (i) of subsection (1) of section 12, who shall hold office for a period of not more than four years.

(3) A member of the Board other than the Chief Executive who is absent from three consecutive meetings without sufficient cause ceases to be a member of the Board.

(4) A member of the Board may by letter addressed to the President through the chairperson resign at any time from office.

(5) The President may by letter addressed to a member revoke the appointment of that member.

(6) Where a member of the Board is, for a sufficient reason, unable to act as a member, the Minister shall determine whether the inability would result in the declaration of a vacancy for the unexpired tenure of office of that member.

(7) Where there is a vacancy

(a) under subsection (3) or (4) or section 15 (2),

(b) as a result of a declaration under subsection (6), or

(c) by reason of the death of a member

the Minister shall notify the President of the vacancy and the President shall appoint a person to fill the vacancy.

Meetings of the Board

14. (1) The Board shall meet at least once every two months for the despatch of business at the times and in the places determined by the chairperson.

(2) The chairperson shall, at the request in writing of not less than one third of the membership of the Board, convene an extraordinary meeting of the Board at the place and time determined by the chairperson.

(3) The quorum at a meeting of the Board is five members of the Board.

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(4) The chairperson shall preside at meetings of the Board and in the absence of the chairperson of the Board, the vice-chairperson shall preside over a meeting and if the chairperson and vice-chairperson are absent, a member of the Board elected by the members present from among their number shall preside.

(5) Matters before the Board shall be decided by a majority of the members present and voting and in the event of an equality of votes, the person presiding shall have a casting vote.

(6) The Board may co-opt a person to attend a Board meeting but that person shall not vote on a matter for decision at the meeting.

(7) The proceedings of the Board are not invalidated by reason of a vacancy among the members or by a defect in the appointment or qualification of a member.

(8) Subject to the provisions of this Act, the Board may determine the procedure for meetings.

Disclosure of interest

15. (1) A member of the Board who has an interest in a matter for consideration shall

- (a) disclose the nature of the interest and the disclosure shall form part of the record of consideration of the matter; and
- (b) recuse himself or herself and not participate in the deliberations of the Board in respect of that matter.

(2) A member ceases to be a member of the Board, if that member has an interest in a matter before the Board and

- (a) fails to disclose that interest; or
- (b) is present and participates in the deliberations of the matter.

Establishment of committees

16. (1) The Board may establish committees consisting of at least three members of the Board and not more than two non-members to perform a function that the Board may determine.

(2) The quorum at a meeting of a committee shall be at least two members of the Board.

(3) Section 15 applies to the members of the committees of the Board.

Allowances

17. Members of the Board and members of a committee of the Board shall be paid the allowances approved by the Minister.

Ministerial responsibility

18. (1) The Minister may give policy directives that are consistent with the object of this Act to the Board and public authorities and the Board and public authorities shall comply with the directives.

(2) The Minister shall, with the assistance of the Agency and other relevant public authorities,

(a) develop a plan that specifies the proposals and priorities relating to identification and implementation of partnership projects over a period of five years; and

(b) review annually the plan referred to in paragraph (a).

(3) The Minister shall ensure that the functions of the Ministry and the Agency are duly performed.

(4) The Minister shall before the final approval of a partnership arrangement or partnership project, direct the relevant division of the Ministry to carry out an assessment to ensure that the financial obligations arising from that partnership arrangement or partnership project are consistent with the fiscal responsibility of the Ministry.

Administration and Staff of the Agency

Divisions and units of the Agency

19. The Agency may create divisions or units of the Agency that the Agency considers necessary for the efficient discharge of the functions of the Agency.

Chief Executive of the Agency

20. (1) The Agency shall have a Chief Executive.

(2) A person qualifies for appointment to the post of Chief Executive if that person has the qualification and experience in partnership arrangements.

(3) The President shall in accordance with article 195 of the Constitution appoint the Chief Executive.

(4) The Chief Executive shall hold office on the terms and conditions specified in the letter of appointment.

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(5) The Chief Executive is responsible for the day to day administration of the affairs of the Agency and is answerable to the Board in the performance of the functions under this Act.

Appointment of other staff

21. (1) The President shall, in accordance with article 195 of the Constitution, appoint other staff of the Agency that are necessary for the proper and effective performance of the functions of the Agency.

(2) Other public officers may be transferred or seconded to the Agency or may give assistance to the Agency.

(3) The Agency may engage the services of advisers, experts or consultants as the Agency considers necessary on the recommendations of the Board.

Finances of the Agency

Funds of the Agency

22. (1) The funds of the Agency include

- (a) moneys approved by Parliament;
- (b) donations, grants and gifts; and
- (c) any other moneys that are approved by the Minister.

(2) The Agency shall, with the approval of the Minister, open a bank account into which moneys received by the Agency shall be paid.

Annual budget of the Agency

23. The Agency shall, not later than three months before the end of each financial year, cause to be prepared and submitted to the Minister, an annual budget in respect of the ensuing financial year.

Accounts and audit

24. (1) The Board shall keep books of account and proper records in relation to the accounts in the form approved by the Auditor-General.

(2) The Board shall, within six months after the end of the financial year, submit the accounts of the Agency to the Auditor-General for audit.

(3) The Auditor-General shall, within six months after the end of the immediate preceding financial year, audit the accounts and submit the audit report to Parliament.

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(4) The financial year of the Agency is the same as the financial year of Government.

Annual report and other reports

25. (1) The Board shall, within one month after the receipt of the audit report, submit an annual report to the Minister covering the activities and the operations of the Agency for the year to which the report relates.

(2) The annual report shall include the report of the Auditor-General.

(3) The Board shall submit to the Minister any other report which the Minister may require in writing.

(4) The Minister shall, within one month after the receipt of the annual report, submit the report to Parliament with a statement that the Minister considers necessary and shall cause the report to be published in a manner that the Minister determines.

Public Private Partnership Fund

Establishment of the Public Private Partnership Fund

26. There is established by this Act a Public Private Partnership Fund.

Object of the Fund

27. (1) The object of the Fund is to provide financial sources to support partnership arrangements.

(2) To achieve the object of the Fund, moneys from the Fund shall be applied for partnership arrangements as the Agency may determine including

- (a) the promotion of partnership arrangements;
- (b) project preparation;
- (c) capacity building;
- (d) market research, education and training; and
- (e) Government support for partnership projects as may be determined by the Minister.

(3) Moneys for the Fund shall not be used for the payment of a consultant or adviser or for the development of a partnership project related to an unsolicited proposal.

Sources of money for the Fund

28. The moneys for the Fund include

- (a) moneys that may become lawfully payable to the Fund;
- (b) moneys transferred from the Ghana Infrastructure Investment Fund in accordance with the Ghana Infrastructure Investment Fund Act, 2014 (Act 877);
- (c) fees from income generating activities;
- (d) donations and grants;
- (e) loans; and
- (f) other moneys that the Minister may with the approval of Parliament determine to be paid into the Fund.

Categories of accounts of the Fund

29. (1) The Board may, in consultation with the Minister, create categories of accounts of the Fund in furtherance of the object of the Fund.

(2) The Board shall at quarterly intervals submit a report on each account to the Minister.

Management of the Fund

30. (1) The Fund shall be administered by the Board.

(2) In furtherance of subsection (1), the Board shall

- (a) pursue policies to ensure the achievement of the object of the Fund;
- (b) co-ordinate and ensure total and timely accountability of the Fund;
- (c) prepare and publish procedures for disbursement of the Fund;
- (d) evaluate and approve partnership projects in need of funding; and
- (e) perform other functions that may be incidental to its functions.

(3) The moneys for the Fund shall be paid into a bank account opened for the purpose, by the Board with the approval of the Minister.

(4) Sections 24 and 25 on accounts and audit and annual report and other reports apply to the Fund.

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Government Support

Government support for partnership projects

31. (1) The Minister shall, on the advice of the Agency, by legislative instrument make Regulations for the type and structure of support that the Government may provide for selected partnership projects and related activities carried out pursuant to this Act.

(2) The Minister shall, in prescribing the types and structure of Government support, take into account the areas of support set out in the Second Schedule unless existing enactments adequately provide for the support.

(3) In making the Regulations under subsection (1), the Minister shall ensure that

- (a) the financial estimates and life cycle cost of partnership projects take into account or are adjusted to take into account incentives to attract private entities; and
- (b) where applicable, the end-user tariff is made more affordable by the incentives.

Public Authorities

Functions of public authorities

32. (1) A public authority shall, in the course of developing its sector plans and programmes in respect of public infrastructure and public services, promote partnership arrangements in furtherance of the object of this Act.

(2) A public authority shall, in the discharge of the duties and the performance of the functions of that public authority in respect of a partnership arrangement, comply with this Act.

(3) Where a public authority intends to undertake a significant partnership project or several small partnership projects, that public authority shall, designate a unit in the office of the public authority for the purpose of coordinating activities related to the partnership project.

(4) A public authority may where necessary engage the services of an expert, consultant or transaction adviser for a specified period to guide or assist that public authority to comply with requirements of standardised documents or Guidelines.

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(5) A public authority shall constitute a project oversight team for monitoring and overseeing the implementation of a partnership project.

(6) A project oversight team may include persons selected from the office of the public authority involved and other relevant public authorities.

Accountability of public authorities

33. (1) Subject to obtaining the relevant approvals, a public authority shall have the primary responsibility for the management of each phase of a partnership project including the identification, feasibility study, due diligence, bidding, evaluation, negotiation, contract finalisation and implementation of that partnership project

(2) Despite the engagement of an expert or consultant, or any general guidance given by the Agency to a public authority, that public authority shall be responsible for the decisions the public authority makes whether or not the decisions are based on the advice of an expert, consultant or the Agency.

(3) A public authority shall ensure that the requisite approvals are obtained at each stage of the partnership process irrespective of whether the approval is preliminary, concurrent or final as set out in the Third Schedule.

Preparation of Public Private Partnership Projects and Award

Registration of a public private partnership project

34. (1) A public authority shall not undertake a feasibility study of a potential partnership project unless the proposed project has been registered by the Agency.

(2) Where a public authority is a local government authority, the Regional Planning Coordinating Unit is responsible for the registration of the proposed project as a potential partnership project and shall forward the particulars of each registered project to the Agency within a month of its registration.

Feasibility study

35. (1) A public authority that has been registered in accordance with section 34 may undertake a feasibility study in respect of a potential partnership project.

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(2) The study shall include matters specified in sections 3 to 8 and the information and justification that may be required for establishing the bankability of the project.

Review of feasibility report by local government authority

36. (1) Where a potential partnership project falls within the approval threshold of a local government authority, that local government authority shall establish a project steering committee to review the feasibility report for that project.

(2) In establishing a project steering committee, the local government authority

- (a) shall be guided by the need to include as members of the project steering committee the representatives of relevant departments of the local government authority; and
- (b) may include as members of the project steering committee external experts or persons from other public institutions with the relevant expertise.

Bidding Process

Bidding process

37. (1) A public authority that seeks to engage in the bidding process for a partnership project shall prepare bidding documents and submit the documents to the Agency.

(2) The bidding documents shall be prepared to meet the requirements under this Act and the Regulations.

Request for Qualification

38. (1) Unless exempted by the Agency, a public authority shall commence the bidding process for a partnership project with a publication of a Request for Qualification.

(2) The Request for Qualification shall be used as a pre-qualification process in order to identify bidders that fulfil the eligibility criteria and are suitably qualified to implement the potential partnership project.

Request for Proposals

39. (1) After the requirements for the Request for Qualification have been met, a public authority may proceed to invite proposals for the partnership project.

(2) A public authority shall invite proposals only through a formal Request for Proposals from a pre-qualified bidder except where that public authority has been authorised by the Agency to proceed with a Request for Proposals without a Request for Qualification.

Two-stage Request for Proposals

40. (1) A public authority may, conduct the Request for Proposals in two stages where

- (a) the potential partnership project involves a complex set of issues or matters which were uncertain at the time of the issue of the Request for Proposals;
- (b) there are contingent issues or matters about which the public authority requires further consultation before making a final decision and before the closing date for the submission of responses to the Request for Proposals; or
- (c) the expected project implementation time will not permit the completion of all aspects of the feasibility study or relevant studies before the issue of the Request for Proposals.

(2) The two-stage Request for Proposals shall not be used as a pre-qualification mechanism and all qualified and short-listed bidders shall be entitled to participate at the second stage.

Evaluation criteria

41. Further to a bidding process carried out by a public authority the selection of bidders for a partnership project shall be determined in accordance with the evaluation criteria provided in Guidelines or the standard bidding documents or Regulations.

Approvals

Approval of partnership project

42. (1) Each phase of a partnership project shall be subject to the approval of the approval authority as required under this Act.

(2) Subject to the Constitution, the approval authorities required to grant final approval are set out in the Third Schedule.

(3) Subject to the Constitution, the Agency may exempt on an individual basis, specific projects which fall below the minimum threshold specified in the Third Schedule, from the application of specified procedures and approval requirements under this Act.

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(4) Where the Agency or any other person gives an approval and in the view of the public authority it is necessary to effect a material change in accordance with the terms and conditions related to the final approval of the proposal, the public authority shall obtain the approval of the approval authority before the required change is effected.

Approval by local government authority

43. (1) The Executive Committee of a local government authority shall consider a partnership project submitted to it and make a recommendation for consideration and approval of the general assembly of that local government authority.

(2) Where the value of the partnership project requires the approval of a higher authority, the Executive Committee of the local government authority shall submit the request to the general assembly for recommendation.

(3) The District Coordinating Director shall, after approval of the general assembly, forward the proposal to the Agency for further action.

Unsolicited Proposals and Related Matters

Unsolicited proposal

44. For the purposes of this Act, an unsolicited proposal is a proposal made by a private entity to undertake a partnership project and submitted at the initiative of the private entity rather than in response to a request from a public authority.

Requirements for unsolicited proposals

45. (1) A partnership project which is stated in the National Development Plan, National Infrastructure Plan, Public Investment Plan or the District Development Plan and other approved sector plans shall not be considered as an unsolicited proposal.

(2) A public authority shall not consider and proceed with an unsolicited proposal unless the proposed partnership project is in line with the National Development Plan and Sector Development Strategy.

(3) An unsolicited proposal shall be subject to a competitive selection process and the selection of bidders shall be determined in accordance with Guidelines or standardised documents or by Regulations.

Form of public private partnership agreement

46. (1) A public authority shall prepare a partnership agreement based on the standardised documents formulated by the Agency in collaboration with the Attorney-General's Office.

(2) The Attorney-General's Office shall review forms of partnership agreements and determine conformity with relevant requirements.

(3) Where amendments are recommended by the Attorney-General's Office, the public authority shall incorporate the amendments in the agreement before the agreement is submitted to the approval authority.

(4) A partnership agreement shall be in the English language and in any other language that may be approved by the Minister.

Scope of public private partnership agreement

47. (1) Subject to the requirements and transaction structure of a partnership project, a partnership agreement may consist of one or more agreements or a principal agreement with subsidiary agreements.

(2) A partnership agreement shall conform to this Act.

- (3) A partnership agreement may require the private entity to
- (a) perform or undertake a specified project or render a particular service;
 - (b) assume financial, technical or operational risks in connection with the performance of a public function or the use of public property; and
 - (c) receive consideration for performing a public function or utilising public property, by way of
 - (i) a fee or charge from any revenue fund or budgetary fund of the Government;
 - (ii) user levies or tariffs collected by the private entity from end-users or customers for a service provided by the private entity; or
 - (iii) a combination of the consideration paid under subparagraphs (i) and (ii).

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(4) A partnership agreement shall explicitly provide for fair compensation to a private entity in the event of termination of that agreement on account of default by the public authority or expropriation by the Government.

Contract execution

48. (1) Subject to this Act and the Regulations,

- (a) the head of a public authority shall execute a partnership agreement on behalf of that public authority in respect of a partnership arrangement; and
- (b) the head of a private entity or an authorised officer of that private entity shall execute a partnership agreement on behalf of that private entity in respect of a partnership arrangement.

(2) A partnership agreement executed in accordance with this Act shall be considered as executed with the approval of the Minister and a forward commitment in respect of the agreement shall be treated as an encumbrance against expropriation in accordance with the Financial Administration Act, 2003 (Act 654) or any other relevant enactment.

Contract management

49. (1) A public authority shall,

- (a) before a partnership agreement is entered into, identify and adopt measures to ensure that the terms of the contract can be implemented; and
- (b) generally oversee the management of the partnership agreement.

(2) A partnership agreement involving the performance of a function of a public authority by a private entity shall not divest that public authority of the responsibility of protecting the public interest and ensuring that the relevant functions are effectively and efficiently performed by the private entity on behalf of the public authority.

(3) A partnership agreement involving the use of property of a public authority by a private entity shall not divest that public authority of the responsibility of ensuring that the property is appropriately protected against forfeiture, theft, loss, wastage and misuse.

Governing law of public private partnership agreement

50. (1) The governing law of a partnership agreement is the law of Ghana.

(2) The parties shall determine the place of arbitration in respect of a partnership agreement including an agreement for the provision of finance for the partnership project under the partnership agreement.

Ownership of assets

51. (1) A partnership agreement shall specify which asset is or shall constitute public property and which asset is or shall constitute the private property of the private entity involved.

(2) A partnership agreement shall, in particular, identify which assets belong to the following categories:

- (a) assets that the private entity is required to return or transfer to the public authority or to another entity indicated by the public authority in accordance with the terms of the partnership agreement;
- (b) assets that the public authority at its option, may purchase from the private entity; and
- (c) assets that the private entity may retain or dispose of on the expiry or termination of the partnership agreement.

(3) The parties shall, in making the provision relating to the ownership and the transfer of assets in a partnership agreement, be guided by the key objectives of the partnership agreement including, where applicable, the need to ensure continuous provision of the services and other deliverables of the partnership project.

(4) Where provision is not made in a partnership agreement for the treatment of an asset in accordance with subsections (1) to (3), that asset shall be considered to be public property.

Acquisition of rights related to project site

52. (1) Where the nature of a partnership project requires that a specific site or land be acquired, allocated or otherwise dedicated for the purpose, a public authority may, either on the initiative of the public authority or through the relevant public entity, make the land available for the purpose of the partnership project in accordance with the terms of the partnership arrangement.

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(2) A public authority may, where the circumstances require, assist a private entity in obtaining the title, access, possession and rights related to a project site as may be necessary for the implementation of the partnership project.

(3) A public authority may acquire land and related rights subject to the State Lands Act, 1962 (Act 125).

Easements

53. Subject to the payment of appropriate compensation that may be required, a public authority or other public entity may, for the purposes of a partnership project and in accordance with the Lands (Statutory Wayleaves) Act, 1963 (Act 186) and a partnership agreement, assist the private entity concerned to

- (a) enjoy the right to enter upon,
- (b) transit through, or
- (c) do work or fix installations upon

property of third parties, as appropriate for the implementation of a partnership project.

Payment of compensation

54. Where compensation is required to be paid to a person who has an interest in or rights over the land acquired, the compensation shall, depending on the nature of the project, be paid by

- (a) the private entity undertaking the partnership project and included in the project cost; or
- (b) the relevant public authority.

Revenue of private entity

55. (1) A partnership agreement entered into in accordance with this Act may provide for a private entity to charge, receive or collect user levies or tariffs from end users as revenue from a partnership project approved by the approval authority.

(2) The parties to a partnership agreement may include a provision in the partnership agreement to enable the private entity to retain all or part of the charges, fees or tariffs paid by the end-users for the use of a facility related to a partnership project as part of or all the compensation to that private entity.

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(3) The imposition of a tariff or user levy payable by a third party or a user of a facility related to a partnership project pursuant to a partnership agreement is subject to

- (a) the applicable law; and
- (b) the terms and conditions of the partnership agreement.

(4) The partnership agreement may, where applicable, provide methods and formulae for the establishment and adjustment of user levies or tariffs within the ambit of the partnership agreement.

(5) Subject to any terms and conditions of a partnership agreement and restriction under applicable laws, a public authority may agree to make payments to the private entity

- (a) for a service rendered to or on behalf of that public authority under a partnership agreement,
- (b) as a contribution towards the capital costs of a partnership project, or
- (c) as a substitute for or in addition to user levies or tariffs for the use of a partnership project or services.

Complaints and Settlement of Disputes

Complaint procedures

56. (1) A person may lodge a complaint under this Act if that person or the entity that person represents is aggrieved as a result of a breach of any partnership arrangement.

(2) A person referred to in subsection (1) may submit a written complaint to the Agency with a copy to the public authority concerned within thirty days from the date the complainant becomes aware of the breach to which the complaint relates.

(3) The Board shall, within ten days of receipt of a complaint, refer the complaint to the Complaints Panel.

(4) A complaint shall not be lodged or entertained if the partnership agreement has been signed.

Complaints Panel

57. (1) There is established by this Act a Complaints Panel for Partnerships consisting of five persons at least two of whom are members of the Board.

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(2) The members of the Complaints Panel shall be appointed by the Board.

(3) The members of the Complaints Panel shall appoint one of its members as chairperson.

(4) A member of the Complaints Panel shall hold office for a period of three years and is eligible for reappointment for another term only.

(5) Where there is a vacancy in the membership of the Complaints Panel the chairperson shall notify the Board of the vacancy and the Board shall appoint a person to fill the vacancy.

(6) The chairperson shall preside at meetings of the Complaints Panel and in the absence of the chairperson, a member of the Complaints Panel elected by the members present shall preside.

(7) Subject to the provisions of this Act, the Complaints Panel may regulate its own procedure for meetings.

Suspension of bidding process by Complaints Panel

58. (1) Where the Complaints Panel is of the view that

(a) a complaint lodged is not frivolous; and

(b) the complainant may suffer irreparable harm or damage if the bidding process is not suspended

the Complaints Panel shall suspend the bidding process for the respective partnership project for a period not less than sixty days.

(2) The Complaints Panel may, on receipt of a complaint and pending the resolution of the complaint, issue a notice of the complaint to all bidders, and to the public authority concerned.

(3) The Complaints Panel shall not act upon the complaint unless the complainant deposits a complaint bond in an amount specified by the Minister at the office of the Complaints Panel.

Decision of Complaints Panel

59. (1) The Complaints Panel shall hear and review complaints in accordance with this Act and the Regulations.

(2) The Complaints Panel shall

(a) resolve a complaint within sixty days after the receipt of that complaint;

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- (b) issue a written decision indicating the reason for the decision; and
- (c) indicate whether the complaint is upheld in whole or in part and the factors that were taken into account in arriving at the decision.

(3) The Complaints Panel shall, not later than five days after a decision is made, submit the decision and the record of proceedings to the Board.

(4) The Board shall, within five days of receipt of the decision from the Complaints Panel, furnish the complainant and the public authority with a copy of the decision.

(5) A person aggrieved with an order or decision of the Complaints Panel may appeal to the High Court.

Complaints made to a private entity

60. (1) Where a private entity is required to provide services directly to the general public or operate a facility for the benefit of the public under a partnership arrangement, that private entity shall establish simplified and efficient mechanisms for the lodging of complaints and claims by the public and end users.

(2) A person affected by the services provided by a private entity under a partnership arrangement may lodge a complaint with the private entity for expeditious redress.

(3) The private entity shall inform the complainant of the decision taken on the complaint within thirty days after receipt of the complaint.

(4) The private entity shall, within fifteen days after every six months, submit to the Agency and the public authority concerned, information regarding complaints received in respect of the implementation of the partnership project and how the complaints have been resolved.

(5) The Agency in consultation with the public entity may make recommendations or give directions to the private entity with regard to measures to minimise or resolve the complaints.

(6) The efficiency of the resolution of a complaint by the private entity shall be taken into account by the regulatory authority and the public authority when assessing the performance of the private entity.

Complaints made to a public authority

61. (1) A person who has lodged a complaint under section 60 and does not receive a response within thirty days or is not satisfied with the response from the private entity, may file a complaint before the Agency and the respective public authority.

- (2) A complaint shall not be acted upon unless the complainant
- (a) submits the complaint in writing or by electronic mail;
 - (b) states the personal particulars of the complainant and the means by which the complainant may be reached;
 - (c) submits a statement on the nature of the grievance and where applicable, the part of the partnership process from which the complaint arose; and
 - (d) deposits a complaint bond in the amount specified by the Minister at the office of the Agency.

(3) The response of the public authority to the complaint shall be in writing and shall state

- (a) the reasons for the decision;
- (b) whether the complaint is upheld in whole or in part; and
- (c) the corrective measures that are to be taken where applicable.

Suspension of bidding process by public authority

62. Except in the case of an emergency, where a public authority receives a complaint from any bidder, that public authority shall immediately suspend the bidding process for twenty-one days if

- (a) the complaint is not frivolous;
- (b) the complaint contains a declaration which demonstrates that the bidder will suffer irreparable damage if the bidding process is not suspended; and
- (c) the suspension will not cause disproportionate harm to the public authority or other bidders.

Dispute between a public authority and private entity

63. A dispute between a public authority and a private entity arising from a partnership agreement shall be settled in accordance with the dispute resolution mechanism agreed by the parties in the partnership agreement or by default, in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

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Miscellaneous Provisions

Special purpose entity

64. A private entity which seeks to
- (a) enter into a partnership agreement as a special purpose entity solely for the purpose of a partnership project; or
 - (b) take over the rights of an entity that previously participated in a partnership process, shall be incorporated in Ghana.

Record keeping

65. A public authority shall keep a record of all matters relating to the selection and award proceedings for a partnership project in the prescribed manner.

Margin of preference

66. (1) A public authority may grant a margin of preference for a domestic business in accordance with the Regulations.

(2) The margin of preference to be applied to a specific partnership project shall be stated in the bidding documents.

(3) A bidder shall not enjoy the margin of preference unless the business of that bidder is incorporated in the country and the majority ownership of the company is held by Ghanaians.

(4) A Request for Proposals and a partnership agreement shall contain a provision to indicate that an entity which enjoys a margin of preference shall not alter a majority stake held by Ghanaians throughout the term of the partnership agreement.

Access to information

67. (1) The Agency shall ensure that, subject to the requirements of any enactment on access to information, relevant information in respect of a partnership project is made available to any person interested in the information subject to the payment of a fee to cover the cost of the medium of the information requested by that person.

(2) Subject to subsection (1), the Agency shall ensure that the following information is made available at a designated website that permits access by the public:

- (a) public private partnership projects registered with the Agency;

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- (b) project concept notes or prefeasibility studies;
- (c) Requests for Qualification;
- (d) the names of pre-qualified and shortlisted private entities;
- (e) Requests for Proposals;
- (f) notices of contract awards;
- (g) decisions of the Appellate Panel;
- (h) reports submitted on the performance of private entities; and
- (i) any other reports prepared by public authorities or the Agency in respect of partnership projects.

Request for information

68. (1) The Minister or a public authority through the Agency may, in the performance of functions under this Act

- (a) by notice in writing, require a bidder or an official of a public authority or a relevant person in the private or public sector to provide information in a form and manner and within the period specified in the notice, to ensure compliance with this Act; and
- (b) interview a person and request that person to provide particulars that are required for specific purposes under this Act.

(2) A notice referred to in subsection (1) shall state that the notice is served in exercise of the powers conferred by this section and shall include a general statement of the purpose for which the information or response is required.

(3) When a requirement to provide information or particulars under this Act is made, the response shall be provided by the person concerned not later than the time specified in the notice or within an extension period that the authority issuing the notice may grant.

(4) A person who fails to provide information requested in accordance with this Act shall pay to the Agency an administrative penalty of three thousand penalty units.

(5) A person who

- (a) knowingly provides misleading or false information or material; or
- (b) willfully obstructs the provision of information under this Act

commits an offence and is liable on summary conviction to a fine of not less than five thousand penalty units and not more than fifty thousand penalty units or to a term of imprisonment of not less than two years and not more than five years or to both the fine and term of imprisonment.

Equity participation in special purpose entities

69. (1) A public authority or a subsidiary of a public authority shall hold an equity stake in a special purpose entity in accordance with the Regulations.

(2) Despite subsection (1), a public authority may hold an equity stake in a special purpose entity pursuant to a partnership arrangement under the following conditions:

- (a) where the Agency has given prior written approval authorising the holding of the equity by a public authority in a special purpose entity under a partnership arrangement;
- (b) where the intention to hold the equity is expressly stated in the Request for Proposals, or in the case of an unsolicited proposal, set out as a condition by the Agency; and
- (c) where the equity is held under an agreement including a shareholders' agreement between the special purpose entity and the public authority which stipulates that the public authority shall not make any present or future financial contribution towards the acquisition of the equity or contribution to capitalisation of any form.

Annual report by the Minister

70. (1) The Minister shall, in the annual budget statement, report on the progress of partnership arrangements and their impact on the economy.

(2) The public private partnership component of the annual report submitted by the Minister to Parliament shall indicate the following:

- (a) the partnership agreements entered into in the preceding year;
- (b) the status of partnership projects under the partnership agreements;

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- (c) the total financial commitment of the Government in respect of the partnership projects;
- (d) the direct and contingent liabilities in respect of the partnership agreements;
- (e) partnership projects earmarked for the ensuing year;
- (f) the Government support required; and
- (g) any other relevant information.

Reports and plans of public authorities

71. (1) Each public authority which has registered a partnership project under section 34 shall, at the end of each year, prepare and submit to the Minister a report on the activities of the public authority relating to the partnership project during that year.

(2) The report shall include

- (a) a general survey of developments during the year to which the annual report relates in respect of matters falling within the scope of public partnerships to be undertaken by the public authority;
- (b) details of progress and the decisions made by the head of the public authority and the Agency, along with the status of compliance;
- (c) details of general directions given to the public authority during the year to which the annual report relates by the Minister, Cabinet or Parliament along with the status of compliance; and
- (d) a report on any other matter as the Minister may require.

(3) A public authority referred to in subsection (1) shall, before the commencement of each year, prepare and submit to the Minister a report on the annual plan for the year containing a general description of work, other than that comprising routine activities in the exercise of the functions of that public authority, which it plans to undertake during the year in furtherance of the objectives of the public authority and the outcomes the public authority expects to achieve during that year.

(4) The public authority shall, before finalising the annual plan referred to in subsection (3), publish a draft of the annual plan and provide forty-five days' notice for inviting representations and objections from the stakeholders and other interested parties.

(5) The public authority shall, upon receipt of the representations and objections, consider the representation or objections.

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(6) The Minister shall

- (a) lay a copy of a report prepared by the public authority under subsections (1) and (3) before Parliament, and
- (b) arrange for copies of the report to be published in a manner that the Minister considers appropriate.

(7) The public authority shall submit to the Minister other reports with respect to the matters that may appear to the public authority to be expedient.

(8) Upon presentation of the report referred to in subsection (1), Parliament may require written replies from, or the presence of, the head of a public authority in connection with any investigation, debate or discussion with respect to the powers exercised or functions performed by that public authority in respect of a partnership project and the public authority shall provide the information and render the assistance to Parliament that may be necessary.

Penalty for non-compliance with orders or directions

72. (1) A person who commits an offence under this Act for which a penalty is not provided is liable on summary conviction to a fine of not less than five thousand penalty units and not more than ten thousand penalty units.

(2) A person who fails to comply with an order or directive given under this Act by the Minister or the Agency or an officer authorised by the Minister or the Agency, within the time specified in the order or directive is liable to pay to the Agency an administrative penalty of five thousand penalty units and in the case of a continuing failure, to an additional penalty of not more than three thousand penalty units for each day during which the failure continues.

Regulations

73. (1) The Minister may, on the recommendations of the Agency, by legislative instrument make Regulations for the purpose of giving effect to this Act.

(2) Without limiting subsection (1), Regulations made under this section may provide for

- (a) the type and structure of Government support for partnership projects;
- (b) registration processes required under this Act;
- (c) application processes required under this Act;

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- (d) regulation of accounts established under the Fund;
- (e) matters related to unsolicited proposals;
- (f) processes for approvals by approval authorities;
- (g) the scope of feasibility studies;
- (h) the format of feasibility reports;
- (i) the basic qualification criteria for private entities;
- (j) the content and form of Request for Qualification;
- (k) content, form and stages of Request for Proposals;
- (l) the content and form of partnership agreements;
- (m) the procedure for record-keeping in respect of the selection and award of partnership projects;
- (n) partnership agreements by public authorities;
- (o) the procedure for the appointment of transaction advisers, consultants and experts for the preparation and implementation of partnership projects;
- (p) the establishment of facilities to meet financial shortfalls in strategic national projects and projects which are considered to be beneficial to the economy but which have a financing gap;
- (q) the margin of preference that may be granted under this Act;
- (r) the criteria to access facilities that may be established for the attainment of the object of this Act;
- (s) partnership arrangements at the level of local government authorities;
- (t) bidding procedures and evaluation of bids;
- (u) contract management;
- (v) special purpose entities;
- (w) bid securities;
- (x) formation of consortia;
- (y) varying the monetary values in this Act; and
- (z) amending the Schedules.

Guidelines

74. (1) The Minister may, in consultation with the Attorney-General, issue Guidelines in respect of administrative and procedural matters required under this Act.

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(2) The Minister shall publish the Guidelines in the *Gazette* and on the website of the Ministry.

(3) For the purposes of this Act, the Minister may, in respect of sectors of the economy including the energy and telecommunications sectors where competitive structures for private participation have been well established, issue sector-specific Guidelines for partnership processes in those sectors.

(4) The sector-specific Guidelines for partnership processes in the sectors referred to in subsection (3) shall conform to the guiding principles and other mandatory provisions set out in this Act.

Interpretation

75. In this Act, unless the context otherwise requires,

“Agency” means the Ghana Partnerships Agency established under section 9;

“approval authority” includes the entities set out in the second column of the Third Schedule and any public body, institution, entity or committee that has the power to give a form of approval at any stage in the public private partnership process;

“Approval Committee” means the committee established by Cabinet in furtherance of the National Policy on Public Private Partnerships before the coming into force of this Act;

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

“bidder” includes a person that participates in the submission of a response or bid for selection proceedings in respect of a partnership project;

“bidding documents” means the Request for Proposals and the accompanying documents used for inviting offers for a partnership project, on the basis of which bidders are to prepare and submit their bids;

“Chief Executive” means the person appointed as Chief Executive under section 20;

“complaint bond” means a bond required for submission by a person who lodges a complaint or who applies for a review of a decision to the Complaints Panel;

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- “Complaints Panel” means the Complaints Panel appointed under section 57;
- “direct agreement” means an agreement between a public authority and the provider of funds to a private entity;
- “domestic business” means any business that has been registered under the laws of the Republic of Ghana;
- “end user” means a person who benefits directly or indirectly from the services of a project undertaken through the implementation of a partnership arrangement;
- “evaluation criteria” includes the criteria for the scoring framework used for the examination of responses to Request for Qualification or Request for Proposals or other related examination of responses to a specific partnership project in order to determine bidders’ responsiveness, qualification and suitability for the prospective award of a contract;
- “expert” means a person who has specialised and proven knowledge of a relevant discipline or activity and may be in the nature of a consultant;
- “feasibility report” means the report which is the outcome of a feasibility study and contains the analysis, evaluation and other relevant aspects of a potential partnership project;
- “feasibility study” means a study commissioned or undertaken by a public authority in accordance with section 35;
- “financial commitment” means a direct and contingent liability and commitment assumed by the Government under a partnership agreement;
- “forward commitment” means an undertaking by the Government for a future payment;
- “Ghana Infrastructure Investment Fund” means the Fund established under section 1 of the Ghana Infrastructure Investment Fund Act, 2014 (Act 877);
- “Guidelines” means the Guidelines issued by the Minister pursuant to section 74;
- “guiding principles” means the principles set out in sections 3 to 8;

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- “infrastructure project” means the design, construction, financing, development and operation of a new facility or service or the rehabilitation, modernisation, expansion or operation of any existing facility or service, where the project, facility or service forms part of a public function;
- “local government authority” includes a District, Municipal and Metropolitan Assembly;
- “margin of preference” means the specific arithmetical margin made pursuant to this Act and contained in a public bidding document which may prescribe a criterion designed to assist domestic businesses become more competitive in the partnership bids;
- “Minister” means the Minister responsible for Finance;
- “Ministry” means the Ministry responsible for Finance;
- “partnership” means a public private partnership;
- “partnership agreement” means an agreement between a public authority and a private entity for the implementation of a partnership project;
- “partnership arrangement” means the legal, regulatory, contractual, financial, administrative and other arrangements for and in respect of partnerships;
- “partnership process” means the series of transactions from the initiation of a partnership arrangement to the conclusion of a partnership arrangement;
- “partnership project” means a project or public service implemented under a partnership agreement between a public authority and a private entity in accordance with this Act;
- “potential partnership project” means a project that has the probability of being developed to provide services through a public private partnership arrangement after the initial assessment of the project;
- “private entity” means a person from the private sector who enters into a partnership agreement or undertakes a partnership project and includes a person who engages in a bidding process for the award of a partnership project;

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“project company” means a special purpose company that has been incorporated in accordance with the laws of the Republic of Ghana solely to implement a partnership project;

“public authority” includes

- (a) a government ministry, department or agency;
- (b) a local government authority;
- (c) a subvented agency;
- (d) a government institution;
- (e) a state-owned enterprise;
- (f) a public educational institution;
- (g) a public hospital;
- (h) the Bank of Ghana;
- (i) a financial institution established for the purpose of public trusts, pension funds, insurance and building society in which the Government has majority interest;
- (j) an institution established by Government for the general welfare of the public or community; and
- (k) an entity in which any of the entities under paragraphs (a) to (j) has majority interest;

“public function” means a function of a public authority;

“public private partnership” means a form of contractual arrangement between a public authority and a private entity for the provision of public infrastructure or public services traditionally provided by the public sector, as a result of which the private entity performs part or all of the service delivery functions of Government, and assumes the associated risks over a significant period of time;

“public private partnership agreement” means an agreement between a public authority and a private entity for the implementation of a partnership project;

“public private partnership project” means an infrastructure project or public service implemented under a partnership agreement between a public authority and a private entity in accordance with this Act;

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- “public sector project” means a project which is stated in the National Plan, the National Infrastructure Plan, the Public Investment Plan or the District Development Plan and other approved Sector Plans;
- “Regional Coordinating Council” means the Council established under section 140 of the Local Government Act, 1993 (Act 462);
- “Regulations” means the Regulations made under this Act;
- “regulatory authority” means an authority empowered by law to regulate the functions and conduct of any person;
- “Request for Qualification” means a formal submission to a public authority by a private entity stating its intention to be pre-qualified and short-listed for the bidding process of a partnership project;
- “small project” means a project which has a total estimated project cost not exceeding twenty five million Ghana Cedis;
- “special purpose entity” means an entity established for a single purpose related to a partnership arrangement;
- “standardised document” means a document which has been approved by the Agency, in consultation with the Attorney-General’s Office, as a generic document that may be used by a public authority for its project by making project-specific modifications in the manner specified in the document or by an order of the Agency;
- “state owned enterprise” means an entity whether or not incorporated under the Companies Code, 1963 (Act 179) whose shares are wholly or partially held or controlled by Government;
- “unsolicited proposal” has the meaning assigned to it in section 44;
- “user levy” means a toll, fee, tariff, charge or similar monetary value that a public authority may grant a private entity to levy and recover moneys from the user of a partnership project for use of any service or output; and

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“value for money” means the net benefit gained by a public authority or consumer, defined in terms of cost, price, quality, quantity or risk transfer as a result of carrying out a public function of a public authority or the use of public property by a private entity, under a partnership agreement.

Savings and transitional provisions

76. (1) A partnership agreement entered into before the coming into force of this Act shall remain in force as a valid partnership agreement where

- (a) the agreement was approved by the appropriate authority and entered into force before 3rd June, 2011;
- (b) the agreement was entered into after 3rd June, 2011 in accordance with the national policy on public private partnerships but before the coming into force of this Act; or
- (c) the agreement was entered into after 3rd June, 2011 without regard to the national policy but the project to which it relates was regularised by the Agency under subsection (2).

(2) The Agency may, within a period of one hundred and eighty days after the coming into force of this Act, regularise a project which was initiated after 3rd June, 2011 without recourse to the national policy.

(3) A partnership project which is required to be regularised under subsection (2) and which is not regularised within the period specified shall only be carried out as a partnership project if it is re-initiated in accordance with the procedure required under this Act.

(4) Any act lawfully done or any directive or Guideline issued by the Approval Committee shall have the same effect as if done by the Agency.

FIRST SCHEDULE
Forms of Public Private Partnerships
(Section 2(1)(b))

INFRASTRUCTURE PROJECTS AND RELATED SERVICES

Public Private Partnerships include the following arrangements and their variants which are made by a public authority with a private entity. The arrangements enumerated in this Schedule are indicative of the types of public private partnerships.

Build and Transfer

1. (1) A contractual arrangement where a private entity undertakes the financing and construction of a project and hands it over to the public authority after its completion.

(2) The public authority reimburses the investment on the basis of an agreed schedule.

(3) This arrangement may be employed in the construction of any project, including critical facilities, which for security or strategic reasons must be operated directly by the public authority.

Build Lease and Transfer

2. A contractual arrangement where a private entity undertakes to finance and construct any project and upon its completion hands it over to the public entity concerned on a lease arrangement for a fixed period, after which ownership of the project is automatically transferred to the Government or the public entity concerned.

Build Operate and Transfer

3. (1) A contractual arrangement whereby a private entity undertakes the construction, including financing, operation and maintenance of a project.

(2) The private entity operates the facility over a fixed term during which it may collect user levies, rentals and other charges that are specified in the agreement or Regulations to enable recovery of the investment in the project.

(3) The private entity transfers the project to the public authority at the end of the specified term.

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(4) This shall include a supply and operate arrangement where the supplier of equipment and machinery, if the interest of the public authority so requires, maintains or operates the facility providing in the process, technology transfer and training to the nominated individuals of the public authority.

Build Own and Operate

4. (1) A contractual arrangement where a private entity is authorised to finance, construct, own, operate and maintain a partnership project from which it is allowed to recover its investment by collecting user levies.

(2) The transfer of the project to the public authority is not envisaged.

(3) The public authority may terminate its obligations after a specified period.

Build Own Operate and Transfer

5. (1) A contractual arrangement where a private entity is authorised to finance, construct, maintain and operate a partnership project from which it is permitted to charge user levies to recover its investment.

(2) The private entity is liable to transfer the partnership project to the public authority after the expiry of the specified period of operation.

Build Transfer and Operate

6. (1) A contractual arrangement where a public authority contracts out a partnership project to a private entity to construct the facility on a turnkey basis, assuming the risks associated with costs, overruns, delays and performance.

(2) On the commissioning of the facility the private entity is given the right to operate the partnership project and collect user levies.

(3) The title of the partnership project always vests in the public authority.

Contract Add and Operate

7. (1) A contractual arrangement where a private entity adds to an existing partnership project which it rents from the public entity and operates the expanded partnership project and collects user levies, to recover the investment over an agreed franchise period.

(2) There may or may not be a transfer arrangement with regard to the added facility provided by the private entity.

Develop Operate and Transfer

8. A contractual arrangement where favourable conditions external to a new partnership project which is to be built by a private entity are integrated into the Build Operate and Transfer arrangement by giving that private entity the right to develop adjoining property and enjoy some of the benefits the investment creates such as higher property or rent values.

Rehabilitate Operate and Transfer

9. (1) A contractual arrangement where any existing facility is handed over to a private entity to refurbish, operate and collect user levies for a specified period, at the expiry of which the facility is turned over to the public authority.

(2) The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.

Rehabilitate Own and Operate

10. (1) A contractual arrangement where an existing facility is handed over to a private entity to refurbish and operate with no time limitation imposed on ownership.

(2) As long as the private entity is not in violation of its franchise, it can continue to operate the facility and collect user levies in perpetuity.

Lease Management Contract

11. A contractual arrangement where a public authority leases a partnership project owned by the Government to the person who is permitted to operate and maintain the partnership project for the period specified in the agreement and to charge user charges.

Management Contract

12. (1) A contractual arrangement where a public authority entrusts the operation and management of a partnership project to a private entity for the period specified in the agreement on the payment of a specified consideration.

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(2) In such an agreement, the public entity may charge and collect user levies either by itself or entrust the collection, for consideration, to a person who shall collect and pay the user levies to the public entity.

Service Contract

13. (1) A contractual arrangement whereby an existing partnership project is handed over to a private entity to renovate, operate and maintain.

(2) The private entity shall be permitted to charge levies as specified in the agreement.

Operate and Transfer

14. (1) A contractual arrangement whereby a private entity undertakes to operate a partnership project and provide services to a public authority for a specified period.

(2) The public authority shall pay the person an amount according to the agreed schedule.

Supply Operate and Transfer

15. (1) A contractual arrangement whereby a private entity supplies to a public authority the equipment and machinery for a project and undertakes to maintain or operate it for a period and for consideration specified in the agreement.

(2) During the operation of the partnership project, the person shall undertake to train employees of the public authority to operate the partnership project.

SECOND SCHEDULE
Government support for partnership projects
(Section 31 (2))

In considering the form of government support that may be provided for public private partnerships, the Minister shall have regard to the options set out in this Schedule.

Guarantees

1. (1) The obligations of the public authority under a partnership agreement including the payment obligations may be guaranteed by the public authority on its own or with the assistance of another public authority or appropriate Government agency which is empowered to do so or possess adequate resources to undertake the guarantees.

(2) The guarantee may be in any of the following forms:

- (a) sovereign guarantee issued by the Government of Ghana, subject to the Constitution;
- (b) the creation or use of special funds established by law that may be appropriately applied for the purpose;
- (c) obtaining surety bonds from insurance companies not controlled by the Government;
- (d) guarantees provided by international institutions or financial institutions not controlled by the Government;
- (e) guarantees provided by a guarantee fund or by a state-owned enterprise set up for that purpose; and
- (f) other mechanisms permitted by law.

Entry into direct agreement by Government

2. The Government or a designated public authority may enter into direct agreement with any lender, financing or guaranteeing institution or the project company.

Project specific support

3. (1) Apart from the support mechanism, the Government of Ghana may support the implementation of a partnership project through the grant to the project company, subject to the requirement of any applicable law, of

- (a) letters of comfort;
- (b) letters of credit;

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- (c) full or partial tax exemption, tax holiday or deferred tax as Parliament may approve;
- (d) capital or other grants to bridge the viability gap of a project;
- (e) recurring grants to bridge the viability gap in the revenues of the project during the operations period;
- (f) rights over public assets; and
- (g) other means permitted by law.

(2) Where the project company qualifies for any investment incentive under any applicable law, such as investment promotion or free zone incentive, the incentive may be in addition to any existing support.

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THIRD SCHEDULE
Accountability of public authorities
(Sections 33 (3), 42 (2) and (3))

Criteria	Approval Authority	Notes
Partnership Projects which require the Republic of Ghana to comply with Article 174 or 181 of the Constitution	Cabinet/Parliament.	This shall be applicable irrespective of the financial threshold or capital outlay of the project.
Partnership Projects which at project inception or planning stage involve a total estimated project cost exceeding two hundred million Ghana Cedis (GH¢200m)	Cabinet/Parliament.	The amount established at pre-feasibility or feasibility shall be used to determine threshold.
Partnership Projects with an estimated project cost of not more than two hundred million Ghana Cedis (GH¢200m) other than projects undertaken by Municipal, Metropolitan and District Assemblies with total estimated project cost not exceeding twenty five million Ghana Cedis (GH¢25m)	Agency	The amount established at pre-feasibility or feasibility stage shall be used to determine threshold.
Partnership Projects undertaken by Municipal, Metropolitan and District Assemblies where the total estimated cost is less than: (a) Five million Ghana Cedis (GH¢5m) in the case of District Assemblies (b) Ten million Ghana Cedis (GH¢10m) in the case of Municipal Assemblies (c) Twenty five million Ghana Cedis (GH¢25m) in the case of Metropolitan Assemblies	General Assembly of the Municipal, Metropolitan and District Assemblies for Municipal, Metropolitan and Local Government Authority Projects.	The amount established at pre-feasibility or feasibility stage shall be used to determine threshold.

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Date of *Gazette* notification: 18th March, 2016.

Public Private Partnership Bill, 2016

MEMORANDUM

The purpose of the Bill is to establish a legal framework for the development, implementation and regulation of public private partnership arrangements and projects between public authorities and private entities for the provision of public infrastructure and public services.

The provision of public infrastructure and public services is one of the prime mandates of Governments all over the world. Public infrastructure like roads, electricity, transportation, water and sanitation, seaports and airports are fundamental prerequisites for economic growth and development. In addition, educational and health facilities as well as public housing and buildings, social, cultural and commercial facilities and infrastructure are essential in modern societies. All across the world, studies have consistently shown the close relationship between infrastructure and economic output.

However, fiscal constraints experienced by governments have resulted in the development of new and innovative approaches to the provision and financing of public infrastructure and public services. The traditional role of the Government as the primary provider of public infrastructure and public services is gradually being supplemented with private sector expertise and financing.

Accordingly, the Bill seeks to promote a combination of policy and legal reforms, financing mechanisms, incentives and institutional support to boost private sector participation in the provision of public infrastructure and public services through public private partnership arrangements and projects.

The Government, on 3rd June, 2011 adopted the National Policy on Public Private Partnerships to provide the policy framework for the implementation of public private partnerships in Ghana.

The Public Private Partnership Bill is therefore a reflection of the desire of Government to improve the quality, affordability and timely provision of public infrastructure and public services in Ghana. The Government is mindful that public private partnership arrangements are

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not a panacea for all public infrastructure investment needs and therefore the public private partnership arrangements are to be viewed as a complement to and not a substitute for the continued commitment of Government to open up key service markets to competition. Public private partnership arrangements will therefore be considered where the arrangement would provide greater value for money than other fully-private or fully-public service delivery options.

Clauses 1 and 2 are preliminary provisions on the object of the Bill and the application of the Bill. *Clause 1* of the Bill provides for the object of the Bill which is to promote private sector participation in the economic development of the country through public private partnership arrangements and to foster the use of private sector resources for the provision of infrastructure and public services. The object encompasses, among others, the creation of an enabling environment and framework to enable private entities to participate in partnership projects and offer value for money to the public sector and users of partnership projects and the delivery of efficient infrastructure and services with assured quality.

Clause 2 deals with the application of the Bill. Among others, the Bill applies to various forms of partnership arrangements, public sector projects undertaken in the form of partnership arrangements between public authorities and private entities, as well as to commercial arrangements carried out through partnership arrangements in respect of state-owned enterprises including the military, police, defence and justice institutions.

The clause also lists activities to which the Bill does not apply. These activities include the grant of a mineral right under the Minerals and Mining Act, 2006 (Act 703) or any applicable enactment on mining, the grant of any right for exploration, development or production under the applicable enactment on petroleum, the divestment of ownership or equity of a state owned enterprise, the procurement of goods, works and services primarily with the use of public funds by any public authority under the Public Procurement Act, 2003 (Act 663) and non-commercial activities that are the exclusive preserve of the military, police, defence and justice institutions.

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Cluses 3 to 8 deal with guiding principles. Clause 3 requires a public authority to ensure that partnership arrangements of that public authority are designed to safeguard the interest of the general public and affected persons.

Clause 4 mandates a public authority to ensure that the documents comprising a partnership arrangement show the allocation of risk to the party best able to control and manage the risk and in addition, that optimal risk is transferred to the private entity to achieve greater value for money.

A public authority is required to conduct a feasibility study of a potential public private partnership project to determine the capital and operational cost of the partnership project based on efficiency and economy in project operations and end-user affordability, among others, *clause 5.*

Clause 6 provides for fairness, transparency and competitiveness in procurement processes relating to public private partnerships. The procurement of a partnership project is to be based on a well defined bidding process, clear instructions to bidders and interested persons to prevent manipulation or abuse of the process and the bidding documents. The reasons in support of the decision of a public authority are to be in writing.

Clause 7 makes provision for adequate stakeholder consultation in respect of each partnership arrangement.

Clause 8 makes provision for the procurement procedures for all partnership arrangements to be consistent with the Bill, the Regulations and Guidelines. However, where no procedure is expressly provided for by the Bill, the Regulations, Guidelines or standardised documents, the provisions of the Public Procurement Act, 2003 (Act 663) are applicable.

Cluses 9 to 12 deal with the establishment, functions and governing body of the Ghana Partnerships Agency. Clause 9 establishes the Ghana Partnerships Agency as a body corporate.

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The object of the Agency as specified in *clause 10* is to promote and regulate the development and implementation of partnership arrangements for the provision of infrastructure and services.

Provision is made for the functions of the Agency in *clause 11*. The functions include coordinating and overseeing the implementation and operation of partnership processes and procedures, providing technical support and guidance to public authorities on structuring, bidding, procurement and implementation of partnership projects, promoting investments in partnership projects, evaluating proposals of public authorities for inviting investments in partnership projects and granting of approvals under the Bill.

Other functions of the Agency include the formulation of standardised bidding documents, partnership agreements and manuals for adoption and use by public authorities, registration of potential partnership projects, implementation of capacity building programmes for public authorities and relevant stakeholders and granting exemptions from the application of specified procedures. The Agency is mandated by this *clause* to advise the Minister in respect of current and future needs of the country concerning infrastructure, policy, pricing and regulatory matters related to infrastructure and partnership processes, reform and restructuring. Furthermore the Agency is required to undertake consultations with various stakeholders.

Clause 12 provides for the governing body of the Agency which is a Board, comprising nine members. It is the responsibility of the Board to ensure the proper and effective performance of the functions of the Agency.

Clauses 13 to 17 provide for standard provisions on the tenure of office of members of the Board, meetings of the Board, disclosure of interest of members of the Board, establishment of committees of the Board and allowances payable to members of the Board and members of committees of the Board. *Clause 18* provides for ministerial oversight responsibility.

Clauses 19 to 21 provide for administration and staff of the Agency.

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Clause 19 empowers the Agency to create divisions or units necessary for the efficient discharge of the functions of the Agency.

Clause 20 provides for the appointment and responsibility of the Chief Executive of the Agency. Appointment of other staff is provided for in *clause 21*.

The finances of the Agency are provided for in *clauses 22* to *25*. *Clause 22* makes provision for the funds of the Agency, *clause 23* for the annual budget of the Agency, *clause 24* for accounts and audit and *clause 25* for annual reports and other reports.

Clauses 26 to 30 deal with the Public Private Partnership Fund. *Clause 26* provides for the establishment of the Fund. The object of the Fund as indicated in *clause 27* is to provide funding to support partnership arrangements.

Clause 28 deals with the sources of money for the Fund. The sources of money for the Fund include moneys lawfully payable to the Fund, moneys transferred from the Ghana Infrastructure Fund in accordance with the Ghana Infrastructure Fund Act, 2014 (Act 877) or any other applicable enactment, fees from income generating activities, donations and grants, loans and other moneys that the Minister may with the approval of Parliament determine to be paid into the Fund.

Clause 29 allows the Board, in consultation with the Minister for Finance, to create categories of accounts in furtherance of the object of the Fund and *clause 30* requires the Board to administer the Fund.

Clause 31 on Government support, empowers the Minister to specify by legislative instrument the type and structure of support that the Government may provide for selected partnership projects and related activities carried out pursuant to this Bill.

Clauses 32 and *33* provide for the responsibilities of public authorities.

Clause 32 requires a public authority to promote partnership arrangements in the course of developing its sector plans and programmes in respect of public infrastructure and public services. Where a public

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authority intends to undertake a significant partnership project or several small partnership projects, that public authority is required to designate a unit in the office of the public authority for the purpose of coordinating activities related to the partnership project.

Under *clause 33*, provision is made for a public authority to be responsible for each phase of a partnership project, including the identification, feasibility study, due diligence, bidding, evaluation, negotiation, contract finalisation and implementation.

Clauses 34 to 36 relate to the preparation of public private partnership projects.

Clause 34 makes the registration of a partnership project a prerequisite for undertaking a feasibility study.

Clause 35 makes provision for the conduct of a feasibility study after registration of a potential partnership project.

Clause 36 requires a local government authority to set up a project steering committee to review feasibility reports for projects that fall within the approval threshold of a local government authority.

Clauses 37 to 41 provide for the bidding process for partnership projects.

Under *clause 37*, a public authority is required to prepare bidding documents in anticipation of a bidding process for a public private partnership.

Clause 38 deals with Requests for Qualification. A public authority is required to commence the bidding process with a Request for Qualification to identify bidders that meet the eligibility criteria and are suitably qualified to implement a potential partnership project.

Clause 39 allows a public authority to proceed to invite proposals for a partnership project after the requirement for a Request for Qualification has been met. The request for proposals is to be made only through a formal Request for Proposals except where a public authority has been otherwise authorised by the Agency.

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Clause 40 specifies circumstances under which a two stage request for proposals may be undertaken. The circumstances include where the potential partnership project involves a complex set of issues or matters which were uncertain at the time of the issue of the Request for Proposals, where there are contingent issues or matters for which the public authority requires further consultation before making a final decision and before the closing date for the submission of responses to the Request for Proposals and where the expected project implementation time will not permit the completion of all aspects of the feasibility study or relevant studies before the issue of the Request for Proposals.

Clause 41 requires a public authority to select bidders for a partnership project in accordance with the evaluation criteria provided in Guidelines, standardised bidding documents or Regulations.

Clauses 42 and *43* provide for the required approvals of partnership projects.

Each phase of the partnership project is to be subjected to approval by an approval authority, *clause 42*. The authorities required to give final approval are detailed in the Third Schedule.

The Executive Committee of a local government authority is also required to consider partnership projects submitted to it and make recommendations for consideration and approval by the general assembly of the local government authority, *clause 43*.

Clauses 44 and *45* are on unsolicited proposals and related matters.

Clause 44 defines an unsolicited proposal. An unsolicited proposal refers to a proposal made by a private entity to undertake a partnership project which is submitted at the initiative of the private entity rather than in response to a request from a public authority.

A partnership project which is stated in the National Development Plan, the National Infrastructure Plan, the Public Investment Plan or the District Development Plan and other approved sector plans is not to be considered as an unsolicited proposal, *clause 45*.

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Clauses 46 to 55 deal with public private partnership agreements.

Clause 46 requires a public authority to prepare a partnership agreement based on standardised documents formulated by the Agency in collaboration with the Attorney-General's Office. *Clause 47* provides for the scope of the partnership agreement.

Clause 48 makes provision for the head of a public authority to execute a partnership agreement on behalf of the public authority and the head of a private entity or a duly authorised representative of a private entity to execute a partnership agreement on behalf of the private entity.

Clause 49 requires a public authority to identify and put in place measures that will ensure proper contract management before a partnership agreement is entered into.

Clause 50 states the governing law of a partnership agreement as the law of Ghana. The parties to a partnership agreement are to determine the place of arbitration.

Clause 51 makes provision for the parties to a partnership agreement to state clearly in the agreement the ownership and transfer of the assets of the project. The parties are to be guided by the key objectives of the partnership agreement including the need to ensure continuous provision of the service and other deliverables of the partnership project.

Clause 52 makes provision for a site or piece of land to be acquired, allocated or dedicated for a partnership project in accordance with the terms of the public private partnership arrangement.

Clause 53 allows a private entity to be assisted to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate for the implementation of the partnership project in accordance with the Lands (Statutory Wayleaves) Act, 1963 (Act 186).

Clause 54 provides for the payment of compensation to a person who has an interest in or right over land acquired for a partnership project.

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Clause 55 deals with financial arrangements and permits a private entity to charge, receive or collect user levies or tariffs from end users as a revenue source from a partnership project approved by the approval authority.

Clauses 56 to 63 make provision for lodging complaints and settlement of disputes.

Clause 56 enables an aggrieved person or a representative of an aggrieved entity to lodge a complaint with the Agency within thirty days from the date the complainant becomes aware of the breach.

Clause 57 establishes a Complaints Panel and provides for the composition of the Panel, tenure of office of the Panel members, meetings and the business of the Panel.

Under *clause 58*, the Complaints Panel is required to suspend the bidding process for a minimum period of sixty days where the Complaints Panel is of the view that the complaint is not frivolous and the complainant is likely to suffer irreparable harm or damage if the bidding process is not suspended.

The Complaints Panel is required to make decisions on complaints submitted to it, within a specified period, *clause 59*.

Clause 60 requires a private entity to establish simplified and efficient mechanisms for lodging complaints and claims by the public and end users where a private entity provides services directly to the general public or operates a facility under a partnership arrangement.

Clause 61 outlines procedures for lodging a complaint with a public authority where a complainant does not receive a response from a private entity within thirty days of lodging the complaint or is not satisfied with the response from the private entity.

Clause 62 requires a public authority to immediately suspend the bidding process for twenty-one days in particular circumstances including where the complaint contains a declaration which demonstrates that the bidder will suffer irreparable damage if the bidding process is not suspended.

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Clause 63 deals with dispute settlement between the public authority and the private entity. Disputes are to be settled as provided in the partnership agreement or in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

Miscellaneous provisions are the content of clauses 64 to 75.

Clause 64 provides for the incorporation in this country of a special purpose private entity solely for the purpose of a partnership project.

Clause 65 requires a public authority to keep a record of all matters relating to the selection and award proceedings for a partnership project.

Clause 66 allows a public authority to grant a margin of preference for a domestic business. The margin of preference is available to a bidder who is incorporated in this country with Ghanaians having a majority ownership.

Clause 67 requires the Agency to make available relevant information in respect of a partnership project. The Agency is also to make available specified information at a designated website that permits access by the public to the specified information.

Clause 68 empowers the Minister, or a public authority through the Agency to request a bidder or an official of a public authority or a relevant person in the public or private sector to provide information within a specified period.

Clause 69 specifies the conditions under which a public authority or a subsidiary of a public authority can hold an equity stake in a special purpose entity.

The Minister is obligated to report on the progress of partnership arrangements and their impact on the economy in the annual budget statement, *clause 70*.

Clause 71 requires each public authority that has registered a partnership project to prepare and submit to the Minister an annual report on the registered partnership project.

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Clause 72 specifies the penalty for non compliance with orders or directives given under the Bill.

Clause 73 lists the matters for which Regulations are required. *Clause 74* lists the matters in the Bill in respect of which Guidelines are to be made or directives are to be issued. *Clause 75* deals with interpretation of terms and expressions used in the Bill. *Clause 76* is on savings and transitional provisions.

MR. SETH E. TERKPER
Minister responsible for Finance

Date: 16th March, 2016.