Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Program in Malawi

*Final Report*

31 March 2007

Submitted To:
Mr. Constantine Chikosi
Senior Project Manager
The World Bank, Malawi

Submitted By:
The Institute for Public-Private Partnerships, Inc.
1010 Wisconsin Avenue, Suite 250
Washington, DC 20007 USA
Tel: 1-202-466-8930
Fax: 1-202-466-8934
www.ip3.org
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RE: Final Report: Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Program in Malawi

Dear Mr. Chikosi

The Institute for Public-Private Partnerships, Inc. is pleased to submit the Final Report for the above referenced consultancy. We welcome your comments and feedback on the report. It has been a true pleasure working with you on this assignment.

Sincerely,

Matthew Hensley
President
IP3
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I. EXECUTIVE SUMMARY

Over the past several months, the IP3 team has conducted extensive field research, interviews, and reviews of existing reports in order to formulate a comprehensive plan for Government to create a policy, legal, and institutional framework for PPP. At the end of this research and analysis period, the team prepared a draft Cabinet Paper, for the Minister of Finance to present to Cabinet, proposing specific actions that could be undertaken by Government in order to establish such PPP frameworks. This Final Report serves as both an update of our previous reports and recommendations and an Action Plan for implementing the nascent PPP Program in Malawi.

Malawi, along with numerous other countries, has been conducting Privatization in an effort to shift the burden of service delivery onto the private sector. This has been done by transferring the ownership and control of public enterprises to the private sector, with the objective of having services performed by those public enterprises subsequently performed by private enterprises, thereby relieving Government of the costs associated with owning and operating public enterprises.

Legal Framework and Options for PPP: New Legislation Desirable in the Long Run but not Necessary in the Short-Run

The Public Enterprise (Privitisation) Act provides the legal mandate for such privatization activities. However, the scope of the Act is limited to such transfers of ownership and control (privatization) to the private sector, including concessions. The question has arisen: “how can the private sector participate in the delivery of services to consumers, when such services are not to be delivered through the use of existing public assets?” Another way to phrase the question is: “what will be the legal basis of a transaction in which the private sector is invited to participate in the delivery of services (that would otherwise have been provided by the public sector) if there are no existing public assets to sell in order to enable the service delivery?”

If the service delivery contemplated involves the use of new assets, there is no provision for such a transaction in the Public Enterprise Act, in its present form. However, there is a provision for issuing “concessions” to the private sector, and that provision provides a legal foundation to bridge the existing legislation with what we propose to be its new successor, a PPP Act. Such an Act would address the long term issues that will likely emerge as Malawi’s PPP program matures, harmonize existing legislation with key PPP practices and procedures, and modernize and clarify the process by which PPP projects are selected, tendered, negotiated, awarded, and monitored.

However, PPP activities and transactions need not be delayed until a PPP Act is established. In fact, PPP can advance using existing legal instruments as long as “Implementing Rules and Regulation” as well as PPP “guidelines and procedures” are enacted so that line agencies, the private sector, and the public understand the rules of the game governing an effective PPP process.
Our findings also conclude that it is unnecessary to amend the Public Enterprise (Privatisation) Act, to include both Privatization and Public-Private Partnership (PPP) concession activities. Amending current legislation would not only take just as much time as introducing new legislation, but would be an imperfect and incongruous “adjustment” that is neither legally effective nor politically well-timed. In the longer-term it is desirable to ‘umbrella’ legislation to address all of the GOM’s PPP activities across all of its functions, including ministries, procurement and oversight. This approach allows for a transition period, that would enable the Privatisation Commission (PC) to spearhead PPP policy, procedures and ‘deal flow’ for PPPs in addition to carrying out its privatization mandate. This responsibility to spearhead PPP on an interim basis would serve as the groundwork for the establishment and operation of a PPP Unit described in detail in the report.1

While the development of a new PPP act is recommended in the future, especially after PPP in Malawi grows to meet demand, PPP can and should proceed using existing arrangements. Essential to this, is the adoption of a coherent PPP policy statement (see section I), and the issuance of Ministerial Regulations that stipulate the policy parameters, and necessary “guidelines and procedures” to undertake PPP effectively until such time that a more comprehensive PPP legal apparatus is required and completed. It is recommended that the Ministerial Decree be issued by the Ministry of Finance and that it articulate the policy objectives, parameters and procedures of the PPP “project life cycle” as well as the role of the Privatisation Commission, Ministry of Finance, and other agencies in facilitating, approving, and monitoring PPP transactions in Malawi. This would include the issuance of PPP “guidelines and standard operating procedures” that would clarify the roles, responsibilities, and authorities of all parties in the development and implementation of PPP transactions in Malawi including the risk management aspects of public financial resources and the role of the PPP Unit.

In this report we have prepared an outline of the PPP Act that provides a legal basis for Public Private Participation in both:

- Purchase of, and management of, existing assets (Privatization); and
- Investment in, and management of, new assets (PPP).

In the interim stage the Ministerial Regulations under the Public Financial Management Act will serve as the basis for the PPP program and to develop an adequate level of PPP “deal flow” until the recommended PPP Unit is established.

**Background to the Recommendations: Amend Existing Law or Enact New Law?**

A considerable amount of time and effort was invested by the IP3 team and our counterparts in Government in deciding whether to amend existing law or enact new law in order to provide the necessary legal basis for a new National PPP Program.

The factors supporting enacting a new law included:

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1 In this Final Report, we have not incorporated the many suggestions for the name and final legal status of the PPP Unit. There are suggestions to call it the PSP (Private Sector Participation) and or PSP Unit etc. This Final Report will use the more ‘generic’ term PPP Unit throughout.
Amending an existing law could take just as long as enacting a new one; 
The purpose of an existing law might be diluted or distorted by amendment; 
Enacting a new law might avoid a need to amend multiple laws; and 
PPP could be mobilized without the “baggage” of privatization.

The factors supporting amending an existing law included:

- The flow from Privatization to PPP is a continuation, not a change, in direction; 
- Both Privatization and PPP fit within the them of Public Private Participation; 
- The PC would have its mandate expanded, whereas if a new law were to be enacted, the 
  PC would have to be transformed into a new entity; and 
- If there were two separate laws, one for Privatization and another for PPP, how would 
  both be done within one organization?

Institutional Design Implications

While the points in favor of enacting a new law were quite persuasive from a legal point of 
view the approach continued to “bedevil the consultancy” as we considered the many 
institutional implications. It is quite common for countries to have separate legislation for 
Privatization and PPP.. There would have continued to be a Public Enterprise (Privatization) 
Act, along with a new PPP Act. In countries where such separate legislation exists, the 
implementation of those laws and regulations is usually also separate. The international 
experience has been that this separation can cause privatization to languish while PPP moves 
forward. We wanted to avoid creating a design that that could result in that kind of problem in 
Malawi, but also reflects that privatization has a “life span” whereas PPP is an ongoing and 
evolving tool for infrastructure development and improving service delivery.

Some of the skills required for PPP transactions are similar to those required for Privatization 
transactions, and those skills already exist within the PC. When considering setting up a PPP 
Unit, at least on an interim basis, the PC should not be left behind to only conclude its 
privatization program when many of the skill sets and experience to facilitate PPP project 
development is in place and that capacity is rare in Malawi. Nor would it make sense, on an 
interim basis, to create two separate new institutions, incur additional costs, and run the risk of 
leaving privatization behind in terms of Government’s focus of support. So from an 
institutional framework point of view, at least on an interim basis the responsibility for 
developing PPP projects, procedures and pilot transactions as well as conclude existing 
Privatization transactions can and should be under one roof

But which roof? Merge the PC into a new PPP Unit, or merge a new PPP Unit into the PC? The 
problem with either merger scenario is that Privatization and PPP are not the same, so doing 
PPP in the long-run, under a Privatisation Commission didn’t make sense, and the other option 
of doing Privatization under a PPP Unit seemed a bit of a stretch in the concept of PPP. Malawi 
is a small country and there is a strong desire by the Government to limit or reduce the number 
of its institutions wherever possible. This is a clear case where the PC, can support the transition 
period of PPP program and project development until the enactment of PPP legislation
Bear in mind, that Line Ministries will still be primarily responsible for implementation of PPP transactions under their sectoral mandate. The role of the PPP Unit, is simply to guide, facilitate, and provide quality control on PPP projects so that “best practices” are achieved, and the interests of the GOM, consumers, and investors are addressed fairly and transparently. Thus, the adherence to guidelines, standards, and procedures is a function that the PPP Unit must achieve, and that, with the authority of a Ministerial Regulation from the Ministry of Finance, can be enforced. This also includes the diligent oversight of public financial resources that can also stem from the legal authority of the Public Financial Management Act.

Thus, from an institutional framework perspective, we also recommend a two-stage approach, with the current PC acting as the interim structure to establish ‘PPP deal flow’ until more comprehensive PPP legislation is enacted and a work program to justify the establishment of a specialist PPP Unit. In the interim the name of the Privatisation Commission (PC) would remain, until such time the PPP legislation is enacted and a more formal and permanent PPP Unit established. Another, though less important consideration, was that the National PPP Program is also part of the National Private Sector Development (PSD) Program, which is to receive substantial donor support. A PPP Unit would interface naturally with a PSD program, and coordinate effectively with Ministry of Trade and. Private Sector Development (MoTPSD)

This approach to the PPP Legal Framework will enable the PC to continue its current privatization and concession activities while also laying the groundwork for a quasi-independent PPP Unit that would operate under the aegis of the Ministry of Finance

**National PPP Program: Policy, Guidelines and Standard Operating Procedures**

Although PPP activity is already underway in Malawi, the activity is fragmented and lacking in necessary coordination. To enable such coordination, Government needs to adopt the a clear and comprehensive National PPP Policy, a draft of which is included in this report.. In order to implement the Policy, Ministerial Regulations are recommended as a possible presage to an overall PPP Act. In order to implement the Ministerial Regulations and catalyze PPP immediately, it will be necessary to prepare PPP Guidelines and Standard Operating Procedures, that will be followed by all stakeholders and enforced by the PPP Unit over time.

In designing and implementing a National PPP Program, it is essential that the result does not create a new layer of bureaucracy that could actually impede the PPP activity already underway. There are already “cells” of PPP experience and expertise in some parts of Government, such as the Ministry Economic Planning and Development (MoEPD), and to some extent in the Ministry of Transport & Public Works (MoTPW), the Ministry of Irrigation and Water Development (MoIWD) and Ministry of Health and the Ministry of Information, Communication & Tourism (MoICT). In designing the structure, policies, and operations of the National PPP Unit, the IP3 team recommends making the Unit a transaction support, due diligence, and information dissemination body, rather than a supervisory body through which all PPP stakeholders must pass. This design differs somewhat from countries in which the political culture is accepting of vertical hierarchy. It accommodates the consensus-building culture of the Malawi political environment.
Action Plan for PPP Program:

The following key steps are necessary to keep the momentum in establishing and managing an effective PPP program. They are discussed in more detail in the body of the report.

- Key Miniseries to jointly sponsor a PPP Cabinet Paper (based on PPP Policy paper set out in this Report)
- Enact and Publish a ‘draft’ National PPP Policy
- Consult stakeholders on the proposed ‘draft’ PPP Policy
- Draft Ministerial Regulations on PPP
- Draft PPP Guidelines and Standard Operating Procedures as attachments to the Ministerial Regulations
- Assess PPP ‘deal flow’ and begin PPP Pilot Project Development
- Finalize Design of a Project Development Facility to invite Donor Support
- Establish a PPP Unit to Implement the PPP Guidelines and SOP’s
- Develop Model PPP Contracts and/or Concession Agreements
- Develop Standard PPP Procurement Documents and Procedures
- Conduct Transaction Assistance and PPP information dissemination
- Conduct Training/Capacity Building at Central, Regional & Local level

Governance and Regulatory Implications of Proposed PPP Framework

Because the regulatory framework in Malawi is under-developed, the PPP program will require the formulation and utilization of Model Contracts for each of the sectors in which PPP activity will be undertaken. The purpose of the Model Contracts is to provide parties to PPP contracts with the protections that would otherwise be provided by independent regulators. Along with these Model Contracts, the National PPP Policy and its related PPP Act and PPP Regulations, must provide highly specific policies and procedures for PPP procurement. We emphasize that the use of contracts to provide the protections that would otherwise be provided by independent regulators is an imperfect science filled with risks of unanticipated disputes. The PPP Program must place a heavy emphasis on developing the regulatory framework as quickly as possible.

In implementing a PPP Program, it will be necessary to issue new Standardized Procurement Documents and Procedures because PPP procurement is significantly different from traditional procurement. PPP requires a business orientation similar to that of private sector joint ventures, while in traditional procurement the arrangement is relatively simple: Government is the buyer and the private sector is the seller. In order to provide guidance regarding the complexities of PPP business relations, and their related risk allocation mechanisms, it is necessary to write entirely new sections of the procurement regime. One way to do this would be to have all of the Government agencies involved in procurement, especially the Office of the Director General of Public Procurement (ODGPP), modify their existing procurement policies, regulations, and procedures.

Another option would be to include new PPP procurement policies, regulations, and procedures in the Regulations to be enacted or under a new PPP Act. This is our recommended approach, because within one body of legislation all of the material can be covered, whereas if all agencies modify their procurement policies, regulations, and procedures there will be the
risk of inconsistency, lack of coordination, and delays caused by internal debate. As long as the new procurement policies, regulations, and procedures provided by the Regulations for the new PPP Act are not in conflict with, i.e. are supplementary to rather than modifications to, the existing procurement policies, regulations, and procedures then the language in the new PPP Regulations can be seamlessly integrated into each agency’s existing procurement regulations. This has been done successfully in a number of countries. Basically, the approach is to provide comprehensive procurement regulations that clarify to line agencies, the public, and the private sector: “if you are using PPP, the following procedures must be followed. All other traditional forms of tendering using public funds, will use existing procurement regulations”.

**PPP Unit and Institutional Framework: Key Considerations**

A typical PPP Unit in a country of Malawi’s size should be lean and nimble, but also have the capacity to cover a range of functions and grow in scale as the program progresses. The PPP Unit should have core technical and management staff and utilize, to the greatest extent possible, local and international experts to keep costs down and increase the skills mix available to the GOM.

Most PPP Units have two or three core functions and/or divisions. In Malawi, the PPP Unit might have three Divisions: (1) a PPP Transaction Division (with staff addressing Privatization as and when requested); and (2) a Legal, Contract Monitoring and Compliance Division, which will supervise both PPP and Privatization contracts and a 3) Education and Promotion Division proactively and reactively work with line agencies in understanding and using the PPP guidelines, procedures, and best practices to ensure that PPP projects follow the rules and achieve the desired results.

There should also be a Project Development Facility (PDF) which would have a separate legal status (trust account), but would have its own budget from Government and/or donor grant resources, from which the PPP Unit would access funds to engage consultants to prepare feasibility studies for PPP projects. The PDF would operate as a cost-reimbursable fund that would hire foreign and local experts to advise various line agencies on the PPP transaction process. In order to utilize the funds and the expertise, line agencies would have to follow the PPP guidelines laid out by the Regulations and procedures of the PDF. Moreover, bidders on PPP projects would have to agree, in advance of submitting bids, to reimburse the PDF for an agreed upon amount to cover the costs of bidding, which ultimately reduces transaction costs for both the GOM and the private sector. The PDF’s ultimate goal is to promote a transparent and efficient process to conduct PPP transactions and to develop the highest quality of bankable and affordable projects possible.

**I.A. PPP Unit Human and Financial Resources**

Regarding staffing of the PPP Unit, the expertise required to cover all phases of the Project Life Cycle (which includes project identification, appraisal, development, structuring, tendering, negotiation, contracting, and monitoring) should include those listed below

- Economic and Financial analysis
Development of Policy, Legal, & Institutional Framework for the PPP Program in Malawi
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- Financial risk analysis & risk assessment;
- Asset management & engineering assessment;
- Transaction negotiations, both legal and financial;
- Legal agreements/contract preparation and management;
- Project appraisal (affordability, risk allocation, and value for money);
- Public awareness, outreach and education.

In infrastructure, the long-term project risk of up to 20 to 30 years can be enormous if the PPP Unit does not have the above-described expertise and access to experienced PPP specialists. As is the case in most countries, much of this experience should be acquired from the local and international private sector. While GOM capacity is high and the experience in some agencies is substantial, the requisite depth and breadth of PPP experience will likely have to be outsourced. Of course, in the long run, this also saves operating costs, as the PPP Unit will be able to add more resources as required. Therefore, competitive recruitment will be required as well as the need to solicit funding, both from GOM and donor sources to finance operating expenses and consultant services.

Best practices in other countries, as well as considerations in Malawi, influence what the PPP Unit should resemble. In general, we suggest commencing with a small initial team of approximately 4-5 personnel until such time that a) the ‘deal flow’ is identified and matures, b) Long term PPP legislation is established and c) Outsourcing of experts to develop and oversee PPP transactions is mainstreamed.

Within this report we anticipate that the mature PPP Unit at its final stage (3-5 years plus) will have a small but flexible team of 10 or more professionals, overseen by a Managing Director with Division or Practice heads. These managers will need to be able to oversee and manage external consultant inputs, as well as liaise with donors to maximize the effectiveness and utilization of grant funding. The PPP Unit will need to be scalable and demand driven, and its management will need to be proactive in initiating things like stakeholder awareness, training and capacity building, dissemination of information relating to PPP, standardization of PPP procedures, and the local and international marketing of PPP project opportunities. The need to scale up to these ‘mature’ levels will be determined by impact and demand for services, including high growth areas such as municipal PPP’s, rural PPP’s, and social PPP’s such as health and education, in addition to traditional economic infrastructure.

**PPP Unit Interim and Long Term Roles and Institutional Relationships**

After considering several options and after examining a number of existing Government bodies, such as, MOF/PERMU, OPC, DSC, the PC, MoTPSD and its MIPA, MoTPW, and the status of MoEPD, we have narrowed down our analysis to one preferred option (see Figure 1 below) In attempting to utilize existing expertise, PERMU and the PC offered the most promise, however not without some institutional alignment issues, as well as limitations of staff resources in PERMU and the present physical location of the PC. We also took into consideration the Privatization Unit’s workload and how the PC would be (or would not be) able to fully or partially integrate PPP activities within its current mandate or an expanded mandate.
It will be essential to ensure that PPP Unit should report directly to the Office of the President & Cabinet (OPC) with delegated powers through the MoF (see suggested relationship in Figure 1 at the end of this Executive Summary). The most effective PPP Units manage, directly or indirectly, sovereign financial risk and utilize the “powers of the purse” thus in Malawi, some kind of formal relationship with MoF is highly recommended while still having linkage to the highest level of political support, under the Office of the President and Cabinet. Given the above-described objectives and criteria, a critical issue is the need for the PPP Unit to ultimately be placed within the Ministry of Finance (MoF) or to set up as a semi-autonomous body.

In Figure 1, we show the recommended “post-interim” structure, in which the PC’s current, but later descending privatization activities are continued within the new PPP Unit, and the Head of Unit reports to the Minister of Finance, who in turn is accountable to the Office of President and Cabinet at the broad policy level. Interaction between the Unit and MoEPD is included because the Unit can only accept projects that have been approved by MoEPD for inclusion in the annual Public Sector Investment Program (PSIP) and with MoTPSD because the PPP program is a component of the private sector development (PSD) program for which MoTPSD is the lead agency.

**PPP Institutional Framework and the Regulatory Regime**

Having a strong and effective regulatory regime is a necessity to attract large-scale private sector investment. To date, the regulatory regime in Malawi is insufficient to attract private capital and efficiency in key sectors. Current regulatory arrangements do not adhere to many of the criteria set down internationally for regulators. Regulatory officials in Malawi are technically competent in their fields, but are lacking in security, continuity, independence, and/or insulation from economic influence. Prospective private operators and investors will “price” the added risk created by this inadequate regulatory environment, causing their targeted rates of return on investment to be higher than many potential PPP projects can offer. This places greater strain on PPP projects, which must be structured to be affordable to both consumers and government, bankable in the sense that private capital can be attracted, and financially efficient so as to enable Government an acceptable value for money.

The standards currently applied in regulating energy and telecommunications will not meet international standards for PPPs. In transport, there is currently no independent regulator; regulatory functions are fragmented across the Ministry of Transport and Public Works (MoTPW), Maine Services Directorate (MSD), Department of Civil Aviation, and the National Road Safety Council, etc. There are proposals to set up a TransRA in order to provide independent regulation, along with an independent Civil Aviation Authority (CAA), but at the present time transport regulation rests within Government, thereby subjecting it to political influence.

The international PPP investor has a choice of many different countries in which they can invest and regulation is one of the deciding factors. A country that can score well on the following factors might attract significant international private investment:

- A stable, free market driven economy;
- Open and active financial and capital markets;
The key consideration for private sector investment decisions is whether the factors listed above create a “level playing field” in which investments can be made without:

- Unacceptable risk that government will fail to honor its contracts,
- Interfere in the economy in ways that distort exchange rates and the mobility of capital,
- Adopt policies in the future that are not friendly to business,
- Not provide timely and equitable resolution of disputes through its administrative and legal venues
- Fair, equable, transparent and consistent regulator.

There has to be a clear separation of the regulatory role(s) and the role of government agencies undertaking PPP projects, e.g. a line ministry generally cannot be both party to a PPP deal and the regulator for that transaction. Therefore, as the new PPP Unit commences its activities there will be a need to simultaneously establish independent regulators, preferably under a Multi-sectoral regulator to achieve economies of scale. While PPP projects can be implemented in Malawi now, most of them will have to be regulated by contract, and monitored by the PPP Unit or line agency until such time that the regulatory framework and organizations in Malawi are operational and functional. The interim report has recommended strategies to harmonize PPP functions and regulatory functions, either through streamlining and enhancing regulatory approaches or by strengthening such capacity through regulation by contract.

**Roles and Relationships between the PPP Unit and other Institutions**

In order to eliminate duplication of PPP functions, which would not be sustainable in the longer term, we must take into account plans and relationships amongst the various institutions. For example, there are proposals for the merger of MIPA and the MEPA under the MoTPSD. There has been extensive debate on the possible merger of the DSC and the PERMU under the OPC and the MOF, respectively. There is also debate on the future funding, role, and work-plans of the PC under OPC. Finally, MoEPD’s large pool of economic and monitoring and compliance experience raises the issue of what role the PPP Unit’s Division of Monitoring and Compliance will perform.

In addition, there are already many enabling and supporting roles for the various organs of state to support successful PPP investment institutional oversight, in addition to regulation, including, but not limited to the following:

- Financial risk and risk transfer;
- Procurement procedures and compliance; and
- Dispute resolution procedures.
Procurement: The Office of the Director General of Public Procurement is ideal for supporting PPP oversight. It has a Monitoring and Enforcement Department, and a Regulation Advice and Review Department, which potentially fit neatly with the oversight role required for PPP without being overbearing and directly controlling. Although the PPP Program will develop its own procurement policies, regulations, and procedures the ODPP will provide essential oversight support.

PPP Dispute Resolution: In order to attract private investment, it is necessary to have contract dispute resolution procedures that are clear, transparent, unbiased, and not excessively time consuming. Formal court procedures can be slow and adversarial, leading to breakdown of relationships and above all costly in terms of trading losses and legal fees. The effectiveness of the legal system is a critical element for investors in the decision to enter a PPP arrangement. Therefore, in PPP it is best if there are alternative ‘fast track’ dispute resolution approaches that support the PPP principles, requiring sector regulatory disputes procedures, mediation services and international arbitration. These forms of dispute resolution are independent, objective and above all, have expert knowledge of the sector to resolve financial, technical and legal issues. They can be referenced or required in the PPP bidding documents and the PPP Unit can disseminate information about how they are utilized.

Regional and Local Government: PPP support cannot be only a central government activity. There is a need for regional and local government bodies to be proactive by identifying and sponsoring PPP projects. One way to accomplish this is to have the PPP Unit assist such bodies in the formation of PPP Cells at the local level. One of the major factors determining the success of PPP in South Africa and elsewhere was the level of additional support local authorities, provincial government institutions, and even community councils received to assist them determine if their infrastructure needs could be met with PPP approaches. The PPP Unit should develop an action plan to train local government officials to understand “small scale” PPP approaches and strategies.

The PPP Unit and the Project Development Facility (PDF): We have proposed that the Privatisation Commission (PC), on an interim basis, take the lead in mobilizing the new national PPP program, so that PPP activity can be commenced without delay and can continue while the above-referenced legislation is enacted. Under its present mandate, the PC is allowed to conduct PPP activities that involve concessions.

The suggested structure and reporting relationships of the PPP Unit is provided in Figure 1 below. The PPP Unit should report to Ministry of Finance (MoF) as an external semi-autonomous legal entity, but decisions made by the Minister of Finance regarding the Unit must be consistent with the relevant policies set by the Office of the President and Cabinet (OPC). The privatization activities currently conducted by the PC will be continued in the PPP Unit, along with the full range of PPP transactions. Within the PPP Unit design is a Monitoring and Compliance Unit for supervision and enforcement of Privatization and PPP Contracts. Reporting to the PPP Unit is a financially and politically independent Project Development Facility (PDF) to facilitate deal flow and pay for the costs of PPP project development and transaction advisors.
The PPP Unit must report to the Ministry of Finance because the rationale of both Privatization and PPP is to reduce the financial burdens of service delivery (in the case of privatization) or to maximize the “value for money” of public investment (in the case of PPP). One would not want a PPP Unit involved in such high value, and politically sensitive, activities to be tied strictly to any particular ministry, hence the need for it to have access to the OPC in order to create a system of checks and balances.

This arrangement also helps to dispel any misperceptions that the PPP Unit is simply an arm of the Ministry of Finance, which could create resentment among some of the other line ministries. At an operational level, any decision by the Minister of Finance can be appealed by application for review by the OPC. Note also the horizontal lines in the diagram provided below, from the PPP Unit to the Ministry of Economic Planning & Development (MoEPD), and to the Ministry of Trade & Private Sector Development (MoTPSD).

The PPP Unit has “budget accountability” to MoEPD because the Unit is not allowed to support any projects that have not received MoEPD approval through the inclusion of the project in the Public Sector Investment Program (PSID). The PPP Unit has “program accountability” to MoTPSD because the PPP activities that it undertakes must be consistent with, and supportive of, the policies and objectives of the Private Sector Development Program funded by the World Bank and implemented via the MoTPSD. At an operational level, this will mean that when the PPP Unit evaluates and structures Privatization and PPP transactions, which is a conceptual possibility, it must take into account the transactions’ anticipated impact on Private Sector Development.

The PDF is a facility that will be grant funded and contract with private sector (local whenever possible) consulting firms to prepare pre-feasibility and feasibility studies for PPP projects. Pre-feasibility studies will be necessary in order to publish Requests for Expressions of Interest, and feasibility studies will be necessary in order to publish Requests for Proposals. These studies will not serve as substitutes for investor due diligence or comprehensive studies required to secure project finance.

The PDF should be financially independent because it has its own budget, independent of the PPP Unit, funded primarily by donor grants. This will attract donors that are interested in funding specific sectors or policy objectives without limiting the goals of the PDF or PPP Unit. Thus, its governing board will include donor nominees. The relationship with donors provides some political independence as well as gives donors a “seat at the table” in targeting key objectives such as improved water supply access, or reduce new cases of HIV/AIDS through investments in health, or improve access to ICT services, etc. Access to PDF funds by line agencies will be only through the PPP Unit, which evaluates proposed PPP projects and selects the ones that it considers appropriate for PDF assistance and for line agencies willing to follow the rules and procedures of the PPP program and the PDF operational guidelines.
Figure 1 – PPP Unit Institutional Roles and Reporting Framework

- MOF – Operating within OPC Policies
- MOEP (Budget Accountability)
- PPP Unit
- MOTPS (Program Accountability)
- PDF
- PPP Transaction
- Monitoring & Compliance
- Education & Promotion
II. INTRODUCTION AND RATIONALE

Over the past several months, the IP3 team has conducted extensive field research, interviews, and reviews of existing reports in order to formulate a comprehensive plan for Government to create a policy, legal, and institutional framework for PPP. At the end of this research and analysis period, the team prepared a draft Cabinet Paper, for the Minister of Finance to present to Cabinet, proposing specific actions that could be undertaken by Government in order to establish such a PPP framework. This Final Report serves as both an update of our previous reports and a Road Map for implementing the PPP Program in Malawi.

The Global Transition from Privatization to PPP

Along with numerous other countries, Malawi has been conducting Privatization in an effort to shift the burden of service delivery onto the private sector. This has been done by transferring the ownership and control of public enterprises to the private sector, with the objective of having services performed by those public enterprises subsequently performed by private enterprises, thereby relieving Government of the costs associated with owning and operating public enterprises.

The Public Enterprises (Privitisation) Act provided the legal mandate for such transfers of ownership and control of existing facilities. As we now approach the point at which most of the existing facilities have already been sold or contracted to the private sector, it is necessary to mobilize a PPP program to enable private sector participation in the operation of new facilities. It is important to keep in mind that the evolution from privatization to PPP should be treated as an evolution, not a radical shift in direction. In many countries, some political elements have tired of the privatization process and all of the negative publicity it tends to attract, caused by the common misperceptions that the privatization process always involves massive layoffs of workers, giving over control of valuable assets to foreign interests, selling off things that government should own to protect the public interest, etc. Our advice to those elements is “be patient just a little while longer” and allow the natural process of evolving from privatization to PPP take its course with enough time to manage the transition without a radical shift in policy.

International Transition Models and Options for Malawi

Managing the transition from privatization to PPP is a delicate and complex task, but fortunately Malawi is not alone in this mission. Many countries are going through the same process, and some have already gone through at least the initial stages of the transition, so there are some international models that can be used as guidelines. Most of the challenges relating to the transition are not in the area of policy, which can evolve naturally and without any radical changes, but rather in the areas of institutional setup and enabling legislation. In Malawi, and in many other countries, one could in theory launch a national PPP program very quickly by simply issuing some PPP standards and guidelines. There is already PPP activity underway in Malawi, so maybe the only need is for Government to provide guidelines on how to do it correctly.
If Government envisions its role as limited to providing guidance, indeed it would be a realistic option to mobilize the PPP program by simply issuing such guidelines. If the Government, however, wants to exercise a greater degree of control over the PPP regime then it would be necessary to at least promulgate some new PPP regulations. If this is the plan, then one must select the appropriate law under which to issue the regulations.

Most of the international models cited as examples of highly successful PPP programs are countries in which the PPP program was launched by PPP regulations issued by the Ministry of Finance or the National Treasury. Examples include South Africa, the U.K., Ireland, and Australia. But in considering these models, one must take into account any differences in political culture that might exist between Malawi and those countries. In all of those countries, there is a political culture that accepts vertical hierarchy and focus of decision-making at high levels of central government. In some countries, Indonesia for example, the post-independence political culture has shifted radically from the old days of government control to a new wave of excitement about democracy, popular participation in national policy, and decentralization. Because of this emerging political orientation, it was not possible to design a PPP program with a strong decision-making body in the central government. The Government of Indonesia opted for a coordinating body, housed in the Coordinating Ministry of Economic Affairs, and was very careful not to put strong decision or approval language in the PPP enabling legislation. So in Malawi, it will be necessary for Government to decide whether the political culture will tolerate a central government decision-making and authorizing body.

**Mobilizing the PPP Program by Issuing PPP Regulations**

If the decision is made that such a body would be politically accepted, then issuing new PPP regulations is the best way to mobilize a national PPP program. Our research has indicated that, although there is some sensitivity in the line ministries, and perhaps in local government, regarding having to request approval from a central government PPP decision-making and authorizing body, generally the political culture would be likely to accept such a body, as long as it did not end up being just another layer of bureaucracy.

Based on this premise, we could proceed with a plan to issue new PPP regulations, but first we must select the law under which the new regulations would be issued. The best way to decide which law to use is to examine the cornerstones of PPP, i.e. affordability, risk allocation, and value for money. In the private sector, those decisions are made all the time, and in a corporation those decisions are made by the Treasurer. When a new project is proposed, the Treasurer must first check the budget to confirm that funds are available, or funds could be made available, for the project. The next step is assessment of the financial risks of the transaction. Working closely with Corporate Counsel, the Treasurer must examine the proposed contract and identify what adverse consequences might occur, causing an adverse impact to the budget. Risks include not only what are specified in the contract explicitly, but also contingent liability risks that the contract will impose upon the company. The next step in the Treasurer’s analysis is an evaluation of the project’s projected Return on Investment, as compared with other projects that can be undertaken with the same level of investment.
Rationale for Role of Ministry of Finance in PPP Program

This analysis and decision-making process is the same as that conducted by a national Treasury in government, except that the term Value for Money is used instead of Return on Investment because government is not only looking for financial returns, it is looking also at economic returns, i.e. the social benefits of the project.

So the kinds of decisions that have to be made in assessing PPP projects are those that are naturally performed by a national Treasury or Ministry of Finance. This indicates that the logical choice of law under which to issue the new PPP regulations would be a law that empowers the Minister responsible for finance to control decisions regarding the prudent use of public funds. In Malawi, that is the Public Finance Management Act.

Legal Basis of PPP Program

The Public Finance Management Act (PFMA) provides the power for the Minister of Finance to control decisions regarding the prudent use of public funds, and it also gives us the reporting structure needed to implement that authority, by designated persons in the relevant government bodies as Accounting Officers. Their responsibility is not only to keep an accounting of how their organization has used the public funds that have been entrusted to it, but also to ensure that the funds have been used in an efficient and effective manner. It doesn’t take much of an intellectual leap to issue regulations that say every major project finance expenditure must at least consider the use of PPP as an option for leveraging public funds with private investment. If such a project were to be proposed for budget appropriation and there was no PPP options analysis included in the project proposal, the Treasury could reject the proposal on the grounds that the Accounting Officer failed to consider a mechanism that could enhance the efficiency and effectiveness of the expenditure of those public funds, the PPP mechanism.

The PFMA thus provides the logical underlying legal basis, as well as the reporting structure, for issuing PPP regulations. At this point, however, we must take as step back and re-visit the privatization program. If we ignore the privatization program, for which we all spent a great deal of time, effort, and money to set up the institutional and legal framework, and then endure the many years of policy debates, we are potentially giving up the opportunity to use an existing vehicle to launch the PPP program, while we press forward by issuing PPP regulations under the PFMA. It will take time to get the regulations agreed, passed, and implemented. Stakeholder organizations will want us to provide Operations Guidelines and Standards manuals so they will know exactly how they are supposed to comply with the regulations. Government and donor budget cycles will require at least six months to a year to put the money in place to pay for the national coordinating and decision-making body that will have to be put in place for the processes required by the regulations to be implemented.

These practical matters point definitively to the need to use the privatization apparatus as an interim implementing agency for the PPP program, until the full policy, legal, and institutional framework for PPP can be put into place and funded.
Use of the Privatisation Commission as Interim PPP Vehicle

The Public Enterprises Act empowers the Privatisation Commission initiate concessions. Nearly all PPP transactions involve some form of a concession agreement. Technically, such concessions are intended to apply only to existing facilities, not new facilities, so it might be considered a bit of a stretch in the privatization legal framework to ask the PC to undertake BOO, BOT, and BOOT transactions that involve new facilities. One way to solve this could be to amend the Public Enterprises Act to insert PPP language that gives clear authority to enter into concession arrangements involving new facilities. But such amendment processes take a lot of time and effort, while we are looking for something that will enable a PPP program to mobilize quickly. In Uganda, the Public Enterprise Reform and Divestment program is making its transition from privatization to PPP and the Government of Uganda is not “splitting hairs” over the theoretical difference between PPP and privatization. Rather, they are focusing on the practical factors: (a) why go through all the effort of making a radical shift away from privatization to PPP when the transition is a natural global trend and should be achievable through a legal process that does not require throwing out the old to create the new; (b) the institutional apparatus and already appropriated budgetary funds are already in place for the setup conducting privatization, so why not use that instead of trying to set up a PPP apparatus overnight; and (c) the skill sets required to do privatization are very similar to the skills required to do PPP so why not let the privatization professionals do PPP transactions?

We agree with this approach and recommend that the Public Enterprises Act, with its authority to enter into concession agreements, and the already established and funded Privatisation Commission, be used as an interim vehicle to mobilize the national PPP program until the full policy, legal, and institutional framework can be put into place, which will take at the very least 6 months and most likely a year or even 18-24 months. Major new undertakings by any government invariably take longer than expected.

Synopsis of Suggested Approach

To recap: we recommend mobilizing the national PPP program by issuing regulations under the Public Finance Management Act, which will make Accounting Officers the nucleus around which stakeholder agency PPP Nodes can be developed, and will make the Ministry of Finance the home for a national PPP Unit.

That is our recommendation, and is the approach that underlies the institutional design described in detail later in this report. The institutional design envisages a structure that will start off relatively small, and will grow as PPP deal flow increases. The design also envisions the immediate designation of a core group of selected professionals in the PC who will be responsible for operating the PPP program within the PC as an interim measure, and would be transferred to the PPP Unit when it is established and funded.

The Issue of whether or not to Enact a New PPP Act

We now turn to the issue of whether a new PPP Act is necessary. It certainly is not necessary to enact such a new law just to mobilize the PPP program. Regulations under the PFMA can do that quite effectively. But what about the longer-term considerations? Will the national PPP
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program flourish under an enabling legislation that is so far down the hierarchy of legal instruments, as compared with a new law? What will potential investors think when they see that the program is based on regulations and not law? A regulation can be changed at will at any time, with little or no consultation with the law committees of the Ministry of Justice and Parliament. The PFMA specifically allows the Minister responsible for finance to pass regulations pursuant to the Act. By implication it also allows the Minister to repeal or change such regulations at will. Maybe something more is needed to send a signal of stability and support to the market.

In the countries in which PPP has flourished under regulations alone, there is a political and economic culture that is naturally receptive to PPP activity. In some countries, e.g. the United States, the culture is so naturally accepting of PPP that there is no national coordinating body or legislation. But can one say the same of Malawi? Probably not, so we have provided a draft PPP Act in the Appendices to this Report for Government to consider if it decides such an Act is needed. In other countries, national PPP legislation has been enacted for one or more of the following reasons:

✓ The legal capacity of the various “spheres” of government to contract with the private sector for long-term service provision is inadequate and/or unclear;

✓ The political culture will not tolerate any vertical, hierarchical, decision-making structure so a national law is needed to underscore government’s commitment to the PPP process, and provide guidance as to how one should do PPP, but does not impose strict decision-making systems involving centralized approval; or

✓ Government considers the need to maintain strict control over the PPP process to be too important to relegate to PPP regulations, so a national umbrella law is passed to impose such control at the highest level.

Existing Capacity to Contract with Private Sector

In this consultancy, we have carefully examined the capacity of the various “spheres” of government to contract with the private sector for the long-term provision of services. We do not see any constraints to such activity sufficient to require a national umbrella act to fill the gaps or correct the inconsistencies, which are minimal and can be rectified through internal adjustments rather than a national initiative. National gap-filling laws of this type are being used in Eastern Europe (the national concession laws) to provide a solution to major inadequacies in the contracting authority legal framework. Malawi does not have that degree of inadequacy. On the contrary, the legal framework for such contracting authority is relatively well developed.

So the first scenario presented above in our checklist for national legislation does not apply to Malawi. The second scenario does not apply either, as we have already shown in our examination of the PPP regulations scenario. We see no indication of substantive resistance to a central decision-making body, as long as that body is seen as facilitative and not just another layer of bureaucracy.
The third scenario is one that might or might not apply to Malawi. Our suggestion is that Government mobilizes the PPP program with PPP Regulations, then monitor how stakeholders and investors respond. If stakeholder agencies resist the authority given to the PPP Unit and Ministry of Finance by the Regulations, and/or if private investors do not show sufficient interest in PPP transactions because they perceive regulations to be only transitory and not a sufficient show of commitment on the part of Government, then yes, a new PPP Act should be enacted.

Introduction to the Report

In the following section on Policy Framework, we present a draft National PPP Policy statement for Government to review and consider for publishing. Following the Policy section, there is a section on Legal Framework, where we provide summary descriptions of the best 14 options for such framework, along with “Pros” and “Cons” columns, then a column for quick reference to the most relevant international examples. Then we reduce the 14 down to the best 3 by using international best practice options analysis methods. At the end of that section, we use subjective analysis to select the preferred option. After the Legal Framework section, we present our analysis of the Institutional Framework implications of what we have recommended for Policy and Legal designs, along with a detailed institutional framework for a PPP Unit that is scaled according to the level of PPP deal flow. Finally, we present a section called Road Map, which shows a Road Map for implementing the recommendations presented in this report.
III. POLICY FRAMEWORK – DRAFT NATIONAL PPP POLICY

III.A. Definition of Public-Private Partnership

A “public-private partnership” is a commercial transaction between a public institution and a private party in terms of which the private party:

(a) performs an institutional function on behalf of the state; and/or
(b) is allowed the use of state property; and
(c) assumes substantial financial, technical, and operational risks in connection with the performance of the institutional function and/or use of state property; and
(d) receives a benefit for performing the institutional function or from utilizing the state property, either by way of:
   (i) consideration to be paid by the institution, which derives from a revenue fund or, where the institution is a national government business enterprise or a regional or local government business enterprise, from the revenues of such institution; or
   (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
   (iii) a combination of such consideration and such charges or fees.

A public-private partnership is not privatization because it does not involve the transfer of ownership and control of state assets to the private sector.

The essence of PPP is the allocation of project risk to the parties best equipped to manage those categories of risk. Generally, political risk is allocated to the public sector partner and commercial risk is allocated to the private sector partner. By allocating risks in this manner, the success of the commercial transaction and its future operations are assured. In practice, there are always some categories of risk in which both partners must share management responsibility.

In Malawi, the legal definition of privatization includes concessions, which generally in international practice are regarded to be PPP. Rather than change this definition, which would require amending the Public Enterprise (Privatization) Act, this Policy provides that concession agreements made for existing infrastructure will be regarded as privatization, while any concession agreements made for new infrastructure will be regarded as PPP.

The rationale for PPP in Malawi is that it will accelerate infrastructure development by leveraging public financial resources with private investment, and it will increase the quantity and quality of public services to improve the quality of life for Malawians. All Government institutions should use PPP whenever possible in conducting economic and/or procurement activities requiring public expenditure. When proposing new projects to be included in national budget and the related Public Sector Investment Plan, all Project Sponsors (the government body that has proposed the project) shall include an appraisal of whether the project should be a PPP.
III.B. Principles of Public-Private Partnerships

**Affordability to Consumers and Government**

*Affordability to Consumers* shall be assessed by conducting a Consumer Demand, Affordability, and Willingness to Pay Survey, which must be conducted by all Project Sponsors. The Survey does not have to be exhaustive, only an indication of how consumers are likely to respond to the services to be provided by the project, whether they will be able to afford the services if offered at projected prices, and under what service conditions they will be willing to pay those prices. When budget resources permit, independent consultants shall conduct such Surveys.

Surveys are required because *PPP projects must be demand driven*. This is quite different from traditional procurement, in which Government makes decisions regarding the projects to be implemented and the prices to be paid. In PPP, the emphasis is on *service delivery* so consumer preferences dictate which projects will be implemented and what prices will be paid. The responsibility of Government is to respond to such consumer preferences, to the extent that resources permit, and leverage those resources by partnering with the private sector.

*Affordability to Government* shall be assessed by determining whether the proposed PPP project is included in the Public Sector Investment Plan (PSIP) maintained by MoEPD, or fits within a category of projects defined as eligible for inclusion within the PSIP. Once it is determined that the proposed project can fit within the PSIP, the Ministry of Finance will be Government’s representative in determining what public resources will be committed to the project. The MoF contact point for this process will be the Debt Management Office’s Risk Management Unit.

If the proposed PPP project is not listed in the PSIP, and does not fit within the kinds of projects defined in the PSIP to be appropriate for support by Government’s budget, the MoEPD is to be consulted (with technical assistance from the PPP Unit, if requested) for discussions on how the project might be included in the following year’s budget. This can be a very time-consuming process, and Project Sponsors contemplating a new project are cautioned to start the consultative process with MoEPD well in advance of performing detailed feasibility analysis.

**Allocation of Risks between the PPP Partners**

*Risk allocation is at the essence of PPP*. In traditional procurement, Government takes all the design and service delivery risks, while the private sector provider is responsible only for the construction and operational risks. In PPP, much of the design and service delivery risks are transferred to the private sector, and Government focuses on managing the risks that it is best equipped to manage, i.e. political risks. Similarly, the private sector partner manages the risks that it is best equipped to manage, i.e. commercial risks.

In practice, the dividing line between political risks and commercial risks is not so clear. Some kinds of risk have to be shared, for example design and engineering risks when the preliminary design and engineering has been conducted by Government and the final design and
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Engineering has been completed by the private partner. Other risks may or not be shared depending on the policy environment, e.g., exchange rate risk.

The guiding principle in allocating risks is that the role of Government is to ensure that the interests of all stakeholders are protected. That includes consumers, who are protected by the service standards, and also the private sector partner, for whom the protection of a "level playing field" must be provided. The role of the private sector is to deliver the services at the specified levels of quantity and quality, at prices consumers can afford. Quantity and quality of service delivery is known as the Service Delivery Standards. Prices necessary to maintain the Standards are defined by tariff formulae in the PPP contract, and are usually limited by an Investor's Equity Financial Internal Rate of Return that has been agreed upon during contract negotiations.

In PPP contracting, there are as many as three parties representing Government. The first is the Contracting Authority. This is the entity that executes the PPP agreement, and which has full responsibility for Government’s obligations under the agreement. The second is the Executing Agency. This is the entity responsible for implementing the acts for which Contracting Agency is responsible under the PPP contract. The third is the Regulator. This is the entity that serves to protect the interests of all stakeholders to the PPP agreement, i.e., Government, the private sector partner, and the consumers. There should be inter-agency written agreements that clearly convey the Contracting Authority’s right to legally obligate the other agencies to obligations they have in the PPP contract. The Regulator should be politically and financially independent. It is essential that the roles and obligations of these parties be clearly defined in the contract.

**Value for Money to Leverage Fiscal Resources**

From a fiscal budgeting standpoint, the concept of value for money is at the core of the PPP approach. It is difficult for Government to build and operate all required infrastructure and provide required services without private investment to leverage public fiscal resources.

The concept of value for money is that the projects to be selected will be those that will provide the highest quantity and quality of service provision for a given amount of public expenditure. In evaluating bids for PPP projects, the focus is different from traditional procurement, which is to select the bidder that can provide the specified product or service at the lowest price. In PPP, the winning bidder should be the one that provides the highest quantity and quality of service delivery, given a particular level of public expenditure, not necessarily the bidder with the lowest cost to Government. For example, a bidder offering a high level of service delivery at the maximum level of Government investment allowed could prevail over a bidder that offered a significantly lower level of service delivery at a cost to Government that is less than the maximum allowed.

**III.C. Role of the National PPP Unit and PPP Nodes in PPP Projects**

An important aspect of the PPP program is that all stakeholders have a key role to play in the PPP project development process. While the National PPP Unit represents the nation’s key focus of expertise in PPP, the Government institutions that propose PPP projects play a critical role.
role in the selection and initial development of PPP projects. PPP projects are normally proposed by Central Government sector ministries, and/or by regional and local Government agencies. Within each such Government ministry or agency, there should be a core group of people who are familiar with PPP. This group, called a “PPP Node,” works closely with the national PPP Unit in the identification, development, appraisal, structuring, financing, and contracting of PPP projects. The national PPP Unit will give technical assistance, including capacity building, to these PPP Nodes. The primary purpose of the National PPP Unit is to provide expert assistance, disseminate information, and build capacity in PPP. The role of the National PPP Unit is not to impose another layer of bureaucracy in implementing PPP projects. Rather, it serves as a resource to the PPP Nodes and other PPP stakeholders. Its dissemination of information function includes standardized procurement documents and procedures. Its capacity building function includes PPP training programs at all levels of Government.

III.D. Role of the Project Development Facility (PDF)

The Project Development Facility is a financially and politically independent managed fund that contracts with private sector consultants to perform feasibility analysis for PPP projects. The PDF responds to requests from the PPP Unit for feasibility analysis and recruits the necessary consultants, from local firms whenever possible, to perform the work. In order to expedite the selecting and contracting process, the PDF maintains a list of consulting firms that have been pre-qualified in accordance with established criteria. Qualified firms are invited to submit their Qualifications once per year, for the PDF to consider in developing the list of pre-qualified firms.

The PDF funds pre-feasibility studies to assist Project Sponsors in preparing their Requests for Qualifications, and feasibility studies to support Project Sponsors in preparing their Requests for Proposals. Project Sponsors may access such PDF assistance only through the National PPP Unit. The feasibility analysis performed by consultants contracted by the PDF does not include investor due diligence, nor does it include the highly detailed and comprehensive analysis that is required for an investment or loan solicitation. Such detailed analysis must be performed by the private sector firms that submit proposals to become partners in PPP projects, and in the bidding documents Government shall disclaim any representation or warranty of the information provided by the PDF-funded pre-feasibility and feasibility studies.
IV. LEGAL FRAMEWORK

In order to encourage private sector participation in the provision of services needed by its populace, and to reduce the fiscal burdens on government for such service provision, the Government of Malawi has implemented a Privatization Program.

In order to encourage private sector participation in the provision of services needed by its populace, and to maximize “value for money” in its fiscal expenditures for provision of such services, Government will implement a Public-Private Partnership Program.

Malawi is moving toward a situation that is becoming increasingly common around the world: privatization programs are winding down toward conclusion, leaving relatively few divestment activities that remain to be conducted by government. IP3 is consulted by many countries as those programs approach this stage in their privatization activity, seeking guidance on how to make the transition from privatization to PPP.

PPP is indeed the next “wave” after Privatization. As the first two paragraphs of this section indicate above, the unifying theme is Private Sector Participation (PSP). When it is necessary to divest of government-owned assets in order to enable the private sector to participate in the provision of services previously provided by government, it is the Privatization methodology that is used.

As a Privatization Program starts nearing the end of its useful life, i.e. as the inventory of government-owned assets suitable for divestment starts to wind down, it is in a natural course of events that PPP emerges as the next phase in PSP because when there are no more existing service provision facilities to hand over to private operation; then it is necessary to build new service provision facilities that will be operated by the private sector. Such new facilities projects are commonly known by their contractual aspects of Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT) and their variants. Such arrangements require a transition from privatization to PPP because the relations between public and private sectors change from seller and buyer to long-term partners.

In designing and implementing a PPP legal framework, the challenges are:

- How can we implement the transition from privatization to PPP without taking away the privatization program’s ability to complete its mission;
- How do we provide the legal basis for conducting privatization and PPP at the same time, until the privatization program completes its mission;
- If the legal authority to conduct privatization and legal authority to conduct PPP are to exist simultaneously, until the privatization program completes its mission, how do we harmonize the two sets of laws and regulations;
In order to create a new legal mandate to conduct PPP activities, which option for legislative initiatives will enable the desired objective with the least possible disruption to the present legal framework; and

Which option for legislative initiatives can be achieved with the least amount of time and effort, without compromising quality and effectiveness?

In order to apply an international best practice approach to evaluating the various Legal Framework options, we took the following approach: (1) identify all of the reasonably feasible options; (2) use a well-established options analysis methodology to reduce the number of options to three; and (c) perform a detailed analysis of the remaining options so as to arrive at a preferred option for the PPP Legal Framework.

Basically, our options for designing and implementing a new legal framework for PPP fall into the following three categories: (1) enact no new PPP legislation; (2) enact a new PPP Act; and (3) do not enact a new PPP Act. In the chart below, we present summaries of the various options, along with brief arguments for and against the options, and then references to any international models that may be available.

### IV.A. Legal Framework Options Analysis

#### Category 1: No New PPP Legislation (4 options)

<table>
<thead>
<tr>
<th>Option / Number</th>
<th>Pros</th>
<th>Cons</th>
<th>International Models</th>
</tr>
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<tbody>
<tr>
<td>No legislation (1)</td>
<td>PPP is already underway in many sectors, and capacity of line ministries and local government to contract with the private sector is already in place, so no need to press for new legislation at the national level. Just issue an operations guideline manual for the national and regional PPP stakeholders to provide guidelines and standards.</td>
<td>Limits the MOF’s role to information dissemination, capacity building, guidance regarding how to apply the principles of affordability, risk allocation, and value for money. Authority for an investment decision has to be vested in separate MOF framework and/or separate legal body with mandate for viability gap funding.</td>
<td>India: Operation Guidelines Manuals for a National PPP Node &amp; PPP Nodes. Malaysia: PPP Unit in the Min of Economic Planning, reports to Prime Minister. USA: Decentralized PPP at all levels of government.</td>
</tr>
<tr>
<td>Issue Standards and Guidelines instead of PPP regulations or Act.</td>
<td>The PPP Unit does only dissemination of information, setting of standards/procedures and PPP standard or model documents for transactions, provides one stop access for private sector, and builds capacity in line ministries and local governments. PC staff selected by Gov’t and donor could move to the PPP Unit.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No legislation (2)</td>
<td>Legal framework could be in place</td>
<td>International experience in such</td>
<td>Sri Lanka: Bureau for Infrastructure</td>
</tr>
<tr>
<td><strong>Set up an investment fund</strong></td>
<td><strong>already under the Investment Act and setup for institution already ready within the Malawi Trade and Investment Centre (MITC); good way to use donor guarantees.</strong></td>
<td><strong>institutions has been mixed. Focus on deal flow rather than solid framework for PPP. Project finance is possibly best left to private investment banks.</strong></td>
<td><strong>Investment. Bangladesh: Infrastructure Finance Facility.</strong></td>
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<td><strong>This mechanism seeks to bridge gap between private and public finance, using a PPP approach.</strong></td>
<td><strong>PPP for existing facilities is something already possible under the Privatisation Act, leaving only PPP for new facilities as the gap to be filled.</strong></td>
<td><strong>Passing a BOT Act would be just as hard as passing a comprehensive PPP Act and leaving PPP for the existing facilities to a sunset Act and sunset PC could be limiting.</strong></td>
<td><strong>Philippines BOT Law</strong></td>
</tr>
<tr>
<td><strong>BOT Law instead of PPP legislation (3)</strong></td>
<td><strong>Fill BOT gap by passing a BOT law for new facilities while sector laws and the Privatisation Act enable existing facilities PPP.</strong></td>
<td><strong>Concessions Law instead of PPP legislation (4)</strong></td>
<td><strong>Until the Act is passed set up the national PPP Unit and program via Minister of Finance regulations per the PFMA.</strong></td>
</tr>
<tr>
<td><strong>Enables very quick start for PPP Unit and Program, and provides a new PPP Act to be passed at the appropriate time by legislature. Along with regulations, standards and guidelines can be issued to provide full guidance on how to do PPP.</strong></td>
<td><strong>By not using the PC as the vehicle for startup, it could be more complicated to set up the new PPP Unit as new institutional and recruiting arrangements needed. The perceived need for a PPP Act may decline as PPP is conducted via regulations.</strong></td>
<td><strong>By not using the PC as the vehicle for startup, it could be more complicated to set up the new PPP Unit as new institutional and recruiting arrangements needed. The perceived need for a PPP Act may decline as PPP is conducted via regulations.</strong></td>
<td><strong>Hungary &amp; multiple Eastern European countries. Often a condition of joining the European Union. Umbrella concession laws, with concession defined so it covers all forms of PPP.</strong></td>
</tr>
</tbody>
</table>
## Category 2: Enact a new PPP Act (5 options)

<table>
<thead>
<tr>
<th>Option / Number</th>
<th>Pros</th>
<th>Cons</th>
<th>International Models</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enact a new PPP Act (1)</td>
<td>No need to enact any new legislation immediately. PC apparatus already in place to carry on PPP activity that is already commenced. The requisite deal flow for PPP Unit should be in place by the time PPP Act passes. A natural synergy between the skills need for PPP and the skills needed for divesting.</td>
<td>Places the PPP program in a sunset organization that will soon be winding down its privatization program and naturally moving off the priority list of legislators. Possibility of tainting the image of PPP by placing it within a privatization entity. The PC has no mandate for PPP for new facilities.</td>
<td>None</td>
</tr>
<tr>
<td>Enact a new PPP Act (2)</td>
<td>It would be relatively quick and easy for the Minister to designate all forms of PPP as privatization modes, and issue related regulations. It might also be possible to do Ministerial Decree, but that would limit reliability in the minds of investors because decrees can change when a minister is changed whereas changes in laws require the approval of Parliament.</td>
<td>Although the Privatisation Act allows the Minister to designate any appropriate form of modality, and gives authority to issue regulation it would be inconsistent to add PPP for new facilities, as such is not divestment. Problem of doing national PPP program in a sunset organization. Possible taint of privatization on PPP.</td>
<td>None</td>
</tr>
<tr>
<td>Enact a new PPP Act (3)</td>
<td>The skills required for PPP are similar to the skills that are required for divestment. As privatization deal flow winds down PPP deal flow picks up, ensuring a steady deal flow to support steady resource requirements.</td>
<td>Possible difficulties in harmonizing the PPP Act &amp; Privatization Act, and problems in having one entity operating under two separate laws. Possible taint of PPP by association with divestment, and lower political support for PPP as support for PC declines.</td>
<td>None</td>
</tr>
<tr>
<td>Implement a national PPP program in the PC for the long term.</td>
<td>The PC is an established entity and could take on the PPP program without delay in mobilization.</td>
<td>None</td>
<td>None</td>
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</table>
## Category 3: Do not Enact a new PPP Act (5 options)

<table>
<thead>
<tr>
<th>Option / Number</th>
<th>Pros</th>
<th>Cons</th>
<th>International Models</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Don’t enact PPP Act (1)</strong></td>
<td>Make adjustments to existing sector acts to harmonize approach to PPP guidelines and procedures. PC staff may be selected for transfer to line ministry and local gov’t PPP Nodes.</td>
<td>Possibility of missing an amendment or creating an inconsistency when putting in PPP provisions. Lots of legislative activity requiring lots of time and effort.</td>
<td>Maputo, Mozambique:PPP in municipal infrastructure.</td>
</tr>
<tr>
<td><strong>Don’t enact PPP Act (2)</strong></td>
<td>Use procurement legislation already existing to provide legal basis for PPP. Selected PC staff to ODPP.</td>
<td>Procurement is buying, and PPP is joint ventures, so in trying to put PPP into the procurement system there is no way to do risk sharing.</td>
<td>None</td>
</tr>
<tr>
<td><strong>Don’t enact PPP Act (3)</strong></td>
<td>Operate the PPP program within PC, Most simple solution, and enables very quick start for the PPP program. No need for new institutional</td>
<td>Perpetuates any concerns that might presently exist regarding the PC and</td>
<td>Uganda: Utilities Reform Unit in Ministry of Finance. Jordan: MOF’s</td>
</tr>
<tr>
<td><strong>Prepare PPP Act, but wait to see if or when needed, in interim use PPP regulations (5)</strong></td>
<td>Launch the PPP program by enacting regulations to PFMA and wait to see if a new PPP Act is needed. Selected PC staff to MOF.</td>
<td>Without commitment to a new PPP Act from the start complacency could set in and political support for the new Act could be lacking if the new Act is needed.</td>
<td>None, but many of most successful P3 programs were set up via regulations pertaining to how public funds are to be utilized.</td>
</tr>
</tbody>
</table>

### Enact a new PPP Act (4)

Privatization and PPP in one consolidated piece of legislation, or amend the Privatization Act to include PPP provisions, and expand the mandate of the PC to do both Privatization and PPP in the long term.

One consolidated new Act or amended Act including privatization and PPP will enable the expanded PC to conduct both Privatization and PPP. Two sources of deal flow to ensure enough activity to justify budget. Similarity of skill sets that are required to do each.

Possible lack of government and donor support for such expanded PC mandate, and perceived prolongation of support for Privatization could impair achievability of this option. Possible taint of PPP with public resistance to privatization.

None
expanding the mandate of PC by issuing new PPP Regulations or a new PPP Decree.

The PPP program could be quickly launched within an existing legal entity.

<table>
<thead>
<tr>
<th>Option</th>
<th>Description</th>
<th>Considerations</th>
<th>Country Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Don’t enact PPP Act (4)</td>
<td>Operate a new PPP program in MOF under regulations to be issued under PFMA. Selected PC staff to MOF.</td>
<td>Creates a fresh new start for PPP without baggage of PC and divestment. Principles of PPP (affordability, risk allocation, value for money) are all principles of public financial management. PPP program properly sits in the ministry responsible for and where decisions are made regarding public finance.</td>
<td>South Africa, U.K., Ireland, Australia: PPP Units in the Treasury operating under Treasury PPP Regulations.</td>
</tr>
<tr>
<td>Don’t enact PPP Act (5)</td>
<td>Issue a Presidential PPP Decree and regulations under the Decree for PPP Transfer selected PC staff to MOF.</td>
<td>Direct evidence of highest-level political support for PPP program. Relatively quick and easy to achieve in comparison with trying to pass a new Act.</td>
<td>Indonesia: National PPP Unit operating under terms of Presidential Decree 67 of 2005, with Standards and Guidelines prepared by the Unit for national &amp; regional government bodies, and for the National Unit itself, for developing PPP projects.</td>
</tr>
</tbody>
</table>

Although the charts above display all the feasible options, the points for and against each option are not covered by a comprehensive analysis. Such comprehensive analysis is provided in the sections below, in which we first define the evaluation factors, then we assign a weight to each of the factors, and then we use the weighted factor options analysis methodology to reduce the total number of options to the best three.

The highest scoring three options, one from each category to ensure that we maintain coverage in all three categories rather than skewing results by narrowing down to only one or two categories, are then evaluated in detail to derive one preferred option. This option is then used to derive some recommendations regarding next steps that will be required in order to implement the preferred option.
In the chart below, we have listed what we consider to be the most important evaluation criteria, and have assigned a weight to each in order to reflect its perceived relative level of importance when applying the factors to our options analysis.

**Evaluation Factors and Weighting**

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<tr>
<th>#</th>
<th>Evaluation Factor</th>
<th>Explanation</th>
<th>Weighting (0 - 10)</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>Affordability to Government &amp; Donors</td>
<td>Are funds available</td>
<td>7</td>
</tr>
<tr>
<td>2</td>
<td>Ease / Speed of Implementation</td>
<td>Time and effort to achieve</td>
<td>6</td>
</tr>
<tr>
<td>3</td>
<td>Utilization of Existing Resources</td>
<td>Re-allocate existing or procure new</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>Political Risk (low risk high score)</td>
<td>Is there political will to support</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>Value for Money</td>
<td>Potential to create deal flow</td>
<td>3</td>
</tr>
<tr>
<td>6</td>
<td>International Precedent</td>
<td>Prior successful model</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>International Trend</td>
<td>Consistent with current trend</td>
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<tr>
<td></td>
<td>Average Weighting (Total / 7)</td>
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</tbody>
</table>

As the table above reflects, we have assigned the highest weight to the Affordability factor, for much the same reason we use it as the first test for PPP project appraisal. If there isn’t enough money to implement the option, what is the point of considering it?

The second highest-weighted factor is time and/or ease of implementation. This factor received a relatively high weighting because we wanted to make sure the option we proposed was a practical one, rather than a theoretical one.

The third highest-weighted factor is utilization of existing resources. The skill sets that are required to conduct PPP activity are similar to the skill sets required to conduct privatization activity, so when we consider the options for a PPP Legal Framework we must take care not to amend or create legislation that would impeded the ability of the PPP program to avail itself of the skills already well developed by privatization officers. This point is particularly important when there is a privatization body that has been in operation for several years and its officers have accumulated considerable experience in managing privatization transactions. The PPP Legal Framework must, therefore not be one that turns its back on the privatization program, its implementing body, and its experienced professionals in order to enable and mobilize PPP, but rather one that takes what is already available in terms of legal authority and builds upon that foundation to authorize and implement the new PPP program.
The 4th factor in our options analysis is Political Risk. For the purpose of this exercise, we define political risk as the reliability (or lack thereof) of political support for the option being examined. In the case of Malawi, this was an important factor in scoring options that involved a longer-term role for the Privatisation Commission in the PPP program. While such options scored highly in the Use of Existing Resources factor (the professional resources in the PC are considered to be quite good) the options did not fare well in the Political Risk test because: (a) donor support for the PC is expected to end at the end of 2007; and (b) although the PC has privatization revenues sufficient to continue in operation for as much as 1-3 years beyond 12/31/07 and has identified some transactions it considers important to complete before ceasing operations, the political support for continued PC operations appears to be relatively uncertain.

It is a long-standing policy of IP3 not to involve itself in political disputes that might compromise the independence of our analysis and recommendations. Accordingly, we did not allow the political battle over the future of the PC to influence our analysis. We waited for an indication that both donor and Government had taken a decision as regards such continued support (or lack thereof), and until such a decision became apparent we continued to consider a longer-term role for the PC in the PPP program. In fact, we prepared a version of this report that was distributed internally for discussion. The report envisioned a PC with a mandate expanded to include PPP along with Privatization, passage of a new law (or amendment of an existing law) covering both PPP and Privatization, and the PPP Unit being located within the expanded PC on a long-term basis. We also prepared this version of the report and distributed it for discussion purposes. We waited for a decision by donor and Government, regarding the future role of the PC in the PPP program, before we released this final report.

The decision became apparent in a Retreat of decision makers that was held at the end of March 2007. Based on the session notes subsequently circulated by the Facilitator of the event, we concluded that both donor and Government had taken the decision not to involve the PC in the PPP program on a longer-term basis. There does appear, however, to be support from both donor and Government to involve the PC in the PPP program on an interim basis, and we have prepared this report accordingly.

If political support for a longer-term role for the PC were to increase, and there is some possibility of that happening after PwC presents its final report to Cabinet, then the total scores of longer-term PC participation options would improve. In particular, an increase of such options’ Political Risk score from the present level of 1 (indicating high political risk) were to increase to a neutral score of 5, then at least one of the longer-term PC participation in PPP options would rise to the top 5 in rank. If the score for Political Risk were to become positive, maybe 6 but certainly if 7, then at least one of the longer-term PC participation in PPP options would attain a ranking among the top 3 and would therefore require detailed analysis and consideration thereof.

The 5th factor used in our multi-criteria weighted options analysis, which is international best practice for policy and legal options analysis, is Value for Money. Once the option passes the Affordability test, then the most important aspect of deciding whether or not government should make the investment is the relative amount of service provision that will be made available by the investment. The concept is similar to the private sector’s Return on Investment,
but in the case of government the focus is more on how much service delivery will be made available than on what financial return can be achieved.

The last two factors address the issue of whether there are international experiences that show the option being considered has been tried and it was successful, and whether the option being considered, while perhaps not yet tested in the international market, might be part of a recognized international trend for PPP.

In the charts below, we present the results of the multi-criteria options analysis:

### Enact No PPP Legislation (4 Options)

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</table>

The results above indicate that Option 1 is significantly more attractive than the other options. A detailed discussion of Option 1 is presented later in this section.

### Enact a New PPP Act (5 Options)

<table>
<thead>
<tr>
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</table>
The results above indicate that Option 5 is significantly more attractive than the other options. A detailed discussion of Option 5 is presented later in this section. In reading these options analysis results, one should keep in mind that a PPP Act might be needed as a mechanism for showing the populace that Government is serious about PPP. Such an Act might not be necessary for technical reasons relating to the legal framework, e.g., to fill gaps in the existing framework or to enable activities not yet clearly authorized, but might be necessary as a mechanism for giving weight to the PPP Policy initiative. This issue will be explored further when we provide a detailed analysis of the three top ranked options, later in this section.

Detailed Analysis of Best Three Options

<table>
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<tr>
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The results above indicate that Option 4 is the preferred option. There is some concern that the score for Options 1 and 4 are relatively close, and that means the reader should carefully examine the individual components of those scores to ensure that there has not been any distortion in the analysis. In considering this matter, we applied a subjective analysis that supported the technical options analysis result, as follows: there has been a continuing theme on the part of donor and Government that some kind of a clear signal needs to be sent that PPP is an important policy objective. In addition, the economy of Malawi has a long history of government control, and that makes it more difficult for a new PPP orientation to take hold unless there is a clear policy and legal “push” for the new PPP program. Without at least pushing forward the new PPP Policy by enacting new PPP regulations (the scenario under Option 4) and just leaving the market to pursue PPP by simply removing present impediments to it in the legal framework (the scenario under Option 1), we believe the PPP program would stall. On this basis, our subjective evaluation supported the selection of Option 4 per the options analysis results above.
In Category I, the highest-scoring option was the one below:

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<tr>
<th>Option / Number</th>
<th>Pros</th>
<th>Cons</th>
<th>International Models</th>
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<tr>
<td>No legislation (1)</td>
<td>PPP is already underway in many sectors, and capacity of line ministries and local government to contract with the private sector is already in place, so no need to press for new legislation at the national level. Just issue an operations guideline manual for the national and regional PPP stakeholders to provide guidelines and standards.</td>
<td>Limits the MOF’s role to information dissemination, capacity building, guidance regarding how to apply the principles of affordability, risk allocation, and value for money. Authority for an investment decision has to be vested in separate MOF framework and/or separate legal body with mandate for viability gap funding.</td>
<td>India: Ministry of Finance sets Operation Guidelines Manuals for a National PPP Node &amp; PPP Nodes. Malaysia: PPP Unit in the Min of Economic Planning, reports to Prime Minister. USA: Long-standing decentralized PPP at all levels of government.</td>
</tr>
<tr>
<td>Issue Standards and Guidelines instead of PPP regulations or Act.</td>
<td>The PPP Unit does only dissemination of information, setting of standards/procedures and PPP standard or model documents for transactions, provides one stop access for private sector, and builds capacity in line ministries and local governments. PC staff selected by Gov’t and donor could move to the PPP Unit.</td>
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The attractive feature of this option is that there is no need to enact any legislation at all, no laws, no regulations, and no decrees. The PPP Unit is established in the Ministry of Finance, because that is where decisions such as Affordability, Risk Allocation, and Value for Money are made at the national level. It prepares and distributes information on the PPP program and how to do PPP projects. It provides capacity building for the various spheres of government involved with PPP project identification, assessment, structuring, and contracting. This kind of PPP Unit is a coordinating body, not a decision making body. A Unit of this sort is appropriate for a country in which either: (a) the political culture will not accept what they would perceive as just another layer of bureaucracy, and would resist any attempt by the Unit to impose any decision-making authority over projects being developed by other government agencies; or (b) the business orientation of the economy is so well developed that PPP has already become routine, government and business are already accustomed to doing joint ventures with one another, and a wide variety of generally accepted PPP practices has evolved, with which stakeholders in the PPP process are already comfortable and need no further guidance, regulation, or motivation.

In the case of India, the political culture was not expected to be tolerant of a PPP Unit that exercised decision-making authority over line ministries and local government units developing PPP projects. There is also a vibrant economy, with a multitude of business activities involving joint working with government bodies already having been in place for many years. The legal environment presents little challenges to PPP activity. Maybe one of the more important factors was the GOI’s decision to place decision-making for government investment into a different body than the PPP Unit. They term investing of the type normally involved in a PPP
transaction to be “viability gap funding” and those decisions are made directly by Treasury, a variety of targeted managed funds, and the new India Infrastructure Finance Corporation (IIFC). There are also well-established private sector financial organizations similar in design to the IIFC, such as Infrastructure Leasing and Finance Company (IL&FC) that make the same kinds of decisions a PPP Unit would make (affordability, etc.) but for market reasons not policy reasons.

In Malaysia, we find again a very active and entrepreneurial economy with a highly developed private sector (very different from Malawi, where the private sector is still in development stage and the economy has been traditionally dominated by Government) and business has been joint venturing with all levels of government for many years. Although the PPP Centre is technically housed in the Ministry of Economic Planning, it is evolving into a transaction-support unit staffed with professionals who could easily qualify for positions in private investment banks. Most of the technical work, however, is done by consultants so the Unit itself does not have a heavy payroll burden. Political support for the Centre and the PPP Program comes from the Prime Minister, who at the end of 2006 began compiling a list of hundreds of officially endorsed PPP projects that would be coordinated by the PPP Centre but largely implemented by consultants.

In the United States, business and government have become so inter-twined that some assert the President is more of a corporate executive than a head of state. Nearly all of the municipal airports are run under PPP arrangements with municipal governments. Toll roads dominate the major routes in many parts of the country, operated by private companies pursuant to concession contracts. One of the more successful PPP operations in the world is managed by the Ports Authority of New York and New Jersey, which is so private-sector oriented they manage billions of dollars of assets with only a few dozen management –level employees, because virtually everything is contracted to the private sector. The legal framework is completely developed in the key areas of Procurement, Contracts, Uniform Commercial Code, Civil Procedure, and Corporation Law, so there are no gaps that a national PPP program would need to fill. Even Government itself is taking e-Gov initiatives designed to make government efficient and responsive like the private sector, so there is no need to reform government to make it a better PPP partner.

At this juncture, the reader may be thinking “none of this sounds at all like Malawi” and indeed that is our point regarding this option. The option scores well because it can be implemented quickly and easily, and indeed a good amount of PPP activity is already underway in Malawi, so standards and guidelines could have an immediate beneficial impact. But this option fails when compared to the highest-scoring options within the other two categories, discussed below, because Malawi needs a clear mandate from the top, with associated strong policy and legal support, to overcome the long tradition of government intervention in the economy and move into joint ventures with the private sector. For this reason, we now eliminate this option from further consideration.

In Category II, the highest-scoring option was the one below:
The most attractive feature of this option is its flexibility, which is certainly needed in a country such as Malawi where the political orientation tends to be quite fluid. In order to officially launch the PPP Program and Unit, the Minister responsible for Finance may issue PPP regulations under the Public Financial Management Act (PFMA). The Act is an appropriate place to issue PPP Regulations because the provisions of the Act pertain to the responsible use of public funds. The PPP tests of Affordability, Risk Allocation, and Value for Money are all cornerstones of any treasury function, in both the public sector and in the private sector. So the project appraisal tools of a PPP Unit fit neatly in the fiscal responsibility purposes of the PFMA. If in the future the Government sees a need to pass a new PPP Act, perhaps to show Government is serious about the program, or that Government is taking control over what had been ad hoc, uncoordinated national PPP activity, or perhaps to provide a new umbrella for the PPP process, then it has the PPP Act we have prepared and can elect to pass that draft Act. This flexibility feature is considered very important in Malawi.

The institutional relationships for a PPP program are also set up by the PFMA; at least the basic components are in the Act, which designates the Ministry of Finance as the legal venue for making treasury decisions, and links between the MoF and the various other government bodies are established by the designation of Accounting Officers. The Act provides that Accounting Officers are the persons responsible for ensuring that all public funds expended by their government body are used in an efficient and effective manner, as well as properly recorded. The new PPP Regulations could simply state that for an Accounting Officer to demonstrate efficient and effective management of public funds, he or she must undertake a PPP viability analysis. In the draft PPP Policy that we prepared for this engagement, we included a provision that any government body that wants to expend public funds must demonstrate that PPP was evaluated as an option for leveraging public funds with private investment.

Although there is not yet an international example of a successful PPP program that was mobilized with regulations while a draft PPP Act waited for government to pass it at the appropriate time, there are several very successful international examples of regulations being used for mobilizing PPP programs. Prominent examples are South Africa, Ireland, the U.K., and Australia. In those countries, however, the business climate was such that PPP readily took
hold as a natural course of events. In Malawi, if the PPP program does not readily take hold, we will need a PPP Act ready to pass to get everyone focused on the benefits of PPP and Government’s commitment to support it.

In Category III, the highest-scoring option was the one below:

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<tr>
<th>Option / Number</th>
<th>Pros</th>
<th>Cons</th>
<th>International Models</th>
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<tr>
<td>Don’t enact PPP Act (4)</td>
<td>Creates a fresh new start for PPP without baggage of PC and divestment. Principles of PPP (affordability, risk allocation, value for money) are all principles of public financial management. PPP program properly sits in the ministry responsible for and where decisions are made regarding public finance.</td>
<td>Despite the success of this model in South Africa, the PFMA in Malawi might be less appropriate for such an approach. Local Gov’t Act might add complexity if it would require duplicate set of regulations, as was the case in South Africa thereby adding some complexity.</td>
<td>South Africa, U.K., Ireland, Australia: PPP Units in the Treasury operating under Treasury PPP Regulations.</td>
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<td>Operate a new PPP program in MOF under regulations to be issued under PFMA. Selected PC staff to MOF.</td>
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The most attractive feature of this option is we already know that regulations could be issued under the Public Finance Management Act, as described in our analysis of the preceding option above, but in this option we drafting a PPP Act and then figuring out when (or if) it should be passed. Although this option has enjoyed success in several countries, those countries have market systems that are more easily adapted to having joint ventures between government and private operators than the system in Malawi.

Because of the potential need for a national PPP Act in Malawi, to give a clear signal to stakeholders that Government is serious about its commitment to PPP, we cannot advise adopting this option because it does not allow for the possible need for such an Act to be passed in the future, if the market response to PPP Regulations is less than hoped.

**Description of Selected Option and Way Forward**

Based on a comparative analysis of the three best-scoring options, presented above, we consider Category II option 5 to be the best choice for Malawi’s PPP Legal Framework. To summarize the essential components of the preferred option:

- Mobilize the national PPP program by issuing PPP Regulations under the Public Financial Management Act and prepare a draft PPP Act for Government to pass at the appropriate time, if and when such an Act is deemed necessary;
While the Regulations are being prepared and passed, their related Operations Guidelines and Standard Documents & Procedures are prepared, institutional arrangements are readied, and support from Government and Donor are put into place, the PPP program will operate within the Privatisation Commission;

- The legal basis for the PC to conduct PPP transactions will be provisions of the Public Enterprises (Privatisation) Act that allow for the use of concessions as one of the approved methods of privatization; and

- A core team of 4-5 professionals will be identified in the PC as the ones who will be responsible for conducting the PPP Program, and they will transfer to the PPP Unit when it is set up in the Ministry of Finance in approximately 12 months.

The process of constructing a PPP Legal Framework around this option would involve the preparation of a Draft PPP Act, which is provided in the Appendices to this report, and a set of PPP Regulations, which are also provided as an Appendix to this report. It is important to note that the draft Act is based upon a U.N. model that has been edited to adapt it to the Malawian legal system, so the draft should not be viewed as a form of turn-key document that can be presented to Parliament. If Government wants to enact such an Act, we will be pleased to communicate with the relevant officials and fine tune the document as needed. The PPP Regulations we have provided are also based on an international model, i.e. South Africa. IP3 was involved in the drafting of the South African PPP Regulations, so we feel comfortable in presenting them in this report.

Our approach to designing a PPP Framework has been based on the following: Policy creates Law, and then Law creates Institutions. Accordingly, the next section presents the Institutional Framework design required by the Policy and Legal Frameworks that have been established in this section, and in the preceding section on Policy.
V. INSTITUTIONAL FRAMEWORK

The Government’s institutional framework for PPP, and the institutional setup for its national PPP Unit, must include provision of standardized procurement and contracting documents, PPP best practices, standard procedures, and guideline tools to identify, structure, evaluate, award, and monitor PPP projects. Development of these Standards and Guidelines should be done during the interim phase of the PPP program, while the program is operated within the Privatisation Commission, and before PPP regulations are passed and the permanent Unit is established under the Ministry of Finance.

V.A. Phases of PPP Institutional Setup

Phase I: Mobilize the national PPP program as follows:

1. Assign selected PC personnel to conduct PPP activities;
2. Conduct preparation and dissemination of PPP Standards and Guidelines;
3. Draft PPP Regulations to be issued under Public Finance Management Act;
4. Establish a PPP website to disseminate information about the PPP program, provide details regarding PPP project opportunities for investors, disseminate information and status reports of PPP procurement activities, and provide easy and quick access to PC personnel tasked with conducting PPP activities;
5. Conduct capacity building programs, in the Ministry of Finance for assessment of risks associated with contingent liabilities in PPP contracts, in the stakeholder government agencies to develop skills that will eventually become centers of knowledge known as PPP Nodes, and in the Privatisation Commission for staff who have been tasked with undertaking PPP activities; and
6. Design, conduct fundraising activities, and establish the institutional setup for a Project Development Facility to fund technical support for PPP transactions.

The approach inherent with this Interim Stage design is to keep salaries and overhead as low as possible while PPP deal flow can be created. At the same time, the Interim Stage affords time to set up the essential components of a PPP Institutional Framework, and to set up a mature stage PPP Unit, both of which cannot be complete until: (a) the new PPP Regulations are passed; (b) Government and donor funding is budgeted and formally put into place for the PPP Unit and the PPP Program; (c) sufficient capacity has been built within the Ministry of Finance for contingent liability risk assessment, in the PC for staff assigned to the PPP Program, and in stakeholder government agencies for project identification, assessment, structuring, contracting, and contract management; and (d) the Project Development Facility has been formally established, and funded.

There is a lot of work in this initial stage, and completing the tasks will take a minimum of 6 months and a maximum of 12 months to 18 or even 24 months, depending on how quickly Government and donors can get the PPP Regulations passed and take all of the necessary decisions regarding institutional setup and funding. Although donor funding for the Privatisation Commission is expected to end on 12/31/07 we have been advised by the PC’s
management that they intend to continue PC operations, with funding from privatization revenues, for most of 2008 and perhaps into 2009. This means the PC will continue to serve as a platform for the PPP Program until all of the key elements of the long-term PPP Program and PPP Unit can be put into place.

**Phase II:** Set up a small, scalable PPP Unit reporting to Ministry of Finance

When all of the necessary institutional, legislative, procedural, and financial elements have been put into place by the end of Stage I, the PC staff who were tasked with PPP activities will be transferred into a new PPP Unit under the Ministry of Finance. Their counterparts in stakeholder government organizations will be the Accounting Officers, as designed in the Public Finance Management Act. The Accounting Officers will be the designated persons responsible for proposing PPP projects to the PPP Unit, and it will be under the Act’s provisions that Accounting Officers must utilize public funds in an efficient and effective manner that PPP Unit personnel will require PPP projects that are proposed by the Accounting Officers to pass the tests of (a) Affordability; (b) Allocation of Risks; and (c) Value for Money.

The private sector may also propose new PPP projects, using unsolicited proposals. In PPP it is important to encourage private sector innovation. However, there will be strict controls over such proposals. First, they must go through the standard channel starting with the relevant agency’s Accounting Officer and then through the PPP Unit’s three-stage approval process. During Phase I of the PPP Program, consultants will prepare detailed standards and guidelines on how to handle unsolicited proposals. They will include international best practice methodologies such as Dutch Auction, Swiss Lottery, automatic short-listing, extra points for innovation in technical proposals, and recovery of research and development cost (audited figures) incurred in preparing the unsolicited proposal through credits made available in their financial proposals.

While stakeholder agencies and interested private parties propose new PPP projects, and the projects are processed, the Phase II PPP Unit will grow gradually in response to the increased deal flow. When the deal flow reaches the level necessary to justify the expenses associated with the **Phase III PPP Unit**, what we have described in detail below as the “mature” Unit, such a Unit will be developed and commence full-scale operations.

**PPP Unit Phased Development**
As long as the mature stage PPP Unit is not engaged in privatization, there is no need to create a formal departmentalization structure to segregate activities of the PPP Unit. If a decision were to be made to have the PPP Unit engage in privatization activities, then it would be best to create formal, separate departments or divisions to distinguish between PPP and privatization in the minds of stakeholders. This will help PPP activities to be conducted without people assuming the Unit’s personnel are trying to divest of government assets, when what they are really doing with PPP is forming joint ventures to create new assets.

The mature stage (Phase III) PPP Unit structure assumes that the privatization program will gradually wind down and conclude its mission from within a structure other than the PPP Unit. Accordingly, the functional divisions illustrated by boxes in the organization charts should not be interpreted to mean formal departments or divisions are necessary. The boxes reflect the functional areas, and in practice many personnel will have responsibilities that overlap one or more of the functional areas portrayed by the boxes. We recommend a matrix management style for managing the Unit and its personnel, to accommodate this flexible and scalable design.

In Phase I, the PPP Program will be implemented by selected PC personnel, and the activities required to move to Stage II are conducted by consultants. This approach is designed to keep fixed costs to a minimum. The assumption is that while the privatization program winds down, fewer PC personnel will be required to conduct privatization activities. Rather than gradually laying off PC personnel as privatization deal flow subsides, we provide selected PC personnel with the opportunity to transition to PPP, and eventually become full-time staff members of the PPP Unit when it is moved under the MoF in Phase II.

In the section below, we present a profile of the human resources that will be needed at the time the PPP Program is ready to graduate to Stage II: setting up a small, scalable PPP Unit reporting to the Ministry of Finance.

**Key Positions for Phase II PPP Unit**

(PPP Regulations have been passed and Standards & Procedures are in place)

1. **Director General / CEO**
   Overall Co-ordination; this will be a working hands-on role with specific responsibility for high profile PPP projects. Also serves as spokesperson for the PPP Program. Reports directly to the Minister of Finance and is accountable to PPP Unit board of directors.

2. **Assistant to DG/CEO and Office Manager**
   Provides administrative support to the DG/CEO and manages human resources.

3. **Information and Education Officer**
   Very important position: responsible for information dissemination, media relations, public relations, and investor relations. Manages the PPP Program website, responds to inquiries received via the website and from other sources.

4. **Transaction Specialist(s)**
One Transaction Specialist capable of handling multiple sectors. Sector specialists and transaction-specific specialists will be recruited as the need arises, with contracts based on duration of transaction. This can expanded out to many roles as required according to each or multi-project assignments. Must be familiar with PPP project life cycles.

5. Economic / Financial Analyst
This is a key position that will require not only the usual abilities to assess economic and financial viability of proposed PPP projects, but also PPP-specific technical skills needed for calculating Value for Money using Public Sector Comparators, and knowledge of the Government budget system necessary to assess Affordability. Must also have technical skill in contingent liability risk assessment, so he/she can advise the risk management group at MoF regarding risk exposures in PPP contracts.

6. Contract Specialist
Commercial contact specialist who has the skills to evaluate draft PPP contracts, direct experience in dealing with concession agreements, and PPP-specific skills needed for risk allocation in PPP contracts. Does not have to be an attorney, but should have at least some formal training in contract law.

7. Procurement Specialist
Must have strong familiarity with Government and donor procurement regulations and procedures. Responsible for PPP project compliance with those regulations/procedures. Until the PPP Unit has enough deal flow to justify the expense of hiring a new Contracts Monitoring & Compliance specialist, the Procurement Officer will perform those tasks.

8. Accountant
Makes daily bookkeeping entries, posts to General Ledger and prepared monthly and quarterly financial statements, performs annual compilations and financial statements, prepares monthly financial reports for management. Does not have to be a chartered accountant but should have at least several years of bookkeeping experience.

9. International Advisor(s)
If donor funds are available for a resident advisor recruited from international experts, we recommend that such a person be recruited. One advisor could be engaged on a 1-year contract with possibility of renewal, for this Stage II of the PPP Unit’s evolution. In Stage III it would be advisable to hire an additional resident advisor, if funds are available. In addition to providing technical expertise, the advisors will be tasked with transferring their skills to local counterparts so that at the end of the advisors’ contracts local professionals can carry on the work.

V.B. Segregation of Duties and Prevention of Conflicts of Interest
In defining duties, responsibilities, and reporting relationships for personnel described above, and in defining the internal reporting relationships for the PPP Unit itself, it is essential to ensure that the design allows for the prevention of conflicts of interest.

The principles to be applied for prevention of conflicts of interest are:
The people who are responsible for development of projects cannot be the same people who are responsible for assessment of those projects;

The people who are responsible for assessment of projects cannot be the same people who formally issue approvals for those projects;

Similar to the point above, but focused on internal financial control: the people who approve expenses cannot be the same people who pay the expenses;

The people who approve PDF funding cannot be the same people who expend the PDF’s funds, for reasons similar to the accounting point above;

The Unit must have financial independence, so that its decisions regarding project approvals are not influenced by financial dependence; and

The Unit must be independent of the industries in which the PPP transactions take place, i.e. it must avoid industry capture.

The concepts above are not new, nor are they unique to PPP Units. But it is not unusual to miss these points when designing a PPP Unit because the design’s focus is on outputs. We have prepared this section to underscore the importance of avoiding any conflicts of interest inside of the PPP Unit. Independence from political, financial, and industry capture are as important for a PPP Unit as they are for a regulatory agency.

Segregation of Duties

So we apply the well-established accounting principle of Segregation of Duties. If the functions of developing projects are segregated from the functions of approving projects then it will be necessary for two or more persons to collude in order to defraud. With no segregation of duties, no collusion is necessary and the temptation/risk is higher that a fraudulent event will occur. Similarly, the function of approving a project must be separated from the process of formally conveying that decision to external parties, for much the same reason that a person who approves an invoice should not be the same person who writes the check.

PPP infrastructure projects often involve the investment of very large sums of money. It is inevitable that some PPP Unit personnel will be approached by interested parties in efforts to influence the Unit staff member’s decisions. If there is segregation of duties, such attempts to influence will fail unless there is collusion within the Unit. So while we are recommending matrix management for the Unit, that should in no way be construed to imply that the functions of each member of the Unit’s staff will be allowed to have any decision-making authorities that overlap the duty areas that must be segregated.

Segregation of PPP Unit and Project Development Facility

Turning now to the Project Development Facility, the person who approves a project for PDF funding cannot be the same person who actually disperses the PDF funds. For this and other reasons described below, we recommend that the PDF be separate from the PPP Unit. In that design, the DG/CEO of the PPP Unit does not approve PDF funding; rather he or she requests the funding. Then the Head of the PDF (who is accountable to a committee) makes the decision whether or not to provide PDF funds. Continuing on the theme of segregation of duties the Head of the PDF will not be authorized to actually disburse funds. It will be an accountant on staff of the PDF who will “write the checks.”
Separating Financial Approval from Financial Disbursement

The segregation of duties afforded by the above-described design also apply to the cash disbursements within the PPP Unit, as well as to the investments made by Government based on recommendations from the DG/CEO of the PPP Unit. For PPP Unit internal expenses, the Accountant writes the checks, not the DG/CEO and although DG/CEO of the PPP Unit formally conveys PPP Unit approval for Government’s investment of the funds it will require for its part of the PPP project, it is not the DG/CEO but rather the national Treasury that will “write the check.”

Other reasons why the PDF must be independent of the PPP Unit are: (a) the funds in the PDF are contributed by Government and Donors with agreements that are usually very different from those associated with funding of the PPP Unit; (b) there may be, and usually there are, funds contributed to a PDF by donors who did not contribute to the PPP Unit; (c) the functions of a PDF are very different from those of a PPP Unit, in that a PDF is structured and operated much like an investment trust, whereas a PPP Unit is structured and operated as a technical facility focused on deal flow outputs; and (e) the PDF has its own internal risk management profile and responsibility, quite separate and distinct from those of the PPP Unit.

Separation of Project Development and Project Assessment

Within the PPP Unit, it is essential to segregate the roles of Project Development and Project Assessment. Similarly, because the PPP Unit is tasked with Project Assessment, while the PDF is tasked with Project Development, their functions must be segregated and approval from one cannot be binding on the other. This provides an important system of checks and balances.

To expand upon the last point above, a PDF has a fixed sum of money with which to operate over a period of time. The money is a revolving fund to the extent that winning bidder are required to reimburse the PDF for funds it expended on technical assistance. A high-risk project may offer potentially high rewards in terms of Value for Money and improved service delivery, but the relatively high risk of not reaching financial closure exposes the PDF to the risk that there will not be a winning bidder who will reimburse the PDF at financial close. Lower risk projects involve less risk of non-reimbursement, but offer lower potential benefits. So PDF managements and its supervisory board, who have a fiduciary responsibility for the funds provided, must manage their portfolio of funded projects based on their internal risk profile and risk management plan. All of this is completely independent of the internal management dynamics of the PPP Unit.

So the DG/CEO cannot approve a project for PDF funding. He or she may approve the project in accordance with the PPP Unit’s project evaluation criteria, but he/she can only request (not approve) funds from the PDF. In summary, the points above describe the internal control systems that will prevent conflicts of interest within the PPP Unit, and we have take the extra step of segregating the PDF from the PPP Unit so as to provide the necessary segregation of duties between approval and disbursement.

Potential conflicts of interest must also be avoided by enduring that financial factors do not unduly influence decisions of the PPP Unit and the PDF. When funds are provided, the
agreements relating to such provision of funds must be carefully examined to ensure that there are no “strings attached” that might cause the Unit or PDF to take decisions based on factors other than the technical factors with which they have been tasked.

Independence from Political and Industry Capture

Sources of funding for the PPP Unit, and regulations on what kinds of funds may be accepted under what conditions, are described in detail in the Sources of Funds section of the Draft PPP Act and Regulations provided in the Annex to this report.

A final point regarding conflicts of interest is that the PPP Unit, and obviously the PDF, must be insulated as much as possible from political influence. This means great care will need to be taken in defining how officers are appointed and removed. Both should be based clearly on merit, there must be competition in the selection process, and there must be clearly defined grounds required for removal.

V.C. Organizational Structure of the PPP Unit

Before the internal organizational structure for the PPP Unit is considered, the actions described in the figure to the right must first be carried out. The options open to the PPP Unit in terms of its location and to whom it will report within the existing Government structures are examined in another section of this report. These options will be better understood by reviewing the PPP Unit design within the current institutional context, taking into account the international models that have been successful.

V.D. PPP Unit Structure and Activities

In Malawi various GoM agencies are involved in PPP, yet the guiding expertise on PPP is dispersed, leaving quality control and coordination without oversight. In most countries that have successfully implemented PPP there is a PPP Unit or “focal point” to ensure that line agencies and local governments pursuing PPP projects adhere to best practices and standards, especially in the assessment of affordability, value for money, and the appropriate allocation of risks between the public and private sector. These quality control and coordination functions should rest with a central PPP body. Therefore, in this report we have recommended the establishing of a National PPP Unit.

Before considering the institutional options, it is essential to define the function and form of the PPP Unit itself. A typical PPP Unit in a country of Malawi’s size should be lean and nimble, but should also have the capacity to cover a range of functions and grow in scale as the program progresses. The PPP Unit should have core technical and management staff and utilize, to the greatest extent possible, local skills to keep costs down and increase the skills mix available to the GoM. Normally, a new PPP Unit will have one or more full-time International Advisors.
These Advisors are usually funded via donor contributions. After a few years, the Advisors’ skills are transferred and they are no longer needed.

Most PPP Units have two or three core functions, each managed by its own department. In many countries, development of the PPP Unit’s functions, organization, and authority have generally followed the phases highlighted on the following page. The Malawi PPP Unit will already have capacity inherited from the PC, so it can begin at Phase II and evolve to Phase III over a 5-10 year period. PPP projects will require ongoing government involvement and there will be a need to have a constant guiding presence in reaching out to the market to identify and execute PPP projects in many different sectors. In Privatization although the transaction technically ends when the asset sale is completed, there is usually an expectation or even a legal requirement that the subsequent service provision by the private operator must conform to certain specified standards. This is always the case when a Privatization transaction involves a regulated industry and/or public utility.

The PPP Unit could have three main functional areas: (1) a Transactions function, to support the analysis, structuring, bidding, evaluation, and negotiation of projects consistent with MoF approval; (2) a Monitoring & Compliance function, to monitor and ensure compliance with the PPP contracts that have been approved by the PPP Unit; and (3) Education and Promotion function to reach out to line agencies and stakeholders on how to plan and implement PPP and how to use the guidelines and procedures essential to project success. There would also be a need for a minor finance and administration function in which accounting, financial reporting and control, office management, human resource management, and administration are conducted.

In the Transactions function group, personnel must be capable of managing all phases of the PPP Project Life Cycle, i.e. project identification, analysis, structuring, tendering, negotiation, and monitoring. Personnel in this functional group should have skills in at least:

- International & domestic lending and banking;
- Financial analysis & risk assessment;
- Asset management & technical assessments;
- Transaction negotiations, both legal and financial;
- Legal agreement/contract preparation and management; and
- PPP Economics (affordability, value for money, risk allocation).

V.E. Phases of PPP Program Evolution

PPP Programs typically go through three phases of evolution. For this reason, PPP Units need to be flexible and scalable as the nature and volume of their activities changes while the national PPP Program goes thorough its life cycle.

The chart below summarizes the key elements of this life cycle.
Three Phases of PPP Unit Evolution

Phase I: Policy and Coordination Unit. Governments initially establish the parameters, guidelines and procedures but with limited enforcement – hoping that PPP projects will flourish and that the private sector is keen to invest. While an important first step, most countries realize quickly that setting a PPP Unit or program is insufficient without clear cut objectives, rules, regulations, training, marketing and political support.

Phase II: Command and Control. In reaction to failures or inability to limit public financial risk, some PPP Units then transition to greater capacity and control. They usually then retain substantial approval authority and project veto power leading to higher quality projects and adherence to market based approaches, professionalism and transparency.

Phase III: Decentralization and Adherence to Common Standards. In this phase, after PPP procedures and rules are implemented successfully over several years, most governments are confident that the line agencies and local government have the capacity to plan and implement PPP projects with assistance from the PPP Unit and outside consultants. This is the trademark of a mature PPP program and in fact, in some cases, the PPP Unit transitions to a different organization one that is less about oversight and now focused more on results and implementation.

The appraisal of project opportunities by the PPP Unit will involve several stages. The first stage is a generally project viability assessment, with a focus on Affordability for government and consumers. The second is a more detailed analysis, based on a pre-feasibility study and focused on Risk Allocation. The third is a comprehensive analysis of the feasibility study, with a focus on Value for Money. The chart below provides an example of workflow in a successful PPP Unit.
V.F. Terms of Reference for PPP Unit Staff Positions

With regard to staffing, this Consultancy proposes to give the PPP Unit a ‘professional face’ to support the line ministries and other PPP initiatives. PPP project initiatives and sponsorship will be the sole responsibility of government and private sector initiatives taken outside of the PPP Unit. If a line ministry has a major PPP project, the question is what type of support would it need that is not already in hand within the various Government bodies? The answer is
possibly the experienced PPP professionals who will work in a hand on and practical manner to take the project through the various feasibility stages.

If the levels of competencies that are required within the PPP Unit are examined, there would be a clear view of the staffing profile and level of service required. The emphasis should be on ‘self-supporting’ senior and experienced officers; without the requirement junior support staff. However, there will be PPP resources required that will be external to the PPP Unit. These external resources will be very specialized, technical and financial expertise that could not possibly be sustained within any one PPP Unit. Therefore, when PPP Unit staffing needs are considered, one must take the view that it will specify, appoint, monitor, and evaluate the work of external specialists/consultants to support a variety of industries, utilities, and service sectors across the whole spectrum of the economy. Experts who evaluate PPP feasibility studies within the PPP Unit should themselves be more than competent in the areas listed in the box to the right. A PPP Unit with this level of expertise can be a very effective unit, delivering a critical evaluation of the sponsored projects through the various feasibility approval stages, while leaving the final decision to Government policy and oversight.

V.G. Project Development Facility (PDF)

The Project Development Facility (PDF) may fund a significant portion of a project’s feasibility consultant costs. The PDF recovers these funds from the successful private party bidder after the financial closure of the PPP. The costs of procuring PPPs, and particularly the costs of feasibility consultants, are significant, and often put a burden on the budget of the sponsoring agency. But quality advisory services are fundamental to procuring affordable, value-for-money PPPs, with adherence to the PPP procurement requirements set out in PPP regulations.

Government and Donors should establish the PDF as a vehicle for sponsoring agencies to source funding for a portion of the feasibility consultant costs, and thus reduce the impact of PPP procurement costs on sponsoring agencies’ budgets. Ideally, also, the PDF should increase the quality and quantity of successful deals that are processed through the PPP Unit’s project pipeline. The PDF should be established as a fund with a limited life span. It will wind down its operations after ten years, by which time PPPs will be well established and their procurement will form part of sponsoring agencies’ budgeting. Although the PDF is designed to be a revolving fund, in the sense that consulting expenses are reimbursed by winning bidders, some deals supported by the PDF will never be recovered because the deal never reaches financial close. This creates a natural “leakage” of funds that will, over an estimated 10-year period, deplete all the funds provided in the original round of grants and contributions.
While the PDF will play an important role in assisting sponsoring agencies to procure PPPs, the sponsoring agency’s ownership of the project is essential to the project's success. Thus, the PDF will not assume responsibility for procuring or managing a PPP project. In accordance with applicable laws and regulations, these functions reside with the sponsoring agency. Although the PDF appoints consultants and supervises their work, the consultant’s client is really the sponsoring agency. The consultant’s contract is with the sponsoring agency, subject to PDF oversight for quality and cost control. The PDF is not a source of grants to sponsoring agencies. Fees are paid directly to the consultant by the PDF.

Because the PDF has to recover the funds it disburse to the maximum extent practicable, it requires successful deals. This means that before projects are proposed to the PDF for funding feasibility analysis, the PPP Unit assesses the project for likelihood of success. Only projects recommended by the PPP Unit are eligible for PDF assistance. There are two additional factors regarding Project Sponsors:

- The sponsoring agency will have to share at least some of the cost of the feasibility analysis; and
- The project will not receive government support unless the feasibility analysis indicates that the proposed project is viable, and the PPP Unit confirms that finding in its own assessment.

Although the PDF should receive some form of support from Government, either cash or in-kind contributions, such as office space and/or support staff, most of the funding for a PDF usually comes from donor grants. Accordingly, the governing board of a PDF always includes representatives of the donors that contributed funds. Procurement policies and procedures used by the PDF must comply with those of the donors who contributed funds, as well as those of Government. The PDF must be financially, and politically, independent from Government, to assure impartiality in the project feasibility analysis process.

The PDF funds feasibility studies for small, medium and large PPP projects across all sectors. A good “rule of thumb” is that over the ten years of the PDF’s operation a total of 45 small projects, 24 medium projects and 8 large projects will be supported, and of these 75 percent will be successfully closed. These assumptions will be tested over time and the PDF’s budget can be adjusted if needed. The size of a project is determined by its anticipated turnaround time and funding requirements as summarized below.

**Core activities of the PDF**

The PDF is a single-function, semi-autonomous entity. It has its own Head and its own Governing Board. A PDF usually also has a committee for financial decisions, and often several committees focusing on specific sectors. The Heads of PPP Unit and PDF are at the same level.

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**PDF Project Size Definitions**

<table>
<thead>
<tr>
<th>Category</th>
<th>Turnaround Time</th>
<th>Funding Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small Projects</td>
<td>≤ 12 month</td>
<td>≤ $3 million</td>
</tr>
<tr>
<td>Medium Projects</td>
<td>1-2 year</td>
<td>~$10 million</td>
</tr>
<tr>
<td>Large Projects</td>
<td>≥ 2 year</td>
<td>≥ $10 million</td>
</tr>
</tbody>
</table>

2 Smaller projects allow the PDF a faster turnover of funds.
and work as colleagues, with different areas of responsibility. The PDF must have a professional accountant to record all financial transactions, and its own bank account, for which the accountant maintains the financial records. Any disbursements from the account above a certain amount must include the written approval of the Head of PDF, and large disbursements will require also the written approval of the Chairperson of the Governing Board. The Head of PDF has the same reporting relationship with MoF as the Head of PPP Unit, though each reports separately. The legal structure of a PDF is somewhat like a Trust, and the Head of PDF along with its Governing Board have a fiduciary responsibility to preserve the funds and ensure they are spent properly. The PDF always has an annual audit performed by an independent certified auditor independent of Government.

The PDF is regulated in terms of PPP regulations and must accordingly comply with Generally Accepted Accounting Principles (GAAP) or the equivalent in its host country. The accounting system subscribes to, and complies with, the requirements of public procurement and auditing. The accounting system supplies financial information in the format and with the frequency required by PPP regulations and the donors.

**PDF Funding Process and Interface with PPP Unit Approvals**

The PDF will only provide funds once it has evaluated and approved an application submitted to it by the PPP Unit, along with the PPP Unit's initial appraisal of the proposed project. Although Project Sponsors are the ultimate beneficiaries of PDF support, access to PDF funds is available only via the PPP Unit, i.e. project sponsors cannot apply directly to the PDF for assistance.

The box above summaries the steps in PDF approval, and funding for feasibility analyses. The process always begins with PPP Unit assessment. PPP Unit Level I approval results in the project being submitted to the PDF with a request for the funding of a pre-feasibility study. When the study is received and approved by the PPP Unit, the Project Sponsor may issue an RFQ within which will be results of the pre-feasibility study. This approval by the PPP Unit is Level II, the result of which will be a request for the PDF to provide the funding for a feasibility study. When that study is received and approved by the PPP Unit, Project Sponsors may issue an RFP. Upon receipt and approval of the feasibility study, the PPP Unit will consider issuing Level III approval to engage in contract negotiations with the Preferred Bidder.

**The PDF Evaluation Committee(s)**

The PDF Evaluation Committee(s) is responsible for evaluating and selecting which projects proposed by the PPP Unit for PDF support, will receive such support. The PDF may have one such Committee, or it may elect to have several such Committees, usually divided by sector or by size of project. The Committee should be made up of not more than five members; an even number of members is required to avoid tied decisions, and having only 3 members would
probably not enable sufficient points of view. The Committee must meet within 1 week of receiving the application for PDF support from the PPP Unit.

**Evaluation Criteria:** When making its decisions, the Committee should consider the following:

*About the Project Sponsor:*

- Does the sponsoring agency have external funds available, e.g. national budget, PSIP, donors, etc. for its share of the costs of the PPP project?
- Does the sponsoring agency have internal funds in its budget for its share of project costs?
- Has the sponsoring agency recently procured a PPP project (successfully or unsuccessfully)?
- Will the sponsoring agency’s strategic goals be achieved by the project?
- Has the sponsoring agency made a commitment to fund the project procurement and feasibility consultant costs, including cost-sharing arrangements with the PDF?
- Has the sponsoring agency appointed a suitably experienced and qualified project coordinator who has the skills and authority to make decisions necessary for project development?
- What is the sponsoring agency’s history of PPP project procurement, and does that indicate a probability of adequate commitment to this project?

*About the Sector:*

- Is this the first time a PPP would be procured for this sector?
- Have any similar but non-PPP projects been procured in the sector?
- Is the project in a sector that is a priority for Government and/or the donors?
- Is the proposed project in the social services sector? If so, will the project provide a core or support function for which Government should make an investment for economic returns?
- How will the project’s economic benefits be viewed vis-à-vis its financial benefits?

*About the Project:*

- Has the feasibility consultant been selected according to applicable PPP procedures? Was the PPP Unit represented on the bid evaluation panel, or have full transcripts of the bid evaluation procedures been provided so that the PPP Unit can ensure compliance with the procurement principles of fairness, transparency, competition, and accountability?
- Do the milestones for feasibility consultant payments put the feasibility consultant at risk if financial closure is not reached, or are their success fees built into consultant compensation structure that could compromise the consultant’s neutrality in determining its findings?
- Are the feasibility consultant costs proportional to project value?
- What is the project’s capacity to generate private sector capital investment or generate service delivery improvements in non-capital intensive projects?
- Has a “market sounding” been conducted and has the private sector demonstrated sufficient interest and capacity for collaborating on the project?
• What are the results of the Consumer Demand, Affordability, and Willingness to Pay Survey?
• What service delivery outcomes and improvements are expected from the project?
• What are the Service Delivery Standards, and can those Standards be complied with through operations and maintenance costs that are sustainable?

About the Funding:
• Has the feasibility consultant’s cash flow projections been verified by the PPP Unit's project advisor, and do they enable a competitive Financial Internal Rate of Return?
• Given prevailing market expectations regarding Equity Financial Internal Rate of Return, can tariff levels required to achieve such return be realistically attained given the consumer profiles and willingness/ability to pay, and political factors impacting tariffs?
• Are the potential funding sources identified in the “market sounding” credible in terms of their track record of success in similar projects, and their financial capacity?
• Is the proposed debt-to-equity ratio within generally accepted gearing limits for this sector, and are any Government guarantees or contingent liabilities required to secure the debt?
• Will the projected cash flows provide sufficient assurance of debt service, in particular does the debt service coverage ratio comply with generally accepted norms for the sector?
• Is there a “take-or-pay” off-take contract that requires Government to pay for capacity even if consumption levels and/or Accounts Receivable collection performance does not provide the required cash flow to make payments required under the contract?
• Is there a supply contract, e.g. fuel supply for a power generator, for which Government must provide a guarantee, or if supply costs pass through to the buyer(s) can the buyer(s) afford it?

Because the PDF operates like a Trust and its Governing Board sets policies consistent with its fiduciary responsibilities, the contributors of the assets of this quasi-Trust have broad discretion in the instructions that they give to the Governing Board. These instructions can be adjusted from time to time as circumstances change. As is the case with a Unit Trust for investment purposes, those providing the Corpus of the Trust may collectively, or in some cases individually, instruct the Board (analogous to the Fund Manager in an Investment Trust) how they want their money to be invested. As is the case with an Investment Trust, these investment decisions reflect the mix of risks that the investors want to have in the Trust. Therefore, the contributors to the PDF may, from time to time, instruct the Governing Board regarding their preferred risk profile. Some PPP projects may have a relatively high level of risk (international PDF experience has been that a high-risk project is one that has about a 25% probability of not reaching financial closure) and other may offer lower financial and economic returns but have commensurately lower levels of risk. The

PDF Project Priorities

The PDF policy board will set annual priorities for the types of projects to be funded by the PDF, and make these public. Projects that fall outside these priorities will not be excluded from getting PDF funding, but the PDF priority will be one of the factors taken into account.
responsibility of the contributors to the PDF is to keep the Governing Board informed of its preferred risk/return profile.

For some donors, their contribution to the PDF really is an investment. For example, when development finance institutions like IFC and KfW make contributions to a PDF, one of the reasons why they do it is that the PDF is likely to generate a continuous “bankable” deal flow of projects that they can finance. A return on funds invested in the PDF is provided through the financing of these projects. Similarly, when a government invests in a PDF, it may perceive that as an investment for future economic returns. Due to these factors, a PDF must operate like an investment trust, rather than a source of free money for Project Sponsors or a “give away” program for feasibility consultants to use for lining their pockets.

A project’s eligibility for funding is assessed under three categories:

- **Priority** – does the project fit within one of the categories of priority projects;
- **Risk** – does the risk/return profile match that specified by the contributors; and
- **Treasury** – is the proposed expenditure consistent with fiduciary responsibility of the Governing Board to manage the PDF in accordance within policies set by the contributors.

Each category has its own rating. Each category then feeds into a matrix that is used to decide whether funding will be provided unconditionally, on certain conditions, or if no funding will be provided.

**V.H. Organizational Structure and Profile of PPP Unit Staff Positions**

The PPP Unit will require a few very senior professional staff, at least one full-time international advisor(s) (for a period of 2-5 years until skills can be transferred) plus some essential support staff and access to office services and related resources. There will also be a need for mid-level professionals, who can be either locals, who have a particular area of technical expertise (such as accounting, financial analysis, engineering, and contract management) or expertise in a particular sector. Regardless of the organizational structures or systems in place, the quality of the PPP “working” management team will be the most critical factor. Most of the other support requirements will be short-term specialists with minimum training requirements.

**Proposed Management Structure of the PPP Unit**

The figure below shows a possible management structure of a “mature” PPP Unit.
PPP Unit Internal Management Structure (Mature State)

Project Matrix Management Structure & Modus Operandi

While the structure set out above appears is a traditional departmental structure; the PPP Unit would need to function less rigidly, using matrix management. As with the current PC, while having a traditional organization structure it has successfully adopted a matrix project management approach to handling its various projects, with key personnel for various departments/functions overseeing the various projects.

This internal management structure relies on clear points of accountability and responsibility within a project management structure rather than fixed lines within a management hierarchy. There is less reliance on line management but heavy reliance on very good project management reporting and monitoring systems. Professional and technical support staffs undertake the main core organizational deliverables through a systematic project management model. Depending on the type of project, functional specialists (e.g. Transition, Legal, Economic, Financial etc.) all can also be involved in project transactions. The Project Matrix Management’ approach places less emphasis on hierarchical line management, with a very flat structure and ‘hands on’ approach to work and deliverables against specific deadlines. As one project ends and new team is formed according to the person specifications required of the strict hieratical management structures. An example will be if their some continuation of privatisation work to be done and PPP work, while these are different type of projects, the same personnel will deliver both, without departmentalization of the work. The chart below illustrates this approach.
**Project Matrix Management (illustrative)**

<table>
<thead>
<tr>
<th>Cross Functional Specialist Requirements</th>
<th>Function 1 – Director of PPP Projects</th>
<th>Function 2 – Director of Procurement and Contract Compliance</th>
<th>Function 3 – Director of Risk Management and PDF</th>
<th>Function 4 – Director of Administration and Accounting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project A Manager</td>
<td></td>
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<td></td>
<td></td>
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<tr>
<td>Project B Manager</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Project C Manager</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Project D Manager</td>
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<td></td>
<td></td>
<td></td>
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<tr>
<td>Project E Manager</td>
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</table>

**Project Management Organization & Contracting External Consultants.**

The IP3 team envisages that the structures and management of the PPP Unit would be organized as a project management organization. Staffing, resourcing, and deliverables represent workloads and can be expanded and contracted as required. The setting up internal and management structures to work in this way is part of the PPP Unit’s capacity and training plan. The main focus will be on deliverables. Specialist staff may be recruited just for the duration of a PPP project and, if their performance warrants, may move on to employment within the PPP Unit.

In addition to recruiting project personnel, the Unit will work very much in the manner of the current PC, with the appointment of local and international specialist consultants. The development of ‘local’ consultant capacity will take some time and resources. Indeed a selective list may need to be exposed to the capacity building proposed for PPP Unit staff and line ministry Project Transition Managers. The appointment and development of the capacity of ‘local’ contracted consultants may be achieved through the PDF under the watchful eye of the Contract Monitoring & Compliance Department of the PPP Unit.

**Potential Core Staffing of the Mature PPP Unit**

The chart below illustrates a potential staffing plan for a Phase III PPP Unit.
Core Staffing for the Mature & Fully Established PPP Unit

<table>
<thead>
<tr>
<th>Director General</th>
<th>Head of PPP Projects</th>
<th>Head of Monitoring &amp; Compliance Unit</th>
<th>Head Education and Promotion</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Public Relations Officer&lt;br&gt; • Admin Assistant&lt;br&gt; Plus PDF Manager</td>
<td>• Chief Economist&lt;br&gt; • Banking &amp; Investment&lt;br&gt; • Financial Analyst&lt;br&gt; • Manager &amp; Transaction Advisors&lt;br&gt; • Admin Assistant</td>
<td>• Contracts Specialist&lt;br&gt; • Asset Manager&lt;br&gt; • Legal Advisor&lt;br&gt; • Risk manager&lt;br&gt; • Monitoring &amp; compliance&lt;br&gt; • Bid Marketing and Comm. Specialist&lt;br&gt; • Admin Assistant</td>
<td>• Public education &amp; promotion specialist</td>
</tr>
</tbody>
</table>

Total: 10-12 + ( additional Transaction Co-ordinates and Monitoring personnel will be required as the number of projects expand) ³

Recruitment Requirements

An open and transparent approach to recruitment at all levels is a requirement to obtain the full confidence of the industry and the public. This Consultancy has been made aware of the pressure to attribute jobs to less than qualified individuals and the external attempts at interfering with the openness of the selection processes. For the PPP program to achieve optimum success the public service guidelines for recruitment must be strictly enforced, and resources will need to be sourced from the private sector. For all PPP Unit personnel the compensation packages should be in line with similar positions in the private sector.

IP3 suggests that any legislation required to set up a PPP Unit should clearly indicate transparent appointment procedures and contain a profile of key positions with minimum standards required, with an emphasis on specialist experience, including the Board or Unit level. There is a public perception that appointments of Board

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³ Including administrative support staff; excluding drivers and messengers, and assuming Transaction Advisors will be engaged from time to time on an as-needed basis, with total time equal to 1 Transaction Advisor.
members are based neither on open and transparent procedures, nor on selection of expert candidates but rather representation of a particular interest group. This is a very important body, which must manage risk factors and whose decisions will have a very long-term effect on the country, therefore best practice is recommended. IP3 suggests following the ‘South Africa King II’ recommendations to ensure appropriate corporate Governance.

**Training Requirements of PPP Unit Staff**

Training & development should be an integral part of the PPP Unit’s planning and operations, and should reflect best business practices, from which training needs can be formulated. The training needs that arise from these best practices will determine the training needs.

**Capacity Building Plan**

A number of initial interventions have been identified to support the initial capacity building needs of the PPP Unit. The overall aim is to build a strong PPP project management approach to accelerate the PPP work program proposed. The program focuses on key technical competencies that need to be developed by staff working together on PPP and Privatization transactions, and supporting functions.

**Organizational Approach**

Training and development should **not** be seen as just ‘off the job’ seminar, lecture, conference or workshop etc., while these are useful for individual specialization and ad hoc training needs. To support the overall staff training and development more initial emphasis need to be placed on in-house workshops and skills transfer via on-the-job training. The overall approach is to work to be sure that the transfer of skills through effective in-house training and shared experience. The schematic shown below encapsulates this approach and the underlining support mechanisms that have to be in place to achieve the desired result. The PPP Unit may need to appoint for initial start up stage an Organizational and Institutional Development specialist.

The aim here is to ensure that the training is accessible to all staff and stakeholders, rather than just seeking single international training for one or two personnel. This should be reserved for specialization, with the core concepts being delivered in Malawi during this stat-up phase.

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### Best Practices in Personnel Development: A Checklist of Required Documents

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Annual Business Plan</strong></td>
<td>(reviewed quarterly, with Mission, Goal and Objectives and Values;</td>
</tr>
<tr>
<td></td>
<td>Design of organization communications model to meet the internal and</td>
</tr>
<tr>
<td></td>
<td>external stakeholders needs;</td>
</tr>
<tr>
<td></td>
<td>Development of personnel competency models for functional and</td>
</tr>
<tr>
<td></td>
<td>organizational roles (reviewed every year);</td>
</tr>
<tr>
<td></td>
<td>Writing of recruitment Person Specifications (which should be reviewed</td>
</tr>
<tr>
<td></td>
<td>as each vacancy occurs);</td>
</tr>
<tr>
<td></td>
<td>Preparation of comprehensive Job Outlines, linked to KPIs (annual, with</td>
</tr>
<tr>
<td></td>
<td>bi-annual review), incorporating: Key task objectives, Criteria</td>
</tr>
<tr>
<td></td>
<td>for success (KPIs) and Accountability (see template in Appendix II);</td>
</tr>
<tr>
<td></td>
<td>Performance Planning &amp; Review (PPR) system with two-way feedback,</td>
</tr>
<tr>
<td></td>
<td>linked to individual performance contracts.</td>
</tr>
</tbody>
</table>
Another idea will be for the PPP Unit to “twin” with a mature and well established PPP Unit in Africa, Asia, or Europe to support training and sharing of information. South Africa has the advantage of proximity, and has a Public Finance Management Act similar to that of Malawi.

**Knowledge Retention & Transfer**

Knowledge retention & transfer is a major topic in many organizations. Retention of knowledge, management of information, and development of underlying supporting structures has to be an emphasis in any organization, including the new PPP Unit. As there was universal agreement that the new PPP Unit should be small and agile, development of underlying support structures would require having a backup person who is able to assume responsibility for PPP transaction, and to support cross training and development of professional and technical staffs.

The common way is to have at least one senior person shadow another person. We suggest the ‘shadowing’ can be simply allocation of responsibility to ‘shadow’, this will not necessarily mean attending meetings, only to ensure to set up regular briefings with their counterpart, go through files and report issues and support quality assurance of documentation etc. This is one of the best ways of cross training and developing supporting professional and technical staff. We suggest that the supporting professional and technical people undertake more of project management and documentation, tracking progress and logging into an Access database. In addition, the PPP Unit can through this process develop a standardized up to date project filing system. This will ensure that a lot of the details of project management are not lost and there is a better appreciation of project tracking, monitoring, and recording of transactions, with the Project Transaction Manager being primarily responsible for implementation rather than tracking, monitoring, and recording.

**V.I. Relationship of PPP Unit to Other Government Departments and Agencies**

We evaluated the relationship between central Government Departments and their Agencies. The IP3 team examined in particular the Office of the President & Cabinet (OPC) together with the Department of Statutory Corporations (DSC) and the Privatization Unit (PC), the Ministry of Trade and Private Sector Development (MoTPSD), and the Malawi Investment Promotions Agency (MIPA) and Export Agency, the Ministry of Finance and the Public Enterprise Reform Monitoring Unit, as well as the Ministry of Economic Planning & Development (MoEPD).

**The Role of Ministries in PPPs**

In identifying the institutional framework for the PPP Unit, see Chapter 4, the team highlighted the central role of line ministries. Ministries are required to identify, promote and champion PPP projects, in which the Unit will play a supporting role in assessing affordability, value for money and potential risk transfer to the private sector through a three-stage feasibility process. The PPP Unit is there to support the output, not act as another level of bureaucracy.

The approach and relationship required by the PPP Unit and the line ministries including their SOEs are at the opposite end of the spectrum for the privatization process. Under new PPP initiatives, SOEs have to commercialize and strengthen their operations to match those of potential private sector partners. This will call for initial investment to improve those areas
within the capacity of the SOE in order for the latter to get ready for the potential ‘marriage’. This process in some industries may take a number of years to achieve before the PPP project can be realized. On the other hand, there are many ‘green-field’ PPP project opportunities without the direct involvement of SOE, where the government offers land, resources and or services. The role of the Ministries is both central and critical to the PPP process. To support PPP initiatives in the Ministries there will be a need for senior PPP transaction managers to be in place within the Ministries to work with the proposed PPP institution structures.

To support PPP projects initiated by the Ministries and other agencies, a counterpart Transaction Coordinator of a caliber similar to that of the Sector Transaction Managers in the PPP Unit should be appointed by the sponsoring line ministries for large-scale PPP projects. Therefore, after the initial ‘green light’ to complete a PPP feasibility study, ministries can commence with the appointment of a contract PPP Management Resource to be based in the sponsoring Ministry or organization, creating a “PPP Node.” This will build up the expertise and capacity within the line ministry as the PPP process gathers momentum.

**Local Authorities and Regional Government Institutions**

In a manner similar to that of line ministries, one would expect to see regional organizations being proactive by identifying and sponsoring PPP projects, either alone or in combination with other local interest groups, while seeking technical guidance from the PPP Unit. When working at a regional or local level there are differences in the types of projects, the scale, and needs in the regions. Once the Project Development Fund (PDF) is established direct support will be available to regional and local governments for PPP transactions.

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**Case Example: PPP and Local PPP Initiatives in South Africa**

One of the major issues identified in South Africa was the level of additional support local authorities; government institutions and even community councils need to commence the PPP project initiatives. Indeed in South Africa had a specialist support structure was established to help develop local initiatives at the start of the PPP projects. Since then the need for additional support has decreased, due to hands on experience gained by local Municipalities. Therefore, PPP concepts are now well understood throughout South Africa and the role of the MIU after some years as ceased.

**Municipal Infrastructure Investment Unit (MIU)**

- **USAID (USA)**
- **DFID (UK)**
- **Government of South Africa**
- **S. Africa Private Sector Reps & NGOs**
- **MIIU Board of Directors (10)**
- **MIIU Professional Staff (8)**
- **USaid Tech. Asst.**
- **Local Authorities**
- **PPP Feas. Studies, Draft Contracts, Bid Evaluation, etc.**
- **PPP Advisors**
- **Private**
- **MSP Project Development Grant Fund ($4 m)**

1. Request for PPP Tech. Assistance
2. Approve Funding
3. ToR for PPP Advisors
4. Issue RFPs for Advisors
5. PPP Feas. Studies, Draft Contracts, Bid Evaluation, etc.
6. Release Funding
7. PPP
Procurement Procedures and Compliance

The ODPP has for many years been working on PPP initiatives. It was originally set up to facilitate the contracting-out of government services. This has been very successful in encouraging ministries and institutions to contract to the private sector services for the provision of security, cleaning, laundry and catering. Since then it has developed regulations for contracting services and for concessions to support PPP projects.

The role and structures of the ODPP are ideal for supporting PPP oversight. It has a Monitoring and Enforcement Department, a Regulation Advice and Review Department, which in an initial examination, fit neatly with the oversight role required without being ‘overbearing and directly controlling.’ It is recognized that this is an ideal place to support the PPP institutional framework. It is expected that a PPP Committee would be established in the PPP Unit to ensure compliance with all the ODPP requirements. It is also expected that they would be represented on the Committee. This would very much model the current procurement practices exercised within the PC, which have been working successfully for number of years.

The ODPP PPP regulations as part of this study will have to be examined in more detail in the Second Interim Report addressing Policy and Legal Implications for establishing the PPP Unit once a final decision is made on the best reporting option for Malawi.

Accessibility by all Private Stakeholders

There has to be universal access for the private sector to all the institution’s structure, with good advice, information, and incentives to get involved. Very often there can be multiple components involved in putting a package together to support private sector investment. These include participation agreements from construction contractors, project operators, banking institutions, and donors, in addition to government bodies. Therefore the institutional design and ‘ethos’ is to be supportive rather than procedural, facilitating the PPP process for all participants.
International Examples of Reporting Relationships for PPP Units

MoF Reporting Structures
- **South Africa** - PPP Unit in National Treasury
- **Sri Lanka** - Independent Board with MoF Chairing the Board
- **Egypt** - PPP Unit in office of the Minister of Finance with a PPP promotion unit in Ministry of Investment
- **Brazil** - National Development Bank/MOF with implementation at State level
- **Chile** - Each Ministry has PPP Node, with national law & policy guidelines

Reporting through Office of the President
- **Philippines** - Coordinating Counsel for Private Sector Participation (CCPPP). View is the fluctuations in MoF attitude & budget toward PPP, which is long-term vision. MoF focused on the budget not on a national priority for infrastructure development while it is assumed the President will strongly supportive with a long-term view.
- **Jordan** – Executive Privatization Unit (EPC), Office of the Prime Minister (King is Head of State). Unclear legal mandate for PPP, even though EPC is default PPP promotion and management organization. Lack of coordination with important line ministries, particularly water and planning.
- **Malawi** - ‘Dotted line’ relationship between the PPP Unit (P3CU) and the MoF & Risk Management Unit (RMU). Conflict between Presidential Vs MoF.
  1. Difficult over Monorail project – lack of competition in tenders
  2. Toll road scandals over the same issue.

Developed Economies Reporting Structures
- **The Netherlands** - A PPP Knowledge Centre has been established within the Ministry of Finance with staffing from MoF and Economic Affairs.
- **Italy** - A temporary government body (the Unita Finanza di Progretto) has been established within the Economic Policy Committee a joint initiative involving Ministries of Public Works, Finance and Treasury
- **The United Kingdom** - Initially Treasury Taskforce more recently has given way to Partnerships UK (PUK) and the Office of Government Commerce. Independent of all these local authorities set up an association to support their initiatives Public Private Partnerships Programme (4Ps)
- **Australia** - The PPP program within Victoria is co-coordinated centrally by the Treasury.
- **Ireland** - Set up with an independent PPP Unit within the Ministry of Finance.

Overall Working Relationships
The team has proposed to strengthen the role of regulation and ensure its independence more so of the line ministries involved in PPP. The intent is to place the line ministries, municipalities, and community groups into a central role in the promotion of PPP projects through the PPP Unit. Due to the need for financial approvals for the main stages of PPP feasibilities, the MoF has a direct role in either managing the PPP unit or supporting its review of PPP proposals. Then there is procurement oversight by the ODPP to ensure openness, competitiveness, and transparency of the procurement process.

Possible PPP Unit Reporting Structure
The following figure illustrates possible reporting structures for the PPP Unit to guide and manage its relationship with other government departments and agencies.
Possible PPP Unit Reporting Structures to Be Developed

V.J. Human Resource Implementation Plan

The final location and reporting structures for the proposed PPP Unit are yet to be decided. While we have defined the basic framework structures for the PPP Unit, the final decision regarding institutional setup will depend on Government’s response to the Cabinet Paper prepared by the IP3 team.

Key Policy Areas

From an institutional development point of view, there are at least ‘six’ policy areas, which need to be addressed:

1. Funding
2. Recruitment & Performance Contracts
3. Remuneration
4. Capacity Building
5. Public Awareness
6. Project Management Structures and Contracting External Consultants

Funding

Funding of the PPP Unit will be a critical factor. While the GoM assumes overall responsibility for maintaining and sustaining the PPP Unit, substantial donor support will be required.
will be a need for donor funding to provide international experts to work in the Unit until their skills can be transferred to local counterparts. In addition donor grant funding will be needed to provide the Project Development Facility (PDF) with funds to finance feasibility studies. In time there may be a case for recovery of cost from the proceeds of PPP transactions. However, we do not see this in the early years of operation. This source of funding is being tested in the UK at present, with a reluctance of line-ministries to pay for PPP Services other than fund part of initial feasibility studies under the PDF arrangements.

**Recruitment & Performance Contracts**

Recruitment procedures have been set out in this report. It is important, as this Consultancy team has emphasized all along, to secure the services of personnel already fulfilling similar roles within the various Government Departments and State Agencies. In particular, the team would like to see the utilization of the PC Transaction and Special Fund management personnel early in the recruitment process, including economic support from the MoEPD, investment from the MIPA, financial analysis from the PERMU and redundant staff from the MDC etc. If this can be achieved early in the establishment of the PPP Unit, then the recruitments can be accelerated. It is still necessary to advertise in a competitive manner the key posts identified.

The PPP Unit is not an administrative or an oversight unit strictly; but a supporting organization to deliver outputs based on a project management methodology. This Consultancy team therefore expects to see all appointments on fixed term performance contracts, in the case for particular infrastructure project for the defined term of the project. It is recommended, that external project specific consultancy contracts be offered rather than the recruitment of staffs into the PPP Unit, in order to keep the PPP Unit small.

**Capacity Building Training Plan 2006-2007**

While the IP3 team has identified the core competencies required for promotion and introduced a PPP Unit within a project management system of working, there is a serious requirement for PPP capacity building. The earlier this is addressed the better it would be not only for the PPP Unit but also for line ministries. The competencies required to mount a successful PPP Unit have been identified. The line Ministries, in addition to the PPP Unit staff need to have an excellent understanding of the working of the PPP Unit. We have suggested for large-scale projects line ministries should appoint their own ‘PPP transaction’ counterparts to the PPP Unit for the line ministries PPP Nodes.

**Public Awareness**

One of the broader considerations in setting up the PPP Unit is the need to communicate known factors now. In South Africa, a major effort went into the communication of the work of the PPP Unit. The Consultancy team believes that there is need to be able to communicate known factors, so as to reassure stakeholders of the approach, role and time-tables or establishment of the PPP Unit. There are a number of line-ministries already active in formulating PPP Strategies e.g. Ministry of Health, the MoTPW implementation of a new rail concession without understanding the proposals for the PPP Unit.
A firm plan does not have to be presented now but rather the intent for the future vision, mission and objectives for the coming year. The question of which legal structure, possible PPP policies, structures and organizational options are therefore only the means to deliver and not the objective in themselves. For example, the key elements of what the PPP Unit will be expected to deliver is known with a high degree of certainty. The Consultancy team suggests that is must be freely communicated now to stockholder’s possible topics we set out below:

1. The Government and the public sector wish to exercise better management over the assets and operations now and into the foreseeable future

2. Building new PPP businesses with strong effective operations and management structures as well as autonomy, while being responsible to Government policy and asset ownership.

3. PPP working practices should be on par with the best local and international practices, which will be a ‘blue print’ for future employment models.

4. The proposed PPP organization will move away from the civil service/public service poor practice more in keeping with a high performance organization, with the independent power of managing its own human resource policies, including the power to recruit; promote; develop and terminate. All PPP policies will be based on open, transparent and fair practice, emphasizing performance

5. There will be regular PPP communication sessions to address concerns and set out the progress of PPP projects during the transition period in establishing a PPP Unit.

6. The activities of the PPP Unit including the Government’s policy responsibilities for supporting pro-poor initiatives; addressing areas of healthcare, water, energy and transport.

7. The Government, regulatory structures and operational and management structures within Government and State Owned Enterprises (SOEs) should be such as to have the capacity to attract Public Private Partnership (PPP) investment in the infrastructure needs.

With these basic principles and communication blocks in place, work setting out the preparation of the groundwork for the transition to the establishment of PPP Unit can be better understood by all stakeholders including parliamentarians. This will support the smooth establishment of a PPP Unit confident in the future of the work program and their potential role.

**Terms of Employment and Pay Structures**

It is doubtful if current civil service salary will attract the right caliber of personnel to these key positions. Senior positions should be on contract, with substantially different terms from the civil service. If the PPP Unit is established as a parastatal outside the civil service then remuneration packages can be on par with the private sector. Private sector remuneration levels
will allow for the recruitment of professional personnel with the depth of industry experience required to achieve rapid results. Accordingly, the PPP Unit could be established as a semi-autonomous body, perhaps along the lines of the Executive Agency model incorporated into the draft PPP Act provided in the Annex to this report.

Having said this, however, there are very successful PPP Units operating within the national Treasuries of several countries. Employees of these Units are civil service employees, and are both highly skilled and effective in their job performance. Civil service compensation levels in some of those countries, e.g. U.K. and Australia, are significantly higher than in Malawi, but the existence of successful PPP Units staffed by civil servants raises the following issue:

**Will the primary function of the Unit be:**

- Manage the process; or
- Manage the transaction?

This is a core issue in the design of the PPP Unit in Malawi, or in any country. If the primary function of the Unit is to “manage the process,” which means ensure that all PPP projects are tested for Affordability, Risk Allocation, and Value for Money, and that those approvals have been obtained before issuing the Request for Qualifications, Request for Proposals, and Contract Negotiations materials, respectively, or …

Is the primary function of the Unit to actually perform the technical tasks required to apply the three tests associated with PPP project appraisal, assist the project sponsors in preparing all the procurement and contract documents, assist in contract negotiations, and generally provide a high level of technical support to the whole process, especially when there is capacity limitation on the part of the sponsoring agency?

If we go to the extreme of Option 1, then we will probably end up creating nothing more than another level of bureaucracy. If we go to the extreme of Option 2, then we have created the equivalent of a boutique investment banking firm.

The solution to this issue is to find the most appropriate middle ground given the particular environment of Malawi, and tailor the PPP Unit design to accommodate that environment. In doing so, we must recruit and train Unit personnel who will be able to provide technical inputs when there is lack of capacity on the part of project sponsors, but not so high a level of technical skill that we have to pay investment banking salaries in order to recruit them.

Generally, the approach we recommend is more toward the “manage the process” option, but with the caveat that sufficient technical skill must be available in-house to help with managing the transaction when there is a capacity constraint on the part of the project sponsor.

**Remuneration**

This is possibly one of the more difficult areas for the GoM, which is seeking to reform its civil service pay structures and the growing differential in status between the many and various parastatals. IP3 has articulated the need for competitive pay structures comparable with the
private sector to recruit and retain the level of personnel required for the PPP Unit. The Consultancy team has indicated that regardless of structure the right personnel within the PPP Unit will make all the difference. The merger of resources from the PC and other organizations is encouraged. The remuneration policy of the PPP Unit should follow Malawi best practice, proposed for a number of recent newly established parastatals.

Below we discuss the remuneration options. The Consultancy team has identified the remuneration policies needed for the projects, and the competencies required to run, manage and deliver on PPP projects for Malawi. Possible compensation levels are in the budget for the PPP Unit included in this report.

**Budgets & Formals of Compensation Proposed**

The mode of remuneration adopted by the PPP Unit will largely depend on its legal status. If the PPP Unit is established as a Civil Service Department then the following conditions apply.

- Employment could be available on permanent and pensionable terms for all staff.
- It is possible under Civil Service status to employ some staff on special contracts as non-civil servants.

If the PPP Unit gets established as a Project under a Civil Service Department then the following conditions would apply.

- It is possible to employ all staff on special non-civil service contracts.

If the PPP Unit gets established as a statutory body, such a Unit or Commission or Executive Agency, then the following conditions would apply.

- Senior expert staff could be employed on fixed term contracts approved by the Board, while other general support staff can be employed on permanent and pensionable terms if seconded from the civil service.
- All staff could be on fixed term contracts while with the PPP Unit.
- Some staff could be on special technical advisory positions, not considered as part of the establishment.

In establishing a PPP Unit, the Malawi Government will need to pay close attention to:

- The need for a high performance organization that is output or results oriented. For such an organization to be established, there will be a need for the institution to have a flexible competitive remuneration structure that allows for the recruitment and retention of high caliber staff. In this connection, employment for officers in senior management would have to be recruited on fixed term performance related contracts.

- The need for employment arrangements that allow for recruitment of a few specialists from around the world on special contracts with clear counterpart arrangements for capacity building and skills transfer, as people with skills required to effectively operationalize a PPP Unit in Malawi may not be easy to find.
In our view establishing the PPP Unit as a statutory organization would offer more flexibility in terms of remuneration as well as the force of law required for effective operations of public private partnerships. We say this with the caveat that some international PPP Units have been very successful with civil servant staffing, though in those countries the civil servant salary levels are significantly higher than those of Malawi.

In the Annex to this report, we have provided detailed budgets for Phase II and Phase III PPP Units. No budget is provided for the Phase I interim arrangements, because the cost sharing arrangements with the Privatisation Commission will be something in which we will not be involved. The negotiations regarding such cost sharing, and where the money will come from to pay for things the PC is not willing to cover in taking on PPP activities, is at this time unclear.
VI. ROAD MAP FOR PPP PROGRAM IMPLEMENTATION

In the preceding sections, we have provided details of our recommendations for the Policy, Legal, and Institutional framework for the PPP Program. In this final section, we propose a step-by-step Road Map for implementation of the PPP Program. This Road Map assumes implementation of Phase I, II, and III of PPP Unit development, as proposed in this report.

As summarized in the Executive Summary of this report, we propose that the following steps be utilized for mobilizing and implementing the National PPP Program:

- Conduct Phase I PPP Activity in Privatisation Commission
- Prepare PPP Standards & Procedures Manuals for PPP Unit and PPP Nodes
- Prepare Standard PPP Procurement Documents & Model Contracts
- Key Ministries Sponsor Cabinet Paper on PPP
- Enact and Publish an Official National PPP Policy
- Conduct Stakeholder Consultation on PPP Policy
- Finalize and Enact PPP Regulations
- Finalize Institutional & Reporting Relationships
- Select and Create Legal Structure for PPP Unit
- Transfer Selected PC Staff to PPP Unit and Recruit for Gaps
- Commence PPP Unit Operations and Build Capacity in PPP Nodes
- Phase II Unit Builds Deal Flow for Transition to Phase III Unit
- When Deal Pipeline is Sufficient Establish Phase III Unit

VI.A. Conduct Phase I PPP Activity in Privatisation Commission

It would take at least 6 months, and quite possibly as long as 12 months or even more, to mobilize a stand-alone PPP program. Then at the end of that arduous journey we would find ourselves with a PPP Unit starved for deal flow. In the PC, we have an institution that already has empowering laws and regulations in place, a mandate to do concessions that can easily be applied to PPP (at least for existing facilities, and possibly for new facilities if the interpretation of the mandate is stretched a bit), and a professional staff with years of experience in doing the kinds of things required to do for PPP transactions. Given that the skills and experience needed to conduct PPP transactions are similar to those required to do PPP transactions, the logical first venue for the PPP program is the Privatisation Commission.

During this interim phase, while PPP transactions are being conducted in the PC by personnel specifically identified as responsible for PPP activity, and provided with assurance of transfer to the PPP Unit when formed (so they can focus on PPP instead of job hunting), the personnel who are assigned to PPP will be building a pipeline of future deal flow for the PPP Unit, conducting public awareness activities, and facilitating a targeted PPP capacity building program.

Also during this interim phase, consultants will be busy preparing PPP Standards & Guidelines in the form of Operations Guidelines Manuals for the PPP Unit and the PPP Nodes, as well as preparing Standard Procurement Documents and Model Contracts.
Government will be busy enacting and publishing a national PPP Policy, drafting and passing new PPP Regulations under the Public Finance Management Act, and setting up the legal and institutional framework for the PPP Unit. We strongly advise that Government also undertake development of the regulatory framework, which will be essential for private investment.

VI.B. Prepare PPP Standards & Procedures Manuals for PPP Unit and PPP Nodes

As mentioned in the section above, a key activity during Phase I will be the preparation of PPP Standards and Procedures, which should be issued as “Operations Guidelines Manuals” for the PPP Unit and PPP Nodes. The legal hierarchy of the PPP Program will be:

- National PPP Policy
- Public Finance Management Act
- PPP Regulations (under PFMA)
- Operations Guidelines Manuals

The Operations Guidelines Manual (OGM) thus comes under the authority of the PPP Regulations, which in turn come under the authority of the PFMA, which in turn comes under the authority of the PPP Policy. It is in the Policy that interpretation of PFMA’s requirement that Accounting Officers must not only account for the public funds that have been entrusted to their organization, but must also ensure that said funds are used in an “efficient and effective” manner, is extended to mean Accounting Officers must consider PPP as one of the options for developing new projects. In application, this means that Treasury will approve no new use of public funds unless the Accounting Officer demonstrates that he/she has performed a thorough analysis of PPP as an option for leveraging public funds with private investment.

At this point, our Accounting Officer colleagues are thinking “ok, but how do I do that?” The answer is “refer to page __ in your OGM.” The Operations Guidelines Manual thus provides not only guidance on how to do PPP; it also provides guidance on how to comply with the law.

Preparing an OGM takes a long time and a lot of hard work. The manuals are highly detailed and have to be harmonized with the PPP legislation, which means there are sections that have to explain how the procedures described not only enable the successful implementation of PPP transactions, but also how the procedures relate to the PPP Regulations. If a new PPP Act is to be passed at some point in the future, we will have to hire consultants to come in for another round of revising the OGM so that is harmonized with, and shows how the various sections tie to the PPP Act. We’ll have to hire a lot of lawyers too, to harmonize all the existing legislation with the provisions of the new PPP Act. Otherwise, we’ll end up with an Act that says one can or must do something, and another act that says one cannot do such a thing. Problems such as this are the norm, which is one reason why we recommended starting the PPP program with a set of Regulations that already have a law for which such harmonization has been achieved.

After the OGM for the PPP Unit, and the OGM for the PPP Nodes, are completed then we will have to distribute them and provide training on how to use them, and capacity building on how to do the things described in the manuals. The preparation, distribution, training, and capacity building activities associated with the OGM will take a full year to complete.
VI.C. Prepare Standard PPP Procurement Documents & Model Contracts

The regulatory framework in Malawi is not fully developed, and until it is it will be necessary to use the “regulate by contract” methodology for PPP activity. In order for private operators and investors to feel comfortable about investing in Malawi, contracts that are executed with them must be overseen by financially and politically independent regulators. Until such political and financial independence can be attained, the contracts themselves will have to include provisions that protect the parties, provisions that would not need to be in the contracts if the regulatory framework was already fully developed.

While we continue to be impressed with the skills of Government officials in the Ministry departments that presently serve as sector regulators, and in the relatively newly-formed independent regulators, until regulation becomes independent of undue political influence, including political influence in the appointment and removal of Commissioners in regulatory bodies, and reliance on Government budgetary resources is ended or at least substantially reduced, the protections that such an independent regulatory regime would provide will have to be inserted into PPP contracts.

Such contracts will serve to alleviate investor concerns by providing very specific remedies for contractual disputes, very specific definitions of the rights and obligations of the parties to the contracts, and very clear allocation of the risks of the project amongst the parties to the contracts. Having said this, one must note that the use of Model Contracts to “fill the gap” while regulatory structures are developed represents a very inexact science. No matter how much effort is put into the drafting of a Model Contract, in applying those Contracts to actual transactions there will always be things that were not anticipated and therefore not covered in the contract, and there will nearly always be differences of opinion when clauses are enforced.

The development of Model Contracts is an immediate Action Item and a consultancy should be engaged as soon as possible to develop those contracts, as well as Standards and Guidelines for PPP, which should be published as Operations Guidelines Manuals for both the PPP Unit and the PPP Nodes. The Model Contracts should be accompanied by Standard PPP Procurement documents, at least Request for Qualification and Request for Proposal documents, which in combination with the Model Contracts will provide a full set of Procurement materials for use by the PPP Unit, the PPP Nodes, and other PPP stakeholders.

VI.D. Key Ministries Sponsor Cabinet Paper on PPP

In 2006 the IP3 consultancy drafted a Cabinet Paper for the Minister of Finance and the Minister of Industry, Trade, and Private Sector Development to consider presenting to Cabinet in order to formalize Government’s support for a national PPP Program. To date, the Paper has yet to be presented to Cabinet, so there is still time to modify it so that it includes the draft PPP Policy material provided in this report. The presentation of such a Paper needs to be as soon as can be realistically achieved, because everything in the PPP program flows from the PPP Policy. The key ministries to sponsor the Paper should include the Ministry of Finance and the Ministry of
Industry, Trade, and Private Sector Development, but one or more other ministries might be interested in sponsoring the Paper, such as the Ministry of Economic Planning & Development.

VI.E. Enact and Publish an Official National PPP Policy

The official National Policy is the signal to all stakeholders that Government is committed to PPP as a development paradigm. The National PPP Policy should be provided in the format used for other official policy statements, such as the ones for transport and water, and the one being prepared for PPP in the health sector. In this report, we have provided the full text of such an official policy statement. Once the policy is agreed by Government, it should be vetted in a stakeholder consensus building workshop, and all stakeholders in the PPP program should be invited to attend, including those from the private sector.

The transport sector national policy recently went through a similar process, and the comments received from stakeholders were very useful to the process of finalizing the policy. Such will be the case with the National PPP Policy as well, because stakeholder inputs are highly useful in ensuring that the policy can be implemented in a practical and effective manner, achieving the results for which the policy was formulated. After the PPP Policy is enacted and published, it will be necessary to conduct stakeholder awareness activities.

VI.F. Conduct Stakeholder Consultation on PPP Policy

Although the first round of stakeholder consultation is done while Government is finalizing the Policy, after the Policy is enacted and published it is essential to hold a series of Stakeholder Consultation events to inform stakeholders of the new Policy, to explain how the PPP Program works, to highlight the benefits of the Program, and to clarify what the Policy means in terms of the rights and obligations of stakeholders. Because PPP is a new way of doing business for the Government, it will be essential to provide detailed guidance to civil servants on how they are required to adjust and/or undertake activities involving contracting with the private sector.

PPP Information Dissemination is something that must be done concurrently with the rollout of the National PPP Program. The PC can do this, as an interim measure, and the entity taking the lead can be the PC’s Public Relations and Information, Education and Communications Officer/Department. The process should initially be focused on dispelling any misconceptions stakeholders might have about PPP. For privatization, this meant explaining why privatization was not “giving away the crown jewels” or “laying off poor workers generate profits for rich investors” or “giving away control of vital national assets to foreigners.” For PPP, this will mean explaining why PPP is not privatization, why PPP is not just another procurement mechanism, why PPP creates new jobs, how PPP will accelerate the development of infrastructure, and how PPP benefits consumers.

VI.G. Finalize and Enact PPP Regulations

Although the Public Finance Management Act specifically authorizes the Minister responsible for Finance to issue Regulations pursuant to the Act, as a practical matter ministers usually seek consensus in Cabinet and Parliament before issuing such regulations. So there is a political
consensus-building process that we will have to go through, as well as the usual consultations regarding technical and legal content, before the Regulations are passed.

In the Annex to this report, we have provided draft PPP Regulations. Although they were designed to go under a new PPP Act, we have been careful to ensure that the language and PPP procedures specified can be accommodated under the PFMA.

IP3 has been involved in the review and drafting of such PPP Regulations in several countries, including South Africa, and will be pleased to provide assistance if requested.

**VI.H. Select and Create Legal Structure for PPP Unit**

The fundamental issue regarding legal structure is whether the Unit should be a Government body, attached to or contained within a Ministry or other Governmental organization, or if it should be a semi-autonomous body such as a Commission or Executive Agency.

The argument for having the Unit be part of a Government body, probably in this case a Unit in the Ministry of Finance, is that institutional structures and reporting relationships are already in place for the Unit if it is simply inserted into an existing Government ministry. The arguments against this option include: (a) setting up the Unit within a particular ministry might cause the other ministers to feel as if they have not been sufficiently enfranchised by the PPP program; (b) other ministers might feel as if this act had given too much power to the Minister of Finance; (c) personnel in the Unit would be civil service personnel, and they might not have the technical skills to do PPP project development and evaluation; and (d) there is no need to set up any form of semi-autonomous body because no such body is really autonomous, i.e. everyone will know the Unit is a de facto arm of the Ministry of Finance so why pretend otherwise?

The arguments for having the Unit be a semi-autonomous body are: (a) it will be able to offer compensation packages that are competitive with the private sector, and will therefore be able to attract higher-quality personnel than it could with civil service compensation packages; (b) a degree of financial and political independence could provide a level of comfort that their deals are being handled on the basis of technical factors rather than political factors; and (c) a semi-autonomous body can provide continuity while senior government officials come and go.

The main arguments against setting up the PPP Unit as a semi-autonomous body are: (a) some successful PPP Units are in government ministries and employ civil servants; (b) there is a pool of skilled civil servants who would likely be attracted to joining a PPP Unit even though it was only able to offer civil service compensation packages; (c) the political backing for such a semi-autonomous body might not be as apparent as it would be in a ministry or directly with the Office of the President and Cabinet; and (d) everyone will assume that the Unit functions as an arm of the Ministry of Finance, so why pretend otherwise?

We find the arguments in favor of setting up the PPP Unit as a semi-autonomous body to be more persuasive than the arguments in favor of setting it up within a ministry.
Location of the PPP Unit

The Privatisation Commission was set up during the tenure of an administration that was more tolerant of the division of Government between Lilongwe and Blantyre than the administration is today. With the current policy of consolidating Government activities in Lilongwe, there is a strong argument in favor of setting up the PPP Unit in Lilongwe. The main reason the PC was set up in Blantyre was they were tasked with privatizing Public Enterprises, and headquarters of some of the largest Public Enterprises are in Blantyre.

The PPP Unit will not be doing much business with Public Enterprises though the PPP program in its interim (Phase I) stage will be doing concessions with them until they are sold off, so there is another good reason to start the PPP program within the Privatisation Commission. By the time we are ready to formally establish the PPP Unit (Phase II) the expectation is that most if not all of the Public Enterprises will have already been privatized, so proximity to the Ministry of Finance will be the key factor in terms of location.

The location question that now arises is “does proximity mean inside the ministry or down the road from the ministry?” Given some of the resentment we have heard toward the PC, that it is an elite group of people who are not sufficiently accountable to Government, that they are too highly paid, that they think they are better or smarter than us civil servants, etc.” we do have a concern about the image being housed outside of the ministry might create for the PPP Unit. A constraint in terms of available office space within the ministry might exist, but a new wing has been recently built and there might be space that could be made available. Being close to the ministry officials, in particular the Minister might have some practical value. But we thing that if the Unit is to be established as a semi-autonomous body its physical location should reflect that degree of independence. So we recommend the “down the road” option.

Ministry of Finance Risk Management Unit

In this report, we have discussed a Project Development Facility and a Risk Management Unit, but we have not included any detailed designs, budgets, or implementation plans for those entities because it is not in our Scope of Work. We would be pleased to design an institutional development plan for these entities if asked to do so as a follow-on consultancy. For now, we simply provide references to those entities and an indication of their potential roles.

There is not presently a Risk Management Unit in Ministry of Finance, only a Debt Management Office, but this consultancy has recommended that, as part of the National PPP Program, a Risk Management Unit (RMU) be established and funded by the National PPP Program, so that the MoF will have the resources necessary to make assessments of any contingent liabilities associated with PPP transactions. During Phase I such an entity might also provide similar assessments for Privatization transactions, but that would require funding support from the privatization program. Such a Unit does not have to start out as a formal unit; it could begin as simply one or two people who have the necessary skills, assigned to the Debt Management Office. If people with such skills are not available in the civil service system, a resident advisor could be engaged to perform the work and transfer skills to civil servant counterparts.
The function of the Risk Management Unit is to assess the relative level of risks associated with contingent liabilities in PPP contracts. With that assessment comes a recommendation as to what sort of reserve the Treasury should record, against which an offsetting expense entry would be made in the event that an adverse event caused the risk to become a direct liability.

An example of a contingent liability would be a Government guarantee to cover the shortfall on debt service coverage in the event that the level of passenger traffic on a new railway project is less than projected. Another example would be a guarantee by Ministry of Finance to cover the shortfall in off-take contract payments by a water utility in the event that the utility’s revenues were inadequate to cover its take-or-pay contractual obligations because consumers were slow to pay their bills. These are both examples of contingent liabilities, which should be managed by the Risk Management Unit, as opposed to the direct liabilities that are managed by the Debt Management Office.

Because a Risk Management Unit is tasked with appraising the risk of having to pay in the event that a contingent liability becomes a liability for payment, due to a risk event having taken place, such a Unit requires highly technical skills in the field of risk assessment that are not present in MoF today. Those skills will be needed for the National PPP Program, so the establishing and funding for such a unit needs to be included in the National PPP Program. In conducting its project appraisal activities, the PPP Unit will liaise with the Risk Management Unit before making decisions regarding Approval Levels for authorizing RFQ, RFP, and Contracting activities for projects that have been proposed by Project Sponsors (government agencies proposing projects).

VI.I. Finalize Institutional and Reporting Relationships

The role of the National PPP Unit in the National PPP Program is pivotal. Without such a Unit there will be no central coordinating body for implementing the Program, or ensuring quality control and adherence to best practices. The PPP Unit is also of critical importance because it provides centralized guidance regarding the identification and development of PPP projects. It also disseminates information on PPP projects, a key function for all stakeholders, especially prospective private sector operators/investors who are from other countries and need “single window” access to the Malawi PPP Program. Capacity building will be another important activity of the Unit, along with standardization of forms and procedures for implementing PPP projects. Such standardization is critical to achieving success in the objective of maintaining fairness, transparency, competition, and accountability in the selection process. The PPP Unit also provides a critical function in the area of contract management, through its Contract Monitoring and Compliance Division. This Division serves as the “watchdog” for the Regulator, which would otherwise be hard pressed to monitor each PPP contract.

As the PPP Institutional Framework is developed, we will need to be very attentive to what the relationship of the PPP Unit will be with the regulators. There are multiple parties involved in a regulation by contract regime, as follows:

- The public sector partner to the transaction, which monitors its partner’s compliance;
- The private partner to the transaction, which monitors its partner’s compliance;
- The PPP Unit Contract Monitoring and Compliance function group; and
The Regulators.

As the regulatory regime is developed, and regulation by contract is used as an interim step, the relationships between these four stakeholders in PPP contracting will need to be clearly defined to avoid duplication of efforts, to allocate responsibilities in accordance with the capacities of the stakeholders, to define how decisions will be made, and to define which organizations will be tasked with enforcing those decisions.

This is not an easy task. Consider, for example, the two Governmental bodies tasked with the monitoring of Public Enterprise performance. Initial confusion as to what kind of monitoring one would do vis-à-vis the other, an accord was reached that one would focus on management and policy decisions, while the other would focus on financial performance. The problem is that even those two clearly delineated areas sometimes overlap. So some degree of uncertainty continues and that undermines the ability of each body to accomplish its intended mission.

In performing providing monitoring and compliance activities for PPP contracts, one has to consider resource constraints. Neither the PPP Unit nor the sector regulator are going to have the human, physical, and financial resources to monitor every little activity that is addressed in the PPP contract. Normally, such day-to-day detailed monitoring is left to the parties to the contract, each of which has a vested interest in seeing that the other party is in compliance, and each of which has the available “on-the-ground” resources to watch what the other does. But what if the public sector partner is not an operating company?

To cite a recent example from Kenya: the railways SOE was devolved into a sector regulator at the time a concession agreement was signed with a private operator. When the IP3 team heard rumors about problems in this PPP transaction, we visited with the regulator and asked them if it was true that the operator was not adhering to its agreed investment program, and if the train speeds were indeed decreasing, and if so why? The answer was basically “we’re not sure.” We then visited the operator, and they explained that the investment program was a 5-year plan, and that they had temporarily reduced train speed to reduce derailments caused by the poor condition of the tracks when they were given to them by Government to manage. They have been making repairs to the tracks and now train speeds are increasing.

If a railway operating company SOE were the public partner to the PPP contract, they would have known right away the answers to our questions. But the SOE operator has been changed into a (much smaller) regulator with only a few staff. They do not have the capacity to check on day-to-day details regarding operator performance.

As long as there are Public Enterprises that serve as operators, this problem does not exist, but as those enterprises are sold off contracts with private operators will be directly with Ministries. A Ministry doesn’t have the resources to check every little thing an operator does. And neither does the PPP Unit or the sector regulator, if separate from the Ministry. So who is going to keep an eye on the operators to make sure they do what they’re obligated to do under the contract?

Part of the answer is that in the process of developing the PPP Regulatory Framework, we will make decisions about how institutions involved in the PPP contract monitoring and compliance process will divide up their responsibilities, so as to avoid duplication and confusion.
opinion, such activities on the part of the PPP Unit must be strictly limited to periodic checking of the performance factors that directly relate to Value for Money and Risk Allocation, taking care to watch for deterioration in areas impacting contingent liability risks.

So that’s what the PPP Unit’s Contract Monitoring and Compliance functional group will do. Now who will do the rest? Those are questions that will have to be answered as the Regulatory Framework is developed and ultimately the best solution is a fully developed regulatory regime that provides economic incentives and disincentives that make detailed, ongoing, day-to-day monitoring of operator performance unnecessary because in such a regulatory framework the market forces will push operators toward compliance.

**VI.J. Transfer Selected PC Staff to PPP Unit and Recruit for Gaps**

This process will have been made a little less complicated by having designated in advance that the PC personnel assigned to the PPP program will automatically transfer to the PPP Unit when formed. We will need to ensure that the job descriptions and compensation packages for those personnel for the PPP Unit are harmonized with the same documents in the PC. Recruiting for any additional personnel required by the new PPP Unit can be conducted using the Position Descriptions provided in the Annex to this report.

The recruiting process can take a long time, so it will be necessary to advertise and begin the interviewing process at least 3 months before the Unit is scheduled to mobilize. The selection process must obviously be competitive, with no exceptions. If Government accepts our advice to set up the PPP Unit as a semi-autonomous body outside of the civil service system, then the recruiting exercise must anticipate a robust response from the private sector. This is desirable, but will add to the number of candidates likely to be submitting applications.

**VI.K. Commence PPP Unit Operations and Build Capacity in PPP Nodes**

Concurrently with the commencement of PPP Unit operations, it is essential to mobilize a PPP capacity building program, somewhat for PPP Unit personnel but more importantly for all the other stakeholders in the PPP program. An immediate need will exist for the PPP Nodes in the line ministries and local government units.

Training and capacity building are critical components of the National PPP Program because the skills required to do PPP are very different than the skills required to do traditional procurement. In traditional procurement, Government does the engineering design and then selects a provider that will build the facility, or provide the goods or services, at the lowest price. In PPP, the basic engineering design parameters are defined by Government, along with the Output Specifications, and the private operator does the detailed engineering design. Private sector innovation is very actively encouraged by allowing bidders to propose their own technological preferences, so long as the Output Specifications are complied with in their proposed design. This means the officials reviewing proposals do not need to be engineers, as they did in traditional procurement. Rather, they need to understand the commercial or quasi-commercial dynamics of Service Delivery. The Output Specifications relate to Service Delivery, the cornerstone of PPP, and provide a quality assurance mechanism.
A great deal of training and capacity building is required to convert government officials, who understand engineering and lowest-price procurement, into officials who are Service Delivery oriented. Being Service Delivery oriented means two important things: (1) the project must be “market driven,” meaning that consumer demand, affordability, and willingness to pay are key project appraisal factors; and (2) the focus of project appraisal is not on the Facilities, but rather on the Outputs of those Facilities. The “market driven” factor is especially foreign to officials of governments in countries where government has traditionally played a pivotal role in most of the key sectors, and has extensively intervened in economic activities. Such interventions characterize the governments of most emerging economies, including Malawi.

Below, we have provided framework for capacity building. The curricula need to be incorporated into a training program for all key stakeholder ministries and departments, as well as regional and local level bodies. This training should be mobilized concurrently with mobilization of the National PPP Program, with an initial emphasis on PPP Nodes, and continued until there is enough capacity for the Program to operate without being constrained by a shortage of skills.

**PPP Professional Certification Program**

Included in the capacity building for PPP should be a professional certification program for managers and senior level officials. Government personnel policies and manuals, along with individual job descriptions, should provide a role for such certification to play in the process of selecting personnel and promoting them to higher-level positions.

The components of such a certification program could be as follows:

- Forms of PPP and where they are being used within the region and around the world;
- Processes to identify PPP opportunities and the key elements that go into a PPP analysis;
- Elements to effectively structure the financing for PPP arrangements and put your new knowledge to the test in a financial modeling simulation exercise;
- How PPPs can be designed so that they stimulate the development of the local private sector and encourage local participation;
- Develop skills to effectively manage (and communicate with) the stakeholders to a PPP, including customers, the media, and labor unions;
- Learn about the Indian PPP regulatory framework;
- Institutional reviews and case studies; and
- Detailed and personalized strategic Action Plan

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THE INSTITUTE FOR PUBLIC-PRIVATE PARTNERSHIPS  78
## Development of Policy, Legal, & Institutional Framework for the PPP Program in Malawi
### Final Report

**Module I: PPP Concepts, Rationale, and Contractual Options**
- Overview of the forms of PPP
- The global experience with PPP and SADC examples
- New variations on PPP, including output-based aid

**Module II: Project Appraisal and Feasibility Studies**
- Objectives and key elements of feasibility studies
- The ‘value for money’ and ‘public sector comparator’ concepts
- Criteria for screening projects
- Managing and allocating risks in PPP
- Engaging consultants to assist with the PPP process

**Module III: Project Finance and Investment Analysis**
- Options for financing PPPs
- The rationale for a project finance approach
- The challenges of project finance for PPP, including currency devaluation, the need for guarantees, and special considerations for donor-financed projects

**Module IV: The Procurement Process**
- The various forms of procurement including competitive bidding, competitive negotiations, and sole sourcing
- Methods for structuring bid evaluation criteria
- Maximizing transparency in the procurement process

**Module V: Communications and Stakeholder Relations**
- Methods for managing stakeholder relations
- Structuring a communications program
- Addressing the human resources and labor relations implications of PPP

**Module VI: Contract Management, Monitoring and Evaluation**
- Using the PPP contract as a regulatory instrument
- Establishing an independent regulatory framework for PPP
- The forms of economic regulation, including price cap & rate-of-return
VI.L. Phase II Unit Builds Deal Flow for Transition to Phase III Unit

Building a “pipeline of deal flow” is investment-banking terminology that is equally applicable to PPP Units. At the macro level, it makes no sense to invest a lot of Government and donor money into a new PPP framework and Unit if there is not going to be a good stream of PPP transactions to provide Value for Money for the funds they have invested. At the micro level, a highly-skilled PPP Unit team will have nothing to do if there aren’t any transactions.

So let’s think for a moment about where PPP transactions come from. Generally, PPP deals are more demand driven than procurement transactions, which tend to be design driven. So the process of conceptualizing, identifying, and prioritizing potential PPP transactions comes from government bodies (and private entities, in the case of unsolicited proposals – which are dealt with in detail by the draft PPP Act and PPP Regulations included in the Annex to this report) that are tasked with service delivery. Examples are a Ministry of Transport developing a plan to expand capacity in ports and airports, a water utility looking to expand its distribution network or build a new treatment plant, a Ministry of Public Works looking to build some new highways using a toll road approach, and a Ministry of Health looking for ways to reduce the overhead in its public hospitals by contracting non-medical services to the private sector.

Note that none of the above examples includes the PPP Unit. So PPP deal flow is not only “demand driven,” it is “ground up” driven. The paradox is that the best PPP skills are in the PPP Unit, and yet most of the PPP deal flow is created by people who have the least training or experience in doing PPP transactions.

In the various governmental bodies that are the source of PPP deal flow, the people involved are mostly civil servants, many of which have little or no experience in business and are thereby not familiar with the commercial dynamics that characterize PPP transactions. Their skills are usually in engineering and/or procurement, and those are indeed the right skills to manage the traditional relationship between government and the private sector, i.e. buyer and seller, known generally as procurement. So how do we enable these people to create PPP deal flow?

The only answer is public awareness and capacity building. These people must be sensitized to the PPP program so that they will make the effort to identify PPP opportunities. Then they will need conceptual training to enable them to develop PPP concepts in response to increased need for service delivery, and then to develop those concepts into initial PPP project designs. From that point, they will need capacity building to help them to prioritize their lists of potential PPP projects, for presentation within their government bodies, and then develop the highest ranking potential projects into business cases for submission to the PPP Unit.
We have provided an illustrative PPP capacity building program in this report. As part of the training, and capacity building as both part of training and as working with PPP Unit personnel we again stress the need to institutionalize the knowledge base that will be build in the training and capacity building program by developing PPP Nodes in these government bodies.

VI.M. When Deal Pipeline is Sufficient Establish Phase III Unit

There are two things that might never happen in the Malawi PPP program. One is the PPP Act might never be passed because Government finds that the PPP program runs fine without it. Care must be taken that a sense of complacency does not set in regarding the PPP Act. If there is a need for it, because of the factors we have explained elsewhere in this report, then it has to be passed, even if things seem to be going well with just the PPP Regulations.

The other thing that might never happen is establishing of the Phase III (or mature) PPP Unit. In a country of Malawi’s size, the deal flow might never reach a level sufficient to justify the cost of such a Unit. In such an event, we would simply continue with the Phase II Unit.

The best way to view the PPP Unit, in all of its Phases, is not to envision a jump from Phase I, then a jump to Phase II, and then a jump to Phase III. The Unit is designed to be flexible and scalable, so size (and cost) is always a function of demand for its services. In matters of public policy and administration, it is usually best to take a gradual transition approach rather than a radical shift in direction approach. That is why the design presented in this report envisions a gradual transition from privatization to PPP, rather than an abrupt cutting off of support for Privatization to pursue a PPP program, and a relatively long interim role for the PC during the transition process. The move from PC to MOF doesn’t have to be done in a hurry, nor does the move from a Phase II Unit to a Phase III Unit. Let things evolve naturally, and take the time to do things right, so that a firm foundation can be put in place for the future.

And remember that PPP is not the magic pill to cure all ills. It’s complicated, and it requires a fundamental shift in the way government goes about delivering services to its constituents. It is extremely important not to allow unrealistic expectations to develop regarding PPP. The road to success in PPP is long, winding, and filled with unexpected challenges to overcome. But we must travel the road, carefully, because if we are to come anywhere near to meeting the ever rising demand for public services, especially infrastructure, there simply is no other option than to engage the private sector, and then try our best to make that marriage work.

VI.N. Timeline for Implementation of the National PPP Program

The two charts provided in the following pages provide an estimated timeline for implementing the National PPP Program. Because Phase III (mature PPP Unit) begins when Phase II ends, it is only necessary to present timeline charts for Phase I and Phase II. The timeline allows 1 year to mobilize the Phase II Unit. This is considered achievable but a little optimistic. We thought it advisable to present a slightly optimistic timeframe, but it could “slip” by 6 to 12 months.

In implementing the Program, it is important to avoid “sequencing” as much as possible, i.e. to avoid having to wait for one component to be in place before working on the other component.
For example, there are many activities that can be undertaken before the PPP Regulations have been formally promulgated. On the regulatory front, once the relationships between the PPP Unit and regulators are defined, it is not necessary to wait for the regulatory regime to be fully developed in order to attract private investment. Model contracts, the basic (not yet tailored to Malawi) versions of which are available, can be used to provide immediate guidance for PPP transactions until versions adapted specifically to Malawi can be developed. Implementation of the National PPP Program should, therefore, be achieved via a simultaneous “multiple parallel path” approach rather than the traditional government “sequential” path.
Annex A. LEGAL FRAMEWORK

Introduction
Governments have the difficult task of trying to meet the diverse and continually changing needs of their citizens. As if this was not difficult enough, citizen expectations continue to grow. Increasingly, they are routinely demanding more and better government services at lower costs. Governments are being challenged to deliver existing social services faster and cheaper besides being expected to deliver additional services.

The ability of governments to meet these ever-growing expectations of their citizenry is constrained by the resource envelope. Conventional financing mechanisms tend to kill most infrastructural projects in developing countries given the limited markets. A cash flow analysis will generally reveal that projects financed under a traditional private investment scenario, will not be financially feasible.

The PPP Financing Model
There are many today who will argue that governments should hand over their activities to the private sector, which will do a far more efficient job. Whilst this may be true to some degree, it is too simplistic an approach to address all the expectations of the people. We believe that the more sustainable response lies in governments taking on a larger role than was traditionally expected of them. We believe that their role will increasingly be in collaboration with, as opposed to the previously antagonistic role against, the private sector. Public-private partnership will require a dialogue between the public and private sector on what needs to be done to promote realization of their joint goal. This partnership will transcend the traditional business boundaries that currently exist and will increasingly extend into policy areas, including education, health, human rights, immigration and citizenship, science and technology, foreign relations, arts and culture.

As a result of this new approach, different “rules of the game” are needed which will enable the development of alternative financing plans. These new rules will enable government officials to become creative, using a multitude of methods and finance techniques to reduce development costs and enhance project income streams. What was previously the “opposition” will now become a partner and both sides will need to work together in order to achieve one objective – the realisation of the project. This joint effort will transform projects from financially infeasible to those that are acceptable to the capital markets. The absence of a facilitative PPP environment that allows these partnerships to take root could thus make the whole difference. It could make or break a project proposal.

This is the backdrop to the current assignment. The Government of Malawi seeks to identify means of addressing the expectations of its people in terms of new social services such as roads, hospitals, schools, etc that cannot conceivably be financed by the country’s development budget. Indeed, even with the generosity of Malawi’s development partners, the financing gap remains huge. At any rate, Malawi’s
development agenda may not necessarily always coincide with the priorities of the country’s development partners. Thus, there will always be projects that the people of Malawi consider a priority that cannot be funded by the Government and its development partners.

There is general agreement that whilst there is no law against PPPs in Malawi, a facilitative environment cannot hurt. The country currently has no policy, legislation or institutional framework dealing specifically with PPPs. This notwithstanding, PPPs mostly in the form of concessions and leases have been undertaken primarily, but not exclusively, under the auspices of the privatisation programme. The absence of a PPP-specific governing framework is not peculiar to Malawi. A number of other jurisdictions have held the view that so long as investments can be made profitably; there is no need for any specific PPP legal and institutional framework. For developed countries, this argument may not carry the same relevance as in poor countries. There is no disputing that developing countries such as Malawi where market-oriented systems are less developed, the private sector are reluctant to undertake PPPs when the legal and policy framework is absent.

Increasingly, there are more and more people who believe that a facilitative legal framework for PPPs can play a pivotal role in promoting PPPs, especially if the sector level legislations, such as those obtaining in Malawi, do not specifically provide for PPPs. The PPP law typically embodies a political commitment, provides specific legal rights, represents an important guarantee of stability of the legal and regulatory regime and, most importantly, provides necessary powers to the executive. In most developing countries, the implementation of privately financed infrastructure projects only became truly established following the promulgation of PPP legislation which outlined the general rules under which PPP projects were to be awarded and executed.

The PPP-specific legislation would:
- create a comprehensive framework to deal with the entire PPP project lifecycle;
- provide a direct legal basis for PPP contracts;
- provide a general framework that specifies the rights of the private sector;
- clarify the “rules of the game” for various government entities; and
- address some of the concerns of the private sector and the lenders.

Having underscored the importance of a PPP legal and institutional framework, its role should not be over-played. A good law will not in itself be reason for an investor to make an investment in country. This is simply not the case. The starting point is that one must have a viable project. It is certainly helpful to the business if the environment boasts of a favourable legal and institutional framework. However, the point is that a project follows a good investment opportunity and not a good investment climate. To be sure, a facilitative environment could help to make a project viable.

**Important Role of PPPs in the development of Projects**
In Malawi’s economic situation, where resources for development are scarce, PPPs can help to provide much needed developmental capital. There are also additional benefits:
- PPPs assist in providing an avenue for quicker delivery of facilities and services;
• Access to funds and technologies/skills ordinarily not available to the public sector;
• Sharing of risks as well as cash flow/revenues;
• Creation of new tax revenues; and
• Promotion of goodwill and trust amongst public entities and their constituents.

With all these benefits, why have PPPs taken a long time to take root in this country? As elsewhere, many of the objections raised against PPPs have been based on the misconception that PPPs are the same as privatisation. The truth is that they are not. To be sure, they may have been used as a form of privatisation with respect to existing public enterprises, but they are not the same. PPPs could be used to develop a new project where none existed previously and therefore nothing to privatise. Additionally, it has not helped that PPPs are difficult to implement in the best of environments. In a climate where no facilitative environment exists, implementing PPPs is especially difficult. Thus, the creation of an environment that is conducive for carrying out PPPs is helpful. Some of the characteristics that will assist to create a facilitative environment are:

1. A Commitment from the Political Leadership
A truly successful partnership between the public and private sector can result only if there is commitment from both the leadership in the government and private sector organization. This needs to go beyond mere lip service. The most senior public officials must be willing to be actively involved in supporting the concept of public and private partnerships, and take an aggressive leadership role in the development of each given venture. A well-informed political leader can play a critical role in minimizing misconceptions about the value to the public of an effectively developed partnership. In the context of Malawi, if PPPs are to succeed there is need to work actively not to allow history to repeat itself. The privatisation experience is probably an example of how not to implement a programme of that magnitude. There are many do believe that the Government has taken a lukewarm attitude towards it. This, they claim, explains the difficulties that the programme currently faces.

2. Legal Framework
Equally important is the need for a statutory foundation for the implementation of public and private partnerships. Too often, laws may limit or lack clarity regarding the formation and management of public and private sector partnerships. Without this clarity, the private sector leadership often view these collaborative partnerships as risky ventures and cannot take advantage of innovative and creative solutions. A number of countries have established effective statutory frameworks to foster collaborative work with the private sector. Unfortunately, any perception of risk, whether real or imaginary, tends to increase the cost of undertaking that project. This makes it increasingly less feasible.

3. Direct Public Sector Involvement
Once a partnership has been established, the public sector must remain actively involved in the project at all levels. Ongoing monitoring of the performance of the partnership is important in assuring its success. This monitoring could be done on a
daily, weekly, monthly, or quarterly basis for different aspects of each partnership (the frequency is often defined in the business plan and/or contract) from an outcome basis. The monitoring also helps the Government to explain to its citizens the positive attributes of the project in addition to ensuring that the private sector partner abides by agreed commitments.

4. **A Well-Crafted Plan**
Each party must know what to expect of the partnership beforehand. A carefully developed plan (often done with the assistance of an outside expert well conversant in this field) will substantially increase the probability of success of the partnership. This plan most often will take the form of an extensive, detailed contract, clearly describing the responsibilities of both the public and private partners. In addition to addressing areas of respective responsibilities, a good plan or contract will include a clearly defined method of dispute resolution as not all contingencies can be foreseen.

5. **Effective Communication with Stakeholders**
More people will be affected by a partnership than just the public officials and the private sector partner. Affected employees, the portions of the public receiving the service, the press, labour unions and relevant interest groups will all have opinions and, frequently, significant misconceptions about a partnership and its value to the general public. It is important to communicate openly and candidly with these stakeholders to minimize potential resistance to the establishment of the partnership. Both parties need to develop an effective communication plan. The communication management process provides a structured approach to creating and delivering effective information, defining audiences and delivery vehicles. The process helps ensure accurate and consistent messages are conveyed, by appropriate authorities through appropriate channels and vehicles at the right time. Successful implementation will positively affect the work environment and relationships with sponsoring organizations, employees and other stakeholders.

6. **The Right Opportunity**
Only a select number of government business problems are ripe for a true partnership. These should have the right characteristics – uncertainty, high complexity, challenging problems, etc. When forming a public-private partnership, it is critically important that both parties set and manage reasonable expectations, especially the government sector.

7. **The Right Partner**
The "lowest bid" is not always the best choice. The "best value" in a partner is critical in a long-term relationship. A candidate's experience in the specific area of partnership being considered is an important factor in identifying the right partner.

8. **Well-Defined Management Processes**
It is important that both public and private sector parties agree on key management processes early in the formation of the relationship.

In conclusion, every effort should be made to ensure that any law providing the framework for PPPs should address the issues that we have covered above.
Current Legal Framework Impacting on PPPs
In order to set up an environment suitable for implementing PPPs in this country, Malawi has over the recent past, commissioned a number of consultants to design appropriate legal and policy framework. Utho Capital Partners were contracted to undertake a situational analysis of the prevailing environment in Malawi in order to determine what needed to be done to improve the PPP legal and institutional framework. Utho Capital Partners provided a comprehensive review of the operational environment. We have reviewed their work as well as that of PricewaterHouseCoopers. PWC also undertaken a similar analysis with particular emphasis on recommending strategies that were to benefit the pace of the privatisation programme. This report benefits from their respective reports.

In addition, to the work undertaken by Utho Capital Partners and PWC we also collected and reviewed a number of laws, by-laws and policy documents in order to identify any bottlenecks that currently exist in Malawi’s legal framework that would make PPPs especially difficult to implement.

1. **The Constitutional Framework**

   The Constitution stipulates that the Government’s paramount duty shall be to promote, safeguard, and advance the welfare of the people of Malawi. The Constitution also commits the Government to long-term investment in health, education, economic and social development. This has clear implications on the amount of investment needed to fulfil these commitments. As discussed above, there does not appear any reasonable likelihood that the Government can meet these commitments. The obligations on the part the Government are clear. Equally clear is the fact that pursuing private enterprise, whether by the Government or the private sector or in association, is not prohibited.

   **ISSUE:**

   - **Supremacy of the Constitution**

     Any Act of the GoM or any law enacted that is inconsistent with the provisions of the Constitution shall to the extent of that inconsistency be invalid. Thus, any law that would seek for instance, to detract from the commitments articulated in the Constitution could potentially be declared invalid. This needs to be borne in mind in the preparation of the new PPP legislation and the amended Privatisation Law.

2. **Privatisation - Public Enterprises (Privatisation) Act**

   By virtue of the Public Enterprises (Privatisation) Act, the Privatisation Commission is the sole authority in Malawi to implement the privatisation of any public enterprise. Although the privatization programme started off impressively, progress has slowed down. The Privatisation Commission engaged PwC to recommend mechanisms for increasing the pace of the programme. PwC’s final report, delivered in June, 2004, contained a total of 291 recommendations covering all aspects of the privatisation programme and some touching on other areas of Malawi’s economic landscape. Overall, the recommendations sought to create an environment that
would be conducive to the smooth carrying out of the privatisation programme. Some of those recommendations propose improvements to the Privatisation Law.

ISSUE:

- **Adequacy of the Privatisation Legal Framework**

  Work is underway that seeks to amend the Privatisation Legal Framework. The advisers have drawn up a Bill which incorporates PPPs as one of the privatisation methods. This is at an advanced stage. In addition, the advisers handling this assignment have produced a Draft Privatisation Policy Document, Draft Privatisation Bill, Draft Privatisation Regulations, and Draft Privatisation Implementation Manual. All these provide for PPPs within the general framework of the Privatisation Programme. Whether the country requires to develop a totally new legal framework or merely build on the strength of existing legal frameworks is a matter that seems to have been settled. The proposal to go ahead with a bridging arrangement that entailed building on the capacity already present at the PC had been premised on the wish to move with speed. Holding other factors constant, the majority opinion favoured the development of a completely new legal framework. There are several advantages for this approach. The legislation would:

  - create a comprehensive framework to deal with the entire PPP project lifecycle;
  - provide a direct legal basis for PPP contracts;
  - provide a general framework that specifies the rights of the private sector;
  - clarify the “rules of the game” for various government entities; and
  - address some of the concerns of the private sector and the lenders.

The draft Privatisation Bill and other ancillary documentation whilst referring to PPPs are not adequately comprehensive to supplant the need for a new PPP umbrella legislation. PPP-specific legislation will cover various critical aspects of the PPP transaction including authorising the public authority to award PPP projects and providing a uniform treatment to issues that are common to PPP projects, such as:

1. Describe the form and extent of PPP in infrastructure projects;
2. Define a process for selecting projects that can be offered to the private sector;
3. Provide guidelines on project preparation so that technically feasible and financially viable projects are prepared;
4. Specify the selection process, and criteria, ensuring that the process is fair, objective, transparent and time bound;
5. Propose an approach for dealing with un-solicited proposals and direct negotiations for selection of the private sector;
6. Provide an indicative risk-sharing framework, so that risks are allocated to the party best positioned to influence the factors affecting the risk and ensuring the interest of all stakeholders is safeguarded;
7. Specify adequate levels of government support to PPP projects;
8. Propose an approach for conciliation or, if necessary, dispute resolution; and
9. Institute an agency which will coordinate PPP transactions and assume charge of sectors that are not assigned to specific line ministries.

The legislation will also specify that:

1. All bid documents be prepared in line with the provisions of the PPP legislation, sector policy and model concession agreements. On its part, the Government will provide incentives which will assist the private sector in the preparation of the project documentation;
2. The bid documents shall include project studies undertaken by the Government, draft concession agreements and offer of Government support;
3. The notice inviting participation will be adequately publicised, so as to attract all possible investors;
4. The bid process would be designed to assess the Developer’s technical, commercial (if required), managerial and financial capabilities;
5. All proposals will be evaluated on a common platform to the extent possible;
6. The Directorate of Public Procurement or other competent authority shall certify that the bidding process has been in line with the provisions of this Act, the Sector Policy and the Model Concession Agreement, if the same has been formulated;
7. Revenue objectives of the Government shall be of secondary importance in determining the selection criteria, and minimising user costs will always be of primary importance;
8. For developer selection through competitive bidding in BOOT, BOT, BOO projects, the Government shall use one or a combination of more than one of the following criteria:
   • Lowest bid in terms of the present value of user fees;
   • Highest revenue share to the Government;
   • Highest up-front fee;
   • Shortest concession period;
   • Lowest present value of the subsidy;
   • Lowest capital cost and operational and maintenance cost for projects having a definite scope;
   • Highest equity premium; and
   • Quantum of State Support solicited.
9. For BT, BLT, BTL, service contracts and management contracts that selection criteria used will be the lowest NPV of payments from the Government;

10. In case of limited response to the competitive bidding process, the PPP unit can recommend that all subsequent procurement for the project is through competitive bidding and re-negotiate the commercial and/or financial offer based on the project cost determined after the competitively bid procurement process or reject the offer and terminate the process;

11. For bids submitted by developer consortiums, the lead consortium member of a pre-qualified consortium cannot be replaced. Further, after a consortium is selected to implement the project, the lead consortium member has to maintain a specified minimum equity stake in the special purpose vehicle for a specified period of time. Replacement of other consortium members may be permitted, provided the same is not prejudicial to the original strength of consortium as determined in course of the evaluation of the Request for Qualifications; and

12. In ordinary circumstances, the Government will not negotiate on the financial/commercial offer submitted by the private sector. In exceptional circumstances, if negotiations are required, the reasons for the same will be documented and recorded. The Government will negotiate the financial and/or commercial offer only with the private sector participant submitting the most competitive proposal. Negotiations shall be restricted to only those conditions that have been enclosed as part of the bid.

- **Timing and Sequencing of Requests for Approval**

The potential to have two legal instruments governing PPPs: the amended Privatisation Legislation and the new umbrella PPP Legislation which the current assignment will produce as one of its outputs could present some problems. It will be critical that these should be reconciled with each other. One option could be that the PC should take charge of PPPs that involve existing assets whilst the new PPP Coordinating Agency could be responsible for the rest. Section 29 of the revised Privatisation Law refers to new PPP regulations. These are yet to be prepared. It is suggested that such reference should be to the new PPP legislation that is to be prepared as an output of the ongoing IP3 assignment.

Initially, the thinking was that it would take a long time for the new PPP umbrella law to be crafted and adopted by the authorities. It was felt then that amending the Privatisation law to incorporate PPPs would be an appropriate bridging arrangement until the PPP-specific law was introduced. This is not the case any more. The two exercises are now happening at about the same time. This should be seen as fortuitous. There is one further point that needs to be
borne in mind. The party representation in the country’s Parliament is asymmetrically in favour of the opposition. This does present some difficulty for the Government sometimes in managing its business in the National Assembly. It is unpredictable as to how a matter before the Assembly will be resolved. Besides, the subject of privatisation does not enjoy much favour across both sides of the political divide. In the circumstances, we believe that too many submissions to the National Assembly could actually poison their opinion against this initiative. Such frequent proposals could potentially provide the National Assembly with the excuse to throw out a particular motion. Parliament might perceive the Government as adopting a “trial and error” strategy for developing possible solutions to the whole issue of PPPs in this country. Thus, we are proposing a departure from the original approach. We propose that the Government presents one package of reforms to the National Assembly. The package would comprise:

- Firstly, a new PPP-specific law through which:
  - a new implementation unit is to be set up to manage the PPPs;
  - a comprehensive framework to deal with the entire PPP project lifecycle would be created;
  - a direct legal basis for PPP contracts would be provided; and generally provide the “rules of the game” for various players;
- Secondly, a revised Privatisation Law in which the PC is empowered to use PPPs as a privatisation methodology. However, such PPPs would be undertaken in a manner that is consistent with the new PPP legislation; and
- Thirdly, appropriate amendments would be effected to other crucial pieces of legislation to facilitate PPPs in Malawi.

The above initiatives would need to be seen as sides of the same coin.

   
   Basically, the Labour Relations Act is concerned with the protection of freedom of association and collective bargaining. The Act also provides for dispute resolution machinery, tripartite Labour Advisory Council and Industrial Relations Court. The Employment Act on the other hand, seeks to reinforce and regulate minimum standards of employment and to ensure equity for enhancing industrial peace, accelerating economic growth and social justice.

   - Case Law - The Stanbic Case:
     
     Employers in Malawi are currently concerned with the decision of the High Court in what has come to be referred to as The Stanbic Case⁴. The Minister of Labour, in exercise of the powers conferred by section 35 of the Employment Act, 2000 issued the Employment Act (First Schedule) (Amendment) Order, 2002. The Order sought to revoke the First Schedule to the Employment Act, 2000 and

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⁴ The State and Attorney General v. Mary Khawela and Others – Misc. Civil Cause No. 7 of 2004 (unreported)
permit an employee whose services had come to an end to collect his pension and any additional sum by which the severance allowance exceeds the pension.

The Stanbic staff argued that they should receive both amounts in full and sought redress from the courts. The High Court decided that the Minister had power to amend the formula for calculating severance allowance payable but not the eligibility criteria i.e. the Minister could not decree that an employee was no longer entitled to the severance allowance. Consequently, employees now can collect both their pension and the full severance allowance.

ISSUES:
- This decision has made employers nervous as those who had sought to insure themselves by taking out pension schemes are actually being penalised. An appeal has been lodged with the Malawi Supreme Court but legal opinion does not hold out much hope on this front. Efforts are in hand to secure the amendment of the Act by Parliament. If this matter does not get resolved, employers are considering dissolving pension schemes. We feel that any private sector partner considering PPPs in Malawi will not feel particularly encouraged by the state of the law vis-à-vis severance payments.
- The Employment Act provides that upon winding up of a company, employees’ terminal benefits take priority over other payments. This however, contradicts the priority provided under the Companies Act in such situations. This situation needs to be corrected.
- The Employment Act demands that upon termination of employment, pension must be paid out within six weeks. Generally, this is a matter outside the control of the individual employer as most pension schemes are managed by third parties. The employer in such a case is not in control of the payment. Again, an appropriate amendment would be helpful.
- Finally, the newly found freedoms which came with the new democratic dispensation in 1994, brought with them new challenges. The Employment Act for instance, provides for procedures for conducting strikes. However, the majority of strikes are actually illegal. Legally established procedures which need to be observed before staff may proceed on strike are usually ignored. This needs to change to assure investors of predictability regarding industrial action.

4. The Land Act, the Land Amendment Act, and the Registered Land Act and the Land Policy
Firstly, we will discuss the Land Policy that was adopted by the Government a couple of years ago. In general, many commentators perceive the Land Policy as a deterrent to investment in industries with long gestation periods. The relatively short leasehold period of 50 years that has now replaced the conventional 99 years is at the centre of the growing view. Another concern is the ostensible discriminatory nature of the policy in relation to the treatment of nationals as opposed to non-nationals.

In relation to the Land Laws, a number of issues come to the fore:
Of the three types of land available in Malawi, customary land is by far the largest type. This is held by chiefs and communities without formal title to it. Although there is provision for converting such land to titled land, the process is long and laborious.

ISSUES:
- A sizeable number of PPP projects will probably involve land. If securing title to such land becomes a very lengthy process, it may place a serious bottleneck to the realisation of those PPP projects. Additionally, even though the PPP project may not require title to land, investors may wish to use such title as security for loan capital.

A new Section 24D stipulates that where freehold land is held by a person who is not a citizen of Malawi for a continuous period of more than two years and during that period such person has not shown his intention to develop the land, the Minister may demand voluntary surrender of the land within a period of ninety days. The new provision appears to discriminate against non-citizens.

ISSUE:
- The appearance of discrimination does not auger well for investment. Such a law, if deemed necessary, ought to apply uniformly to all.

Section 2(l) of the Land Act Regulations, provides that a lessee may not transfer or otherwise dispose of any portion of leasehold property (including mortgaging the land) without first obtaining written consent from GoM. Section 24A of the Land Act requires anyone wishing to offer for sale any private land to give 30 days written notice to the Minister of Lands.

ISSUE:
- Stories abound of delays in the issuance by the Government of the consent (r. 2(l) and certificate of compliance (S.24A). This would need to change to facilitate PPPs.

5. Lands Acquisition Act
Under the above Act, the Minister may compulsorily or by agreement acquire any land if, in his opinion, it is desirable or expedient in the interests of Malawi to do so. Section 10 empowers the Minister to determine the amount of fair compensation to be paid to the person from whom the land is being compulsorily acquired.

ISSUE:
- The lack of predictability regarding amount of fair compensation and the level of discretion given to the Minister makes investors uneasy as the GOM tends to rely on the government valuation surveyors whose independence could be questioned.

6. Conveyancing Act & Stamp Duties Act
Stamp duty at the rate of three percent of the value of the property subject of the transfer or sale is payable to the Government. There is also duty, albeit a much reduced level, on a mortgage or charge.

- This is a form of tax. It could therefore very be that in trying to encourage investment in PPPs the Government may grant a general or specific waiver for this duty.

7. **Companies Act & Protected Flag, Emblems and Names Act**

PPPs can be undertaken through any myriad of vehicles, although the incorporation of a limited liability company under the Companies Act would be the commonest type. The process for securing the registration of a company in Malawi is fairly simple and straight-forward. If the name of the proposed company wishes to use the word “Malawi” or “National” or “Republic” etc, it is necessary to obtain specific approval from the Government – the Office of the President and Cabinet.

**ISSUE:**
- Stamp Duty is payable on the nominal capital of the company. This can be costly depending of the amount of the authorised share capital. To facilitate PPPs and help to make new projects viable, one of the potential incentives could be to allow the prospective investors a waiver with regard to this stamp duty.

8. **Taxation Act, Customs and Excise Act**

The Tax Act provides a tax regime for any investor, be it a citizen or non-citizen or indeed a corporate entity. With respect to resident individuals and companies, tax is levied on all income from within or deemed to be within the country. In relation to commercial operations, the Act allows (within some limitations) the carry over of operating losses in the determination of taxes payable in later years. Additionally, the employer is required to withhold employment taxes (popularly known as “Pay As You Earn” or “PAYE”).

**ISSUES:**
- A recent amendment of the Taxation Act (2005) attempts to limit to six years the ability to carry forward any tax losses. The Investment Promotion Act, on the other hand, suggests that tax losses can be carried forward indefinitely.
- Work is in hand that seeks to remove the discretion to grant tax waivers from the Minister of Finance. Any incentives for PPP projects therefore will need to be sanctioned by Parliament probably through the new Act.
- To enable PPP projects to be viable, it may be necessary to accord certain projects preferential taxation rates. The Government may wish to give this matter further thought.

9. **The National Transport Policy, 1998 & the Road Traffic Act**

High transport costs, weak infrastructure and poor access to rural areas remain important issues in the economic development of Malawi. This will prove a major consideration in the implementation of PPPs. It is as much an obstacle as it is an
opportunity for potential PPP projects. The goal of the National Transport Policy therefore is to ensure the provision of a coordinated transport environment that fosters a safe and competitive operation of commercially viable, financially sustainable, and environmentally friendly transport services and enterprises.

ISSUE:
- One would wish to see the provisions of the Road Traffic Act consistently enforced. It may help to curb the ever-increasing number of accidents on Malawi’s roads, which in turn, increases the cost of insurances.

10. Communications Act
The Communications Act deals with telecommunications, broadcasting and postal legislation. The Act creates an Authority whose board acts as the regulatory commission.

ISSUE:
- The Government granted exclusivity to an operator. A subsequent Minister simply ignored it. There is need for consistency. The decisions of the Government are not divisible. They cannot be ascribed to individuals. PPP projects are generally long-term projects. Investors will need to be assured that irrespective of ministerial changes, the Government will honour its commitments irrespective of the individual ministers who entered into such arrangements.

11. Electricity Act
The Electricity Act establishes the Electricity Council as a corporate body for the purpose of regulating the generation, supply, distribution, transmission, safety and use of electricity within Malawi.

ISSUES:
- Power outages are not unusual in Malawi. Yet assured electricity supply is critical for most industries. This is the biggest challenge for PPP projects. Most of the potential new PPP projects will rely on power to succeed. This is a bottleneck that will need to be resolved.
- The unbundling of ESCOM will generate opportunities for PPPs in generation, transmission and distribution of electricity. The private sector could generate electricity using micro hydro power plants, photovoltaic power plants, or other types of small power generating facilities.
- There is also the potential for a larger PPP in the area of power generation using coal.

12. Immigration Act
The Act regulates the entry of people into Malawi. A balance needs to be struck between the need to bring in much needed investment and the desire to keep out the undesirables.
ISSUE:
- This Act has been criticized for allowing extremely high levels of governmental discretion. It is argued that such discretion could be abused.
- Additionally, a change in the legislation to provide for timeframes within which the Government will make decisions may be helpful.

13. **Public Procurement Act**
The Act applies to all procurement carried out by procuring entities using public funds. The Act established the Office of the Director of Public Procurement who is responsible for the regulation and monitoring of public procurement in Malawi, and who is accountable and reports to and operates under the general supervision of the President.

ISSUES:
- No provisions exist currently governing the monitoring of performance.
- As the Act provides for the review of the procurement process, it seems only natural that some dispute resolution mechanism be provided for.
- There is need for the Act to refer to PPPs.

14. **Corrupt Practices Act**
The Act seeks to curb corruption in Malawi thereby advancing the welfare of the people of Malawi and their economic activity.

ISSUE:
- The recent suspension of ACB Director suggests that the body is not as independent as the Nation was led to believe. The director could have been suspended for justifiable cause. That is however, unknown as there has been no official announcement for the director’s suspension. In a democracy, these actions fuel suspicion and this is not helpful to the creation of an enabling investment environment.

15. **Export Processing Zone Act**
The Export Processing Zone Act is an enabling Act intended to provide for the establishment, operation and administration of Export Processing Zones within Malawi. An EPZ is defined as an area or building declared as such by the Minister.

ISSUE:
- No industry has as yet been declared a priority industry to allow such industry to benefit from the incentives prescribed by the Act. This has rendered the Act superfluous.

16. **The Export Incentives Act**
The Act provides export incentives to registered exporters and establishes a National Export Policy Committee.

ISSUE:
The Export Incentives Act and the Export Processing Zones Act could be merged into one Act. Both of them cover very similar matters. This is probably the reason for the long-talked about merger of MEPC and MIPA.

17. Public Finance Management Act
The purpose of the Act is to establish a system for proper management and control of public resources. The Act establishes principles of fiscal and financial policy consistent with the economic goals of the Government.

ISSUE:
- Whilst the legal provisions seem well-intentioned, it is critical that oversight responsibility resting with the Executive and the National Assembly be exercised dutifully. Otherwise, the impression may be created that no one will be held accountable for any abuses.

18. Water Works Act, 1995
The Act is meant to facilitate the establishment of water boards and water areas, ensure proper administration of such water areas and provide for the development, operation and maintenance of waterworks and waterborne sewerage sanitation systems and all other matters which are in accord with these aspirations. All water utilities in Malawi are governed by this Act although previously each had its own establishment Act.

ISSUE:
- The inability of a board to supply sufficient water could prove fatal for a PPP project. Thus, an investor is not assured of either sufficient or continuous water supply. This position does not bode well with potential investors. The Government needs to review this position carefully to see how best to address it, including giving special incentives for PPP projects in this supportive industry.
- There is a conflict between the above Act and the Local Government Act with respect to responsibility for distribution of clean water and management of waterborne sanitation services. This would need to be resolved.

19. Investment Promotion Act
The Investment Promotion Act encourages private investment into Malawi. For this purpose, it established the Malawi Investment Promotion Agency. The function of the Agency is to be the central facilitator of investment in Malawi.

ISSUE:
- Apart from identifying investors, MIPA does has no mandate to procure, monitor, or evaluate projects.

20. The Immunities and Privileges Act
The Immunities and Privileges Act states that the Government is not immune as regards “disputes of a commercial nature or proceedings relating to any interest of
the state in, *inter alia*, immovable property in Malawi, proceedings relating to its membership (shareholding) of a body corporate which has members which are not states”.

**ISSUE:**
- It would appear that enforcement of judgments against the Government by way of execution is still a matter that is not well-settled. This will cause concern to potential investors. It is critical that the Government should demonstrate that it respects the decisions of the courts by timely settling judgment debts.

**21. Capital Markets Development Act**
The Act provides a framework for creating a capital market, encouraging investments and regulating the market. The Exchange has developed procedures for listing and maintaining listed securities.

**ISSUE:**
- Malawi now has a stock market on which a number of stocks are listed and traded. However, the market still remains shallow. This has implications on the ability of investors to raise significant capital for PPP projects.

**22. Banking Act, 1989**
The Banking Act was adopted in 1989. The principal aim of the Act is to provide for the regulation of the business of banking in Malawi conducted by commercial banks and financial institutions. The Act also provides for the Reserve Bank of Malawi’s supervision over banking business.

**ISSUES:**
- Banks in Malawi earn their revenues, in the main, from their investment in government paper, and, to a lesser extent from their higher margin service businesses (primarily the purchase of foreign currency), rather than in credit activity. This means that securing capital in Malawi can be a problem in terms of insistence of banks on security and the high cost of debt capital.

- It is important to develop the capability of Malawi’s banking sector to appraise infrastructure projects, evaluate and adequately manage risks so that long-term funds could be released to this sector.

- Interest rates must come down to promote economic growth and to facilitate PPPs. This will, of necessity, involve a reduction in government borrowings, a reduction in reserve requirements which the Malawian banks need to deposit with the Reserve Bank, and a reduction in the high spreads of the banking sector.

- The creation of venture funds, in cooperation with donor countries and NGOs, should be encouraged.
• Institute private sector infrastructure financing facility with donor assistance

• Encourage commercial lending into PPPs by blending with donor financing

• Through regulatory guidelines, Malawi could explore the option of directing bank lending into infrastructure projects.

• Provide tax incentives for investments/lending to infrastructure projects.

23. The Exchange Control Act
The Exchange Control Act gives guidance and authority to authorized dealers to transact on behalf of Reserve Bank of Malawi on matters concerning foreign exchange. Briefly, the Exchange Control Act sets out the parameters for dealings in foreign currencies.

ISSUE:
• As a result of the structure of the economy, foreign exchange availability can be problematic. This has consequences on the stability of the currency. Investors in PPP projects will view this as a risk.

The purpose of the Competition and Fair Trading Act is to establish and encourage an environment in Malawi that is conducive to fair trade and the development of competitive markets in goods and services. To support this goal, the Competition Act establishes the Competition Fair Trading Commission.

ISSUE:
• The commission was set up sometime last year. The secretariat is yet to become fully operational. Time is of the essence. It is suggested that PPPs as other facets of the economy will benefit from a fully operationalised Competition Commission.

25. The Public Health Act
The Public Health Act governs the health sector supported by the Nurses and Midwives Act; the Medical Practitioner and Dentists Act; the Pharmacy, Poisons and Medicines Act; and the Anatomy Act. CHAM’s administration of private hospitals is an example of PPPs at work. The government pays the salaries of staff while delivery of service is undertaken by CHAM.

ISSUE:
• The main Act governing this sector is very old and could do with an overhaul that will seek to bring it in line with the realities of our world today.

26. The Education Act
The Ministry of Education administers the education sector through the Education Act.
ISSUES:

- This Act is outdated. It could do with some review to bring it up to date.
- The sector needs to establish appropriate mechanisms to control quality.
- Develop systems that can ensure that there is transparency and accountability for the delivery of services.

27. The Environment Management Act
The Act’s main objective is to provide for the protection and management of the environment. The Act entitles every person to a right to a clean and healthy environment.

ISSUE:
- Enforcement remains a huge challenge. There are competing demands between the need for development and the realisation that such development has to be undertaken in an environmentally friendly manner for it to be sustainable.

28. Anti Money Laundering and Finance of Terrorism Bill
Malawi does not have a law against money laundering or financing of terrorism. This has implications on the cost of doing business internationally.

ISSUE:
- The cost of doing business internationally is said to have increased by as much as US$1.0 million per month by reason that Malawi does not have any legislation governing money laundering. A Bill has been before Parliament for a number of months. The approval of this bill is now a matter of great concern to captains of industry in Malawi.

Potential areas for PPP Projects

Local Assemblies:
- Under the government’s decentralisation policy, there are proposals to devolve water distribution and sales to local assemblies. The water boards will supply water in bulk to water reservoirs in the local assembly areas, from where local assemblies will distribute it to consumers in their areas, bill and collect the charges. However, local assemblies do not have the capacity to handle such tasks. This offers good potential for PPPs.
- Local Assemblies are also responsible for road maintenance. This is another area for PPPs.
- There are other infrastructure services as well which could be procured under PPP arrangements.
- Expanding the water kiosks is another possibility for PPPs.
- There are many opportunities for PPPs at the municipal level. Services such as sewage treatment, refuse collection, sanitation, city cleaning, landscaping, public transportation, kiosks to provide services to the public, public lavatories, car parking, covered markets, recreational facilities and even social services, all could be provided by the private sector in partnership with local governments.
Health:
- Management of hospital infrastructure.
- There are a number of opportunities for PPPs in the health sector such as cleaning, catering, laundry, etc, but there are concerns over the capacity of the private sector to deliver their part of the bargain.

Education:
- The private sector could operate public schools under a management contract with the schools remaining publicly owned and funded.
- Public schools and universities could contract out to the private sector to manage canteen, healthcare, and related facilities.
- The private sector could design, finance, construct and/or maintain and operate the facility under suitable contract with the public sector. There are several contractual variants possible for this, such as Build-Operate-Transfer, Build-Transfer-Lease and Build-Lease-Transfer.

Forestry Act
- The new policy also recognises the role of the private sector not only in utilisation but also in the management of the forest resources.
- Since many parties external to forestry department have significant influence on the sector, institutional change has to be examined from a broader perspective, although the Forestry Department remains the institution with vested interest in drawing attention to the needs and potentials of the sector. There are two key institutional changes that are underway as the result of the change in forest policy, namely industrial plantations management by the private sector and community management of forest and tree resources.

Tourism
The Ministry of Information and Tourism is already familiar with PPP projects. The commonest are the concessions and management agreements of tourist facilities in various parts of the country. Ownership remains with the Government. Management is what is transferred to the private sector. The level the further risk to be transferred to the private sector will be a function of whether it is a concession or a mere management agreement.

- As Malawi remains one of the unspoilt destinations for eco-tourism but with very little infrastructure, opportunities are huge. Development in this sector remains dismal despite the Government’s declaration that this sector is a high priority sector. Partnership with the private sector thus presents one of the only remaining viable option for the development of tourism.

Transport Sector
- The construction and upgrading of the road sector has provided new opportunities for local contractors. Toll-roads are likely not to be viable, unless the government is willing to subsidise them, as the traffic volumes are too low.
Telecommunications and Postal Services

- Privatising the retail operations of the post office. Presently franchising of loss-making post offices is underway. Mail distribution and transport could be outsourced. There is also potential for outsourcing of services such as cleaning, maintenance, etc.
- Opportunities for PPPs in telecommunications will be greater once Malawi Telecoms is privatised. Outsourcing of services, maintenance, and installation are all possibilities for PPPs.

Energy Sector

- There are opportunities for PPPs in small-scale power generation, such as photovoltaic power plants, micro hydro power plants, and the conversion of medium- and low-voltage customers to become electricity retailers.
- There are opportunities for outsourcing billing and collection, cleaning, maintenance, staff services, etc.
- There are possibilities of developing the coal sector using PPPs, although foreign partners would be required because of high levels of capital investment and technology.
- The development of strategic fuel reserves could be done as a PPP. Current reserves are between ten to fifteen days of demand.

Law Development - Executive Branch

Most of the laws that are tabled in the National Assembly for debate emanate from the Executive Branch of the Government. A Government Department will provide the general outline – instructions so to speak – to the Ministry of Justice covering the gist of the issue that the instructing Ministry wishes to achieve through the proposed legislation. The Ministry of Justice then drafts the Bill and after it is agreed with the instructing Government Department, it is thereafter presented to the Cabinet Committee on Legal Affairs. If the matter subject of the law affects a sector committee of Cabinet, the draft law needs to be considered by that sector Cabinet committee as well before it goes to full Cabinet. It is only after the Cabinet has approved the Bill that it is published in readiness for consideration by the National Assembly.

Parliament

Parliament in Malawi comprises not just the elected representatives of the people (MPs) but also the President. Legislative powers are vested in Parliament. Malawi has a unicameral system of Parliament. As discussed above, Bills are mainly tabled by the Executive Branch of Government. Any Bill needs to go through several stages: readings, committee stage, reporting stage, voting and passing into an Act of Parliament. Once passed, the President may assent or reject it. If it is rejected, it may be brought back to the House and if it is again adopted by the National Assembly, the President has no option over the matter but to assent to the Bill.

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5 There are draft laws that come into Parliament through Private Members' Bills, but these are by far in the minority.
6 In the case at hand, it is possible that the Cabinet Committee on Commerce may wish to review any new legislation that affects investment in the PPP arena.
Implementation Unit - Legal Mandate
There is growing unanimity that it would be preferable to have a unit that would facilitate PPPs in Malawi. This report discusses options for the possible institutional set up. Possible agencies could include the PC, MIPA, Office of the Directorate of Public Procurement, Department of Statutory Corporations, Public Enterprise Reform and Monitoring Unit (PERMU) or indeed a government department/ministry. What would be the ramifications from a legal point of view?

- **Existing Organisation**
  If an existing organization such as the PC or MDC were to be used for this purpose, we would suggest that the enabling Act should mention such an organization by name. As such a body would play a regulatory role, it would be beneficial to give it appropriate legal authority. This is true also if the Government chose to utilize a government ministry. Our view in such a case is that it would again be preferable to accord such government legal authority probably through the PPP legislation. Any administrative arrangements that would seek to utilize a government body without the accompanying legal authorization would be no improvement on the current status quo.

- **New Organisation**
  If a new organization altogether was to be set up, this could be achieved through the PPP-specific legislation. This would probably be the most natural choice, as it would obtain the highest legal recognition. Conceivably, there would be no legal obstacle why such an entity could not be a company incorporated under the Companies Act. We must confess though that since this organization would play regulatory role more than a trading one, we would have no immediate justification for proposing that this route be adopted.

### UPDATED IMPLEMENTATION TIMETABLE

<table>
<thead>
<tr>
<th>Activity Description</th>
<th>RESPONSIBLE OFFICE</th>
<th>TIMING &amp; RATIONALE</th>
</tr>
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<tbody>
<tr>
<td>Finalise PPP Concept and Synchronize with other</td>
<td>PC, &amp; Ministry of</td>
<td>Immediate; to avoid duplication of effort and the possibility of initiatives with conflicting agendas</td>
</tr>
<tr>
<td>initiatives by other GoM Departments</td>
<td>Finance</td>
<td></td>
</tr>
<tr>
<td>Develop PPP Policy Document</td>
<td>PC &amp; Ministry of</td>
<td>By the end of October, 2006. IP3 have been recruited to undertake this work.</td>
</tr>
<tr>
<td></td>
<td>Finance</td>
<td></td>
</tr>
<tr>
<td>Secure Approval of PPP Policy Document</td>
<td>PC, OPC, &amp;</td>
<td>By the end of December, 2006.</td>
</tr>
<tr>
<td></td>
<td>Ministry of Finance</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>• IP3 will provide a crude draft of the PPP-specific Legislation by the end of the</td>
</tr>
<tr>
<td>Current Assignment</td>
<td>Responsible Ministry/Department</td>
<td>Timeframe</td>
</tr>
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<td>-----------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Secure approval of the Cabinet Committee on Legal Affairs</td>
<td>PC &amp; JUSTICE</td>
<td>By May, 2007</td>
</tr>
<tr>
<td>Secure approval of Cabinet</td>
<td>JUSTICE</td>
<td>By June, 2007</td>
</tr>
<tr>
<td>• Cabinet now meets once every week. How quickly Cabinet considers a matter is a function of how much the sponsoring Minister is pushing it and the perceived importance of the particular matter.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adopt Policy and Draft PPP Legislation</td>
<td>Justice &amp; Ministry of Finance</td>
<td>By June, 2007</td>
</tr>
<tr>
<td>• Consideration may be given to a low key publicity initiative</td>
<td></td>
<td></td>
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<tr>
<td>Submit PPP Legislation to Parliament</td>
<td>JUSTICE</td>
<td>By August, 2007</td>
</tr>
<tr>
<td>• The pipeline of Bills awaiting presentation to the National Assembly is large. Thus, to get a Bill through the approval process in the National Assembly could be an unpredictable exercise.</td>
<td></td>
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</tr>
<tr>
<td>Upon approval of the PPP Legislation by Parliament, secure Assent of Bill by the President</td>
<td>JUSTICE</td>
<td>By October/November, 2007</td>
</tr>
<tr>
<td>• This should really be a matter of course unless during the approval process, Parliament introduces significant amendments to the PPP Legislation.</td>
<td></td>
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</tr>
<tr>
<td>Ensure that New PPP Act is made operational</td>
<td>Ministry of Finance</td>
<td>By January, 2008</td>
</tr>
<tr>
<td>• This will require a Media Campaign that will aim at informing the public as to what is being contemplated by the new law.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resource the PPP Implementation Agency and Launch the Programme</td>
<td>Ministry of Finance</td>
<td>By April, 2008</td>
</tr>
<tr>
<td>• Preferably by the time the Act is being made operational, the funding should have been provided for. This may entail the making of appropriate provisions in the 2007/2008 GoM Budget.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Set up PPP Implementation Office and fill vacancies &amp; generally undertake the recruitments</td>
<td>PC &amp; Ministry of Finance</td>
<td>By April, 2008</td>
</tr>
<tr>
<td>• It is envisioned that by this date, the Head of the Implementation Agency will have been recruited and he/she in turn will facilitate the recruitment of the rest of the identified support staff.</td>
<td></td>
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</tr>
</tbody>
</table>
Matt I unsure what to do from here; I suggest just insert the work Dye complete and ignore this or stick it in another appendices as possible ‘alignment requirements

This section includes the outline and draft text for the amended Public Enterprise Act.

**PPP ACT, Outline**

**ARRANGEMENT OF SECTIONS**

**PART I PRELIMINARY**

Preamble
Recitals

1. Short title
2. Interpretation

**PART II THE PPP UNIT**

3. Establishment of the Unit
4. Functions of a Government Authority
5. Act confers additional powers
6. Saving of prior agreements
7. Changes in the status of Government Authorities
8. Types if infrastructure
9. Composition of the Board
10. Co-opted Members
11. Tenure of office and vacancies
12. Allowances of members
13. Authority and functions of the Board
14. Provision of advice
15. Proceedings of a Board meeting
16. Committees of the Board
17. Minutes of Meetings
18. Disclosure of interest
19. Seal of the Unit
PART III SECRETARIAT

20. Secretariat of the Agency
21. Director General of the Agency
22. Other Employees
23. Seal of the Unit

PART V FINANCIAL PROVISIONS

24. Raising resources for the PPP arrangements
25. Minister may guarantee loans
26. Minister may advance moneys from the Consolidated Fund
27. Parliament to appropriate resources to fund the activities of the Agency
28. Agency or Government Authority to keep record of cost of transactions
29. Funding sources of the Agency
30. Financial year of the Agency
31. Agency to keep books of account

PART VI PUBLICATION OF INFORMATION

32. Publication of certain information
33. Annual Reports
34. Progress Reports
35. Unauthorised persons not to publish or disclose information
36. Oath of Secrecy
37. Prohibition against disclosure of confidential information

PART VI MISCELLANEOUS

38. Prohibition against seeking to exert undue influence on officers
39. Vesting of existing property
40. Prior leases and agreements
41. Arbitration
42. Falsification of Information
43. Penalties for offences
44. Conflict with other laws
45. Promulgation of regulations

Part I – Preliminary

Preamble
An Act to provide for the establishment of a body to be known as the PPP Development Agency and to define its functions, to provide for the legal, regulatory and institutional framework for the development of public-private partnerships in Malawi and to provide for matters connected with or incidental to the foregoing.

Recitals
WHEREAS the Government of Malawi recognizes the urgent need for adequate and sustainable infrastructure as a prerequisite to Malawi’s private sector led economic development and acknowledges its inadequate capacity to provide such infrastructure by itself;

AND WHEREAS in order to accelerate the development of the required infrastructure, the Government deems it necessary to take comprehensive measures to create an investment climate that will promote its provision by the private sector on the basis of fair business principles;

AND WHEREAS in order to encourage and facilitate collaboration between the Government and the private sector in the provision and operation of the said infrastructure, it is necessary to protect and secure the interest of consumers, community, and the private sector operators in a fair manner;

AND WHEREAS the Government of Malawi considers it desirable to establish a favourable legislative framework to promote and facilitate the development and implementation of privately financed infrastructure projects by enhancing transparency, fairness, and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;
BE IT THEREFORE ENACTED by the Parliament of Malawi as follows –
PART I
PRELIMINARY

Short Title
1. This Act may be cited as the Public-private Partnership Development Act, 2007

Interpretations
2 (1) In this Act, unless the context otherwise requires -
“Agency” means the Public-private Partnership Development Agency or PPP Development Agency established by Section 3;
“appropriate Minister” means any Minister of the Government —
(a) on whom functions stand conferred, or
(b) who has general responsibility,
in respect of or in connection with a public-private partnership;
“bank” has the meaning ascribed thereto in the Banking Act;
“Board” means the Board of the Agency;
“Chairperson” means the chairperson of the Agency appointed under Section 9;
“company” means a company within the meaning of Section 2 of the Companies Act, 1984;
“concessionaire” means a person that carries out an infrastructure project under a concession contract with a Government Authority;
“confidential information” in relation to Section 59 includes —
(a) information that is designated by the Board or the Minister to be confidential either as regards particular information or as regards information of a particular class or description,
(b) commercial information in relation to contractors, consultants, providers of finance or any other person, and
(c) proposals of a commercial nature or tenders submitted to the Agency by contractors, consultants or any other person.
“consultant” means any person engaged by the Agency to undertake any work of a specialized nature connected with the work of the Agency and includes banks, public accountants, lawyers and valuers;
“construction” includes building, refurbishment, maintenance, repair, improvement, demolition, extension and replacement;
“direct agreement” has the meaning given to it by Section 4(1)(c);
“Director General” means the chief executive officer of the Agency;
“equity” means any financial interest resulting from the purchase of shares for a consideration;
“financial institution” has the meaning ascribed thereto in the Banking Act;
“functions” includes powers and duties, and a reference to the performance of functions includes, with respect to powers and duties, a reference to the exercise of the powers and the carrying out of the duties;
“Government Authority” means any of the persons and bodies outlined in the First Schedule;
“immediate family member”, in relation to a person to whom Section 18 applies, means—
(a) the person’s spouse, child, parent, brother, sister, grandchild, grandparent, or
(b) a person with whom the person is cohabiting,
“infrastructure facility” includes an existing asset or an asset to be provided under a public-private partnership arrangement and means physical facilities and systems that directly or indirectly provide services to the general public;
“investor” means an individual, a company, an established fund, a mutual fund, a financial institution, or any other institution, entity or commercial venture whether local or foreign, and in any format of enterprise recognized by the Companies Act, intending to invest in infrastructure facility under a public-private partnership arrangement, but does not include the Government, a Local Authority or a public enterprise;
“Local Authority” means a District Assembly, City Assembly, Town Assembly, or Municipal Assembly, for the purposes of the Local Government Act, 2001;
“Minister” means the Minister for Finance;
“operation” includes management and maintenance;
“partner” has the meaning given to it by Section 4(1)(a);
“public investment projects” includes projects involving public-private partnership arrangements;
“public-private partnership arrangement” has the meaning given to it by Section 4(1);
“Public Accounts Committee” means the Committee of Parliament of Malawi established under its Standing Orders and mandated to examine and report to the Parliament on the appropriation accounts and reports of the Auditor General;
“Public Appointments Committee” means the Public Appointments Committee established under Section 56(7) of the Constitution;
“public-private partnership” means a form of cooperation in which the Government partners with a private sector partner to build, expand, improve, or develop an
enterprise in which each Government and the private sector partner contribute one or more of know-how, financial support, facilities, logistical support, operational management, investment or other input required for the successful deployment of a product or service, and for which each Government and the private sector partner is compensated in accordance with a pre-agreed plan, typically in relation to the risk assumed and the value of the result to be achieved;

(2) In this Act—
(a) a reference to a Section or Schedule is a reference to a Section of, or a Schedule to, this Act unless it is indicated that reference to some other enactment is intended,
(b) a reference to a subsection or paragraph is a reference to the subsection or paragraph of the provision in which the reference occurs, unless it is indicated that reference to some other provision is intended, and
(c) a reference to any other enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended, extended or adapted by or under any subsequent enactment.

Part II – The PPP Agency

Establishment of the Agency

3. (1) There is hereby established a body to be known as the Public-Private Partnership Development Agency which shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name, and to acquire, hold and dispose of land or an interest in land, and to acquire, hold and dispose of any other property and with power, subject to this Act, to do or perform all such acts and things as a body corporate may by law do or perform.

(2) The Minister shall by Order published in the Gazette appoint a day to be the day on which this Act shall come into operation.

Functions of a Government Authority

4. (1) Without prejudice to the functions of a Government Authority under any other enactment, a Government Authority may, either itself or in conjunction with any other person (including another Government Authority)—
(a) enter into a public-private partnership arrangement with a person (in this Act referred to as a “partner”) for the performance of functions of the Government Authority specified in the arrangement in relation to—
(i) the design and construction of an infrastructure facility, together with
the operation of services relating to it and the provision of finance, if
required, for such design, construction and operation; or
(ii) the construction of an infrastructure facility, together with the
operation of services relating to it and the provision of finance, if
required, for such construction and operation; or
(iii) the design and construction of an infrastructure facility, together with
the provision of finance for such design and construction; or
(iv) the provision of services relating to an infrastructure facility for not
less than 5 years and the provision of finance, if required, for such
services;

(b) to the extent that a public-private partnership arrangement involves an
existing infrastructure, the Government Authority will only undertake such
work after ensuring that the Privatisation Unit has no plans to undertake similar
work in terms of the Public Enterprises (Privatisation) Act;

(c) subject to subsection (4), arrange or provide for a payment to a partner,

(d) enter, where appropriate, into an agreement (in this Act referred to as a
“direct agreement”) with a person who has arranged or provided funding for the
partner for the carrying out of the public-private partnership arrangement,

(e) transfer an interest, or part of an interest, of the Government Authority in an
infrastructure facility or part of an infrastructure facility, to the partner, or,
subject to the prior consent of the appropriate Minister or, if the Government
Authority is a Minister of the Government, subject to the consent of the Minister
for Finance, to a nominee of the partner by transfer, assignment, conveyance,
grant of lease or licence or otherwise,

(e) take a transfer of an interest of the partner or a nominee of the partner, in an
infrastructure facility or part of an infrastructure facility, by transfer, assignment,
conveyance, grant or surrender of lease or licence or otherwise.,

(2) Subject to subsection (3) and (4) the Government Authority may, whether or not for
consideration, transfer, convey or assign its interest in any real or personal property
(including leaseholds) owned or held by such Government Authority to a company
formed under Section 13 for the purpose of enabling such a company to carry out its
financing functions in connection with public investment projects.

(3) A Government Authority shall not convey, assign or transfer any such property to
any such company unless the consent of the Minister and the appropriate Minister has
been obtained.
(4) A Government Authority may attach such terms and conditions as it considers appropriate to any transfer, conveyance or assignment pursuant to subsection (1).

(5) The Minister may, on the advice of the Agency and with the approval of the Cabinet, from time to time, issue policy directions prescribing further objectives and forms of public-private partnership arrangements and the guidelines to be followed for the proper and effective implementation of the provisions of this Act, and such objectives and guidelines shall be valid for all purposes unless inconsistent with the Act and only to the extent of the inconsistency. In accordance with this provision, the Public-private Partnerships Development Policy of 2007 constitutes the current policy of the Government.

(6) A public-private partnership arrangement may include terms and conditions in relation to the performance by the partner concerned of the partner’s obligations under the arrangement as agreed by the Government Authority.

(7) (a) Where a payment is arranged or provided for pursuant to Section 4(1)(c) the Minister may, at any time until entry into the public-private partnership arrangement by the Government Authority, give directions to the appropriate Minister in relation to the aggregate value of the moneys committed to such arrangements, as he or she considers necessary.

(b) The appropriate Minister shall, in performing his or her functions, have regard to any directions given by the Minister under this Section.

(8) Functions conferred on a Government Authority by this Section are in addition to and not in substitution for any other functions of the Government Authority.

(9) The public-private partnership arrangements undertaken pursuant to the provisions of this Act shall be carried out based on the principle of fairness; transparency; and accountability.

**Act confers additional powers**

5. (1) For so long as it continues in force, a public-private partnership arrangement shall operate to confer on the partner concerned the functions of the Government Authority specified in the arrangement, subject to any terms and conditions so specified.

(2) A function conferred on a partner by a public-private partnership arrangement—

(a) may be performed by the partner in the partner’s own name, subject to the general superintendence and control of the Government Authority concerned,
(b) shall, notwithstanding such arrangement, continue to be vested in the Government Authority concerned concurrently with the partner and may be performed by either or both of them.

(3) The conferral of a function of a Minister of the Government on a partner by a public-private partnership arrangement shall not affect the Minister’s responsibility to Parliament or as a member of the Government for the performance of the function.

(4) In this Section “functions”, in relation to a Government Authority, includes functions of any other Government Authority to be performed by it pursuant to an agreement or arrangement duly made by it with that other Authority.

**Saving of prior agreements**

6. Where an agreement or arrangement was entered into on a date before the commencement of this Act, and that agreement or arrangement would have been a public-private partnership arrangement or direct agreement if this Act had been in operation on such date, then the agreement or arrangement, as the case may be, shall have effect and be taken always to have had effect as if this Act was in operation when the arrangement or agreement was entered into.

**Changes in the status of Government Authorities**

7. (1) Where the Minister, following consultation with any appropriate Minister, is of the opinion that—

(a) a public authority not standing specified as a Government Authority in the First Schedule ought, having regard to the purposes of this Act, to stand so specified, or

(b) having regard to the amalgamation, dissolution or change of name of a Government Authority, the Government Authority ought to cease to be specified in the Schedule or to be so specified under a different name or description, he or she may, by Order, amend the Schedule by adding the name of a person or body to it or by deleting the name of a person or body specified in it or by so adding and deleting, as the case may be.

**Types of infrastructure**

8. A Government Authority can enter into a public-private partnership arrangement involving the following types of infrastructure—

(a) transportation infrastructure; including road, rail, marine, and air transport;

(b) infrastructure for the extraction, processing and distribution of potable water;
(c) waste water infrastructure;
(d) telecommunication infrastructure;
(e) energy infrastructure;
(f) mineral, petroleum and natural gas infrastructure;
(g) education and health infrastructure; and
(h) any other type of infrastructure as the Minister may from time to time designate
by notice published in the Gazette.

Composition of the Board

9. (1) The Board shall consist of a seven members who will be appointed by the
President by notice published in the Gazette, and every such appointment shall be
subject to confirmation by the Public Appointments Committee.
(2) In appointing members under subsection (1), the President shall have regard to the
need for continuity of service on the Board, so that at least half of the members
appointed thereunder shall be reappointed for the next term of office.
(3) Once confirmed by the Public Appointments Committee the members shall elect
from amongst their number a chairperson of the Board.
(4) Subject to term limits herein, once appointed, members can only be discharged in line
with the provisions of Section 11 below.
(5) The Chairperson and members shall have at least two of the following attributes-
   (a) more than ten years’ experience in commercial enterprise in the capacity of
      management;
   (b) professional experience of ten years or more in the financial, accounting,
      legal, economic or other relevant industry in a position of responsibility in which
decisions were required to be taken by the potential member on behalf of the
employer;
   (c) professional, regulatory or governmental experience in anti-competition or
anti-trust compliance or enforcement for no less than ten years;
   (d) ten years or more experience as a government official responsible for
management of fiscal responsibility, budget, financial accountability or similar
tasks;
   (e) certification as a public accountant in Malawi or elsewhere having at least the
standards of Malawi for certification;
   (f) certification as an attorney in Malawi or elsewhere having at least the
standards of Malawi for certification;
(g) ten years professional experience in a position requiring expertise in economics; or
(h) achievement of the level of university degree, in finance, law, accounting, economics and/or public policy.

(6) The President shall, in so far as is practicable and having regard to relevant experience, ensure an equitable balance between men and women and public and private sector experience in the composition of the Board.

Co-opted Members
10. (1) The Board may in its discretion at any time and for any period invite any person, to attend any meeting of the Board or of any of its committees and take part in the deliberations of the meeting, but such person or officer shall not be entitled to vote at such meeting.
(2) Section 18 shall apply, \textit{mutatis mutandis}, to a person or an officer attending a meeting of the Board pursuant to subsection (1).

Tenure of office and vacancies
11. (1) Subject to Section 9 above, a member of Board shall hold office for a period of four years and shall be eligible for reappointment the, but the office of that member shall become vacant -
(a) if he or she resigns his or her membership by letter addressed to the President and the resignation shall take effect from the date specified in the letter or upon receipt of the letter by the President, whichever is the later; or
(b) upon his or her death; or
(c) if he or she is absent, without the consent in writing of the Chairperson or without valid excuse, from three consecutive meetings of the Agency of which he or she has had notice; or
(d) if he or she becomes an undischarged bankrupt; or
(e) if he or she participates directly or indirectly in a public-private partnership arrangement; or
(f) makes a composition or arrangement with creditors; or
(g) is convicted of an indictable offence in relation to a corporate body, including an offence under the Companies Act, 1984; or
(h) is convicted of an offence involving fraud or dishonesty, or
(i) is disqualified or restricted from being a director of any company; or
(j) if a member of the Board is for stated reasons removed from membership of
the Board by the President if, in the President’s opinion, the member has become
incapable through ill-health of performing his or her functions.

(2) If a member of the Board dies, resigns, retires, becomes disqualified or is removed
from office, the President may appoint a person to be a member to fill the casual vacancy
so occasioned and the person so appointed shall be appointed in the same manner as,
and for the remainder of the term of office of, the member of the Board who occasioned
the casual vacancy.

(3) A member of the Board whose period of membership expires by the passage of time
shall be eligible for re-appointment as a member of the Board, but shall not serve more
than 2 terms.

**Allowances of members**

12. The members of the Board shall each be paid such remuneration and such
allowances for expenses as the Minister shall from time to time determine.

**Authority and functions of the Board**

13.(1) The functions of the Board shall be to plan, manage, implement and control
public-private partnership arrangements, or other form of undertaking public
investment projects in Malawi and in particular, but without derogation from the
generality of the foregoing—

(a) to advise any Government Authority of what, in the opinion of the Agency,
are the optimal means of financing the cost of public investment projects in order
to achieve value for money;

(b) to formulate, and recommend to the Minister for approval, public-private
partnership policy guidelines;

(c) to implement public-private partnership arrangements in accordance with
this Act and the regulations issued hereunder;

(d) to advance moneys (including repayable loans and equity) and to enter into
other financial arrangements in respect of projects approved by any Government
Authority;

(e) to provide advice to any Government Authority on all aspects of financing:
refinancing and insurance of public investment projects to be duly undertaken by
means of public-private partnership arrangements or within the public sector,

(f) to form, or cause to be formed, companies, subject to the approval of the
Minister, for the purpose of securing finance for public investment projects...
where, in the opinion of the Agency, it is necessary or expedient to do so in order
to discharge its functions under this Act;
(g) to monitor progress of the implementation of public-private partnership
arrangements in Malawi and report same to the Cabinet on a regular basis that is
no less often than on a quarterly basis,
(f) to prepare a long term action plan and submit such plan to the Minister for
approval; and
(g) to do all such things as are necessary or incidental or conducive to the better
carrying out of the functions of the Agency specified in this Act.

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

(3) In carrying out its functions, the Board shall comply with all guidelines and
instructions that the Minister may, from time to time, issue to the Agency.

**Provision of advice**

14. (1) In providing advice under this Act, the Board shall have regard to—
(a) such policy directions as the Minister may issue for the purposes of this
paragraph to Government Authorities from time to time in relation to the
financing of public investment projects, and
(b) such policy guidance as the Minister may issue for the purposes of this
paragraph to Government Authorities from time to time in relation to the
process, procedures and regulation generally of public-private partnership
arrangements.

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

(3) The provision of advice by the Agency under this Act may include, where
appropriate, advice as regards the engaging of consultancy services across the range of
technical and other relevant expertise necessary to undertake such projects.

(4) Subject to any guidelines that the Minister may from time to time issue for the
purposes of this Section and other provisions of the Act in respect of public investment
projects, including —
(a) the type of project,
(b) the size of the project,
(c) the stage of development of the project, and
(d) any other relevant factors that will determine projects on which the Agency’s advice will be sought,

a Government Authority shall seek the advice of the Agency as soon as is practicable before undertaking a public investment project.

(5) In the discharge of functions under this Act the Agency shall at all times exercise due care, skill, prudence and diligence and act in the utmost good faith.

Proceedings of a Board Meeting

15. (1) The Board of the Agency shall, subject to this Act—

(a) ensure that the functions of the Agency are being performed effectively,
(b) set the strategic objectives and targets to be met by the Agency,
(c) ensure that the objectives and targets are met,
(d) be responsible for preparation and presentation, for approval or reporting, of an Annual Work Plan, Annual Budgets and Five-year Corporate Strategic Plan, and
(e) meet for the transaction of business at least once every three months at such places and at such times as the Chairperson may determine.

(2) A special meeting of the Board may be called by the Chairperson upon written notice of not less than fourteen (14) days received from any member of the Board and shall be called if at least four members so request in writing.

Provided that if the urgency of any particular matter does not permit the giving of such notice, a special meeting may be called upon giving a shorter notice, so long as the member of the Board calling the meeting and alleging the emergency contacts directly and advises in person each member of the Board of the meeting, its time, date and place, and provides a description of the emergency, and does all possible to enable such member to attend the meeting in person or by conference call. In the case of emergency meetings, attendance by real time telephone conference shall be the equivalent as attendance in person.

(3) Half of the members of the Board shall form the quorum of any meeting of the Board.

(4) There shall preside at any meeting of the Agency-

(a) the Chairperson; or

(b) in the absence of the Chairperson such member as the Chairperson may designate or such member as the members present and forming a quorum may elect from among their number for the purpose of that meeting.

(5) The decision of the Board on any matter before any meeting shall be that of the majority of the members present and voting at the meeting and, in the event of an
equality of votes, the person presiding shall have the casting vote in addition to his or her deliberative vote.

(6) No member of the Board shall attend to the business of his office within the Board through a representative and where a member is unable to attend any meeting of the Board he may request that his apologies for failure to attend be recorded, except for instances within this Act where attendance is permitted by the member via real time conference call.

(7) The Board may act notwithstanding one or more vacancies among its members or at the meeting, provided there is a quorum at the meeting.

(8) Subject to this Act, the Board shall regulate, by standing orders or otherwise, the procedure and business of meetings of the Board.

Committees of the Board

16. (1) The Board may establish committees and delegate to any such committee such of its functions as it considers necessary, and the Board may appoint as members of a committee established under this subsection persons who are or are not members of the Agency and such persons shall hold office for such period as the Agency may determine.

(2) Subject to any special or general direction of the Board, any committee established under this Section may regulate its own procedure.

Minutes of Meetings

17. The Board shall cause minutes to be kept of the proceedings of every meeting of the Agency and of every meeting of a committee of the Agency.

Disclosure of interest

18. (1) A Board member, an employee of the Agency or a consultant to the Agency who, or whose immediate family member, is directly or indirectly interested in a private or professional or official capacity in any matter relating to any public investment projects being considered by the Agency shall disclose such interest.

(2) Where a member of the Board or a member of the staff of the Agency, or a consultant, adviser or other person engaged by the Agency, has a pecuniary interest or other beneficial interest in, or material to, any matter which falls to be considered by the Board or by the Agency itself, he or she shall—

(a) disclose to the Board or, as the case may be, to the Director General, the nature of his or her interest in advance of any consideration of the matter,
(b) neither influence nor seek to influence a decision to be made in relation to the matter, and
(c) take no part in any consideration of the matter, and—
   (i) absent himself or herself from the meeting or that part of the meeting
during which the matter is discussed, and
   (ii) not vote on a decision relating to the matter.
(3) For the purposes of this Section, but without prejudice to the generality of subsection
(1), a person shall be regarded as having a beneficial interest if—
   (a) he or she or any immediate family member or any nominee of his or her or
any connected person, is a member or director of a company or any other body
which has a beneficial interest in, or material to, a matter referred to in that subsection,
   (b) he or she or any immediate family member is in partnership with or is in the
employment of a person who has a beneficial interest in, or material to, such a matter,
   (c) he or she or any immediate family member is a party to any arrangement or
agreement (whether or not enforceable) to which such a matter relates, or
   (d) any immediate family member has a beneficial interest in, or material to, such
a matter.
(4) For the purposes of this Section a person shall not be regarded as having a beneficial
interest in, or material to, any matter—
   (a) by reason only of an interest of his or hers or of any company or of any other
body or person mentioned in subsection (2) which is so remote or insignificant
that it cannot reasonably be regarded as likely to influence a person in
considering, discussing or in voting on, any question with respect to the matter,
or in performing any function in relation to that matter, or
   (b) if he or she can show that at the material time he or she was unaware, and in
the circumstances could not possibly have been aware, that a immediate family
member had an interest referred to in subsection (2).
(5) Where an interest is disclosed pursuant to this Section, the disclosure shall be
recorded in the minutes of the meeting of the Board, or otherwise duly recorded by the
Director General.
(6) Where at a meeting of the Board, or otherwise within the Agency, a question arises as
to whether or not a course of conduct, if pursued by a person, would constitute a failure
by him or her to comply with the requirements of subsection (1), the question shall be
determined by the chairperson of the meeting or by the Director General, as appropriate,
whose decision shall be final, and where such a question is so determined, particulars of
the determination shall be recorded in the minutes of the meeting of the Board or
otherwise duly recorded by the Director General.

(7) Where the Minister is satisfied, on being informed by the Board, that a member of the
Board (including the Chairperson) has contravened subsection (1), the Minister shall
decide the appropriate action (including removal from office) to be taken in relation to
that member of the Board. The Minister may, if he or she thinks fit, remove that member
of the Board (including the Chairperson) from office.

(8) Where the Chairperson is satisfied that a consultant, adviser or other person engaged
by the Agency, has contravened subsection (1), the Chairperson shall decide the
appropriate action to be taken.

(9) Where the Director General of the Agency is satisfied that a member of the staff of the
Agency has contravened subsection (1), the Director General of the Agency shall decide
the appropriate action to be taken.

(10) The Agency may issue and publish guidelines as to what may further constitute an
interest for the purpose of this Section.

**Seal of the Agency**

19. (1) The Agency shall, as soon as practicable after its establishment, procure a seal.

(2) The seal of the Agency shall be authenticated by the signature of—

(a) the Chairperson and one other member of the Board, or

(b) 2 members of the Board, authorised by the Board to act in that behalf.

(3) Judicial notice shall be taken of the seal of the Agency and every document
purporting to be an instrument made by the Agency and to be sealed with the seal of the
Agency (purporting to be authenticated in accordance with this Section) shall be
received in evidence and be deemed to be such instrument without proof unless the
contrary is shown.

(4) Any contract or instrument which, if entered into or executed by a person not being a
body corporate, would not require to be under seal may be entered into and executed by
the Director General or such as senior officials of the Agency authorised by the Board for
that purpose.

**Part III - Secretariat**

**Secretariat of the Agency**
20. The Secretariat of the Agency shall consist of the Director General and other employees of the Agency appointed under this Part.

**Director General of the Agency**

21. (1) The Agency shall appoint, on such terms and conditions as it may determine, a Director General of the Agency who shall be the chief executive officer of the Agency and shall in addition perform such duties as the Board shall assign to his office and ensure the effective administration and implementation of the provisions of this Act. The Director General shall, at a minimum, meet the qualification requirements of a member as stipulated in Section 9(5).

(2) The Director General shall –

(a) report and be accountable to the Board; and

(b) carry out such duties as the Board shall assign to him or her.

(3) Without derogation from the generality of the responsibilities and duties of the Director General conferred under subsection (1), the duties of the Director General shall include the following -

(a) to formulate and submit to the Board proposals and recommendations for the development of public investment projects;

(b) to prepare for consideration by the Board the policy framework, programme strategies, selection criteria and annual targets for public investment projects;

(c) to establish operational guidelines and transparent procedures for preparation and implementation of public investment projects; and

(d) to carry out studies on issues relating to improving the business environment and recommend policy changes to facilitate public investment projects.

(4) The Director General or, in his absence, such other officer of the Agency as the Director General may designate shall attend meetings of the Board and may address such meetings, but shall not vote on any matter-

Provided that the person presiding at any meeting may, for good cause which shall be recorded in the minutes of the meeting require the Director General or such other officer to withdraw from such meeting. For the purpose of this Subsection good cause shall mean exclusively that highly sensitive or confidential information is to be revealed or that information concerning the Director General is to be discussed, including by way of example, performance, salary, contract terms, etc. and in that case the Director General shall be excused from the meeting only for the time of the highly sensitive or confidential discussion and such departure from the meeting due to such discussion shall be recorded in the minutes of the meeting.
Other employees

22. The Agency may appoint, on such terms and conditions as it may determine, such other employees, subordinate to the Director General, as it considers necessary for the performance of its function and to assist the Director General in discharging his duties and responsibilities.


Raising resources for PPP arrangements

47. (1) Subject to subsection (2) and to such guidelines as the Minister may issue, the Agency may from time to time raise money in any currency.

(2) The combined net aggregate of the principal of all moneys raised and outstanding by the Agency and any companies formed under Section 13(1)(f) shall not exceed such total sum as the Minister from time to time set and publish in the Gazette.

(3) The Agency may engage in transactions of a normal banking nature with the Minister or any Government Authority and any other persons for the purpose of performing any of its functions.

(4) The Agency may open and operate bank accounts, including accounts in currencies other than the currency of the Republic of Malawi.

Minister may guarantee loans

48. (1) The Minister may subject to the provisions of the Public Finance Management Act, 2003, guarantee the due repayment by the Agency or any companies formed under Section 13(1)(f) of the principal of any moneys raised by the Agency or such companies, or the payment of interest on such moneys or both the repayment of the principal and the payment of the interest, and any such guarantee may include a guarantee of the payment by the Agency or such companies of Unit and incidental expenses arising in connection with such moneys.

(2) The Minister shall, as soon as may be after the expiration of every financial year, lay before Parliament a statement setting out with respect to each guarantee given under this Section during that year or given at any time before, and in force at, the commencement of that year—

(a) particulars of the guarantee, including the remaining life of the guarantee;

(b) in case any payment has been made by the Minister under the guarantee before the end of that year; and
(c) the amount of moneys covered by the guarantee which was outstanding at the end of that year.

(3) Moneys paid by the Minister under a guarantee under this Section shall be repaid to the Minister, with interest on it at such rate or rates as he or she appoints, by the Agency or any company referred to in subsection (1), as the case may be, within 2 years from the date of the advance of the moneys out of the Consolidated Fund.

(4) If the amount is not repaid as stipulated in subsection (3) above, and without prejudice to any other method of recovery, the same shall be recoverable as a simple contract debt in any court of competent jurisdiction.

(5) In relation to guarantees given by the Minister under this Section in respect of moneys in a currency other than the currency of the Republic of Malawi—

(a) each of the references to principal, each of the references to interest and the reference to Unit and incidental expenses in subsection (1) shall be taken as referring to the equivalent in the currency of the Republic of Malawi of the actual principal, the actual interest and the actual Unit and incidental expenses, respectively, such equivalent being calculated according to the cost in the currency of the Republic of Malawi of the actual principal, the actual interest or the actual Unit and incidental expenses, as may be appropriate, at the time the calculation is made;

(b) the reference to moneys in subsection (2) shall be taken as referring to the equivalent in the currency of the Republic of Malawi of the actual moneys, such equivalent being calculated according to the rate of exchange for that currency and the currency of the Republic of Malawi at the time the calculation is made; and

(c) each of the references to moneys in subsections (3) and (4) shall be taken as referring to the cost in the currency of the Republic of Malawi of the actual moneys.

(6) Any payment by the Minister under this Section shall be a charge on the Consolidated Fund.

**Minister may advance moneys from the Consolidated Fund**

49. (1) The Minister may advance moneys from the Consolidated Fund to the Agency or a company formed under Section 13(1)(f) on such terms and conditions as he or she may determine.

(2) Moneys advanced under subsection (1) may include moneys for the purpose of making an equity investment in such a company.
Parliament to appropriate resources to fund the activities of the Agency

50. The expenses incurred by the Minister in the administration of this Act shall be paid out of moneys provided by the Parliament and those incurred by any other Minister of the Government shall, to such extent as may be sanctioned by the Minister, be paid out of such moneys.

Agency or Government Authority to keep record of cost of transactions

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

Funding sources of the Agency

52. (1) Subject to subsection (2), the funds of the Agency shall consist of such moneys as may -

(a) be appropriated by Parliament for the purposes of the Agency;
(b) be received by the Agency under subsection (2); and
(f) otherwise vested in or accrued to the Agency from government allocations.

(2) The Agency may -

(a) accept money by way of grants or donations from any source in or outside Malawi provided that such source and their principals, relatives, related entities, representatives or affiliated parties of any type, have not theretofore participated directly or indirectly in any public investment projects in Malawi and shall thereafter be disqualified from participating in any public investment projects in Malawi;
(b) subject to the approval of the Minister, raise, by way of loans from any source in or outside Malawi, such money as it may require for the discharge of its functions, provided that such source shall comply with the restraints in subsection (a) above; and
(c) charge and collect fees in respect of programmes, publications, seminars, documents, consultancy services and other services provided by the Agency.

(3) The Agency may invest in such manner as it thinks fit such of its funds as it does not immediately require for the performance of its functions.
Financial year of the Agency
53. The financial year of the Agency shall be the period of twelve months ending on 31st July in each year or on such other date as the Minister may specify by Order published in the Gazette, provided that the first financial year of the Agency may be such shorter or longer period than twelve months as the Minister shall determine but being not less than six months nor more than eighteen months.

Agency to keep Books of Account
54. (1) The Agency shall cause to be kept proper books of account and other records relating to its account.
(2) The accounts of the Agency shall be audited annually by independent auditors appointed by the Agency.

Part VI – Publication of Information
Publication of certain Information
55. (1) The Agency shall maintain detailed records of -
(a) the public-private partnership arrangement transactions that have been undertaken;
(b) the registered consultants, valuers, lawyers, public accountants and banks dealing with the public-private partnership arrangements;
(c) the bidders and bid prices;
(d) the successful bidders and the reason for selecting such bidders;
(e) the cost of transactions and any other special conditions of the public-private partnership arrangements; and
(f) any other matters as the Agency may deem appropriate.
(2) The Agency shall prepare for approval of the Board and thereafter subsequent publication of an Annual Business Plan and a Three-year Strategy Plan.

Annual Reports
(1) As soon as practicable, but not later than six months after the expiry of each financial year, the Agency shall submit to the Minister a report concerning its activities during that financial year.
(2) The report referred to in subsection (1) shall be in such form as the Minister shall approve and shall include information on the financial affairs of the Agency and there shall be appended to the report -
(a) an audited balance sheet;
(b) an audited statement of income and expenditure; and
(c) such other information as the Agency may consider appropriate or as the
Minister may direct.

(3) The Minister shall, during the meeting of the Parliament next following receipt by
him of the report referred to in subsection (1), lay the report before the Parliament, but
otherwise the Agency may publish the report for public-private partnership
arrangement to the public.

**Progress reports**

57. The Agency shall every quarter, at the end of September, December, March, and June
produce a report to Cabinet on its activities during that period, giving details of bids
received and selected and other particulars and shall publish the report for sale to the
public.

**Prohibition against publication or disclosure of certain information**

58. (1) No person shall, without the consent in writing given by or on behalf of the
Agency, publish or disclose to any person, otherwise than in the course of his duties, the
contents of any document, communication or information which relates to, and which
has come to his knowledge in the course of, his duties under this Act.

(2) Any person who knowingly contravenes subsection (1) shall be guilty of an offence.

**Oath of secrecy**

59. Every -

(a) member of the Board;
(b) member of a committee of the Board;
(c) employee of the Agency;
(d) consultant in the service of the Agency,

shall, upon assumption of his office, take such oath of secrecy as may be
approved by the Agency or as may otherwise be prescribed under this Act or
presented as a guideline in the regulations. Provided, however, that the Agency
and its consultants shall not be constrained by such oath of secrecy where
responding to challenges or claims made against the Agency or any member by
third parties, provided further that the response does not disclose more
information than reasonably required to address fully the challenge or claim.

**Unauthorised persons not to publish or disclose information**
60. (1) Save as otherwise provided by law, a person shall not disclose confidential information obtained by him or her while performing (or as a result of having performed) duties under this Act as—
   (a) a member of the Board,
   (b) Director General,
   (c) a member of the staff of the Agency, or
   (d) an adviser or consultant to the Agency, or an employee of such person whilst performing duties relating to such advice or consultation, or obtained while in performance of a service contract, unless he or she is duly authorised by the Agency to do so.

(2) A person who contravenes subsection (1) is guilty of an offence and is liable on conviction to a fine not exceeding K100,000 or to imprisonment for a term not exceeding 12 months or to both.

(3) Nothing in subsection (1) shall prevent disclosure of information to the Board, the Director General or the Minister.

**Part VII – Miscellaneous Provisions**

*Prohibition against seeking to exert undue influence on officers*

61. (1) A person who communicates with a member of the Board, the Director General, a member of the staff of the Agency, or a consultant, adviser or other person engaged by the Agency, for the purpose of influencing improperly his or her consideration of any matter which falls to be considered or decided by the Agency is guilty of an offence.

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

(3) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding K100,000 and/or imprisonment for a term not exceeding 12 months.

*Vesting of existing property in the Agency*

62. Any property procured or acquired for the purposes of the public sector investment programme shall, on commencement of this Act, vest in the Agency.

*Prior leases and agreements*
63. (1) Any leases and agreements entered into in relation to enterprises to be privatized under this Act in anticipation of the coming into force of this Act are hereby nullified.

(2) Subject to the laws of Malawi including the laws on limitations, the Agency shall have power to inquire into the public-private partnership arrangement of any public enterprise effected at any time before 1996 to determine whether or not the public-private partnership arrangement was done in the best public interest.

(3) Subject to the laws of Malawi, including the laws on limitations, where the Agency is of the opinion that the public-private partnership arrangement referred to in subsection (2) was sufficiently damaging to the public interest so as to be considered improper, it may declare such transaction to be *ultra vires* for reasons it shall report publicly in writing, and the Agency shall have the power to renegotiate the purchase of the public enterprise in question with the new owner thereof, following, as far as possible, the principles and procedures outlined in this Act.

**Arbitration**

64. Any dispute between an investor, a partner, a Government Authority and the Agency arising from or relating to a public-private partnership arrangement shall be settled by arbitration in accordance with the Arbitration Act.

**Falsification of information**

65. (1) A person who knowingly -

(a) falsifies any information;

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

(c) solicits for use by any person not authorized under this Act any confidential information, relating to the privatisation of a public enterprise shall be guilty of an offence.

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

**Penalty for offences**

66. A person guilty of an offence under this Act shall be liable to a fine of K100,000 or of an amount equivalent to the financial gain or loss generated by the offence, if such amount be greater, and/or to imprisonment for five years.

**Conflict with other laws**
67. To the extent that the provisions of the Public Procurement Act and any other laws are in conflict with the provisions of this Act, the provisions of this Act shall prevail.

**Promulgation of Regulations**

68. The Minister, on the advice of the Agency, may promulgate regulations prescribing-
   (a) tender procedures;
   (c) pre-qualification and registration of bidders procedures;
   (d) public announcement requirements;
   (g) negotiation guidelines;
   (h) final transaction monitoring guidelines;
   (i) Pre and post public-private partnership arrangement audit requirements;
   (j) Any forms required for the purposes of this Act;
   (k) Anything required to be prescribed under, or for the purposes of, this Act; and
   (l) such other matters as are necessary or conducive for the better carrying out of this Act.

Passed in Parliament this _____ day of ______, two thousand seven.

**Clerk of Parliament**

**First Schedule**

*Government Authority* shall include:
   1. A Ministry or Department of the Government,
   2. A Regional Authority,
   3. A Local Authority, and
   4. The National Roads Authority.

**Second Schedule**

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List of Projects that can be negotiated without following the provisions of the Act
Annex B. DRAFT REGULATIONS

PROcedures for Public Private Partnership Arrangements

46. Selection of Concessionaire
47. Procedures for pre-selection proceedings
48. Prequalification criteria
49. Formation of bidding consortia
50. Evaluation of expressions of interest
51. Procedures for request for proposals
52. Information to be contained in Request for Proposals
53. Request for Proposals to set out principal terms
54. Amendment of request for proposals
55. Criteria for evaluating technical and financial proposals
56. Evaluation of proposals
57. Resubmission of qualification statement
58. Ranking of proposals and ensuing negotiations
59. Negotiations of a concession contract without competitive procedures
60. Engagement of concessionaire without following procedures in the Act
61. Unsolicited proposals will be considered in exceptional cases
62. Procedures for dealing with unsolicited proposals
63. When an unsolicited may be considered
64. Government Authority may require to establish a basis of comparison for unsolicited proposal
65. Proposals shall be treated confidentially
66. Summary of essential terms of a concession contract to be published
67. Government Authority to keep record of proceedings
68. Prohibition against officials participating in public-private partnerships arrangements

Bidder may file a claim for loss, etc

1. Definitions

In these regulations, unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Act, has the same meaning, and –
“affordability” means that the financial commitments to be incurred by a Government Authority in terms of the public-private partnership arrangement can be met by funds –

(a) designated within the Government Authority’s existing budget for the infrastructure facility to which the agreement relates; and/or
(b) destined for the Government Authority in accordance with the Ministry of Finance’s future budgetary projections for that Government Authority;

“Controlling Officer” means any person appointed by the President or other appointing authority who is –

(a) the head or principal person in charge of a Ministry or Department or public enterprise; and
(b) charged with the duty to, or who actually does, collect, receive, disburse or deal in any way with any public money, or a person who is charged with the purchase, receipt, custody, or disposal of, or the accounting for, any public resources or public securities;

“Government property” includes all movable and immovable property belonging to the Government as well as intellectual property rights vested in the Government;

“Project Officer” means a person identified by the Controlling Officer of a Government Authority, who is capable and appropriately qualified to manage a PPP to which that Government Authority is party from its inception to its expiration or termination;

"public enterprise" means a corporation, board, Unit, company, parastatal body or similar body, corporate or unincorporate, in which the Government has direct or indirect ownership, equity or interest and includes partnerships, joint ventures or any other form of business arrangement or organization or any commercial entities or commercial assets howsoever held or created in which the Government has direct or indirect interest but does not include a Government department;

“transaction adviser” means a person or persons appointed in writing by a Controlling Officer of a Government Authority, who has or have appropriate skills and experience to assist and advise the Government Authority in connection with a PPP, including the preparation and conclusion of a Public-private partnership agreement; and

“value for money” means that the provision of the infrastructure facility or the use of Government property by a partner in terms of the Public-private partnership agreement results in a net benefit to the Government Authority defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

2. Exclusive competency of Controlling Officers

2.1 Only the Controlling Officer of a Government Authority may enter into a Public-private partnership agreement on behalf of that Government Authority.
3. Project inception – Ministry of Economic Planning and Development Approval

3.1 As soon as the Government Authority identifies a project that may be concluded as a PPP, the Controlling Officer must in writing –
   (a) Seek the approval of the Ministry of Economic Planning and Development through the Agency for the inclusion of the project on the Government’s priority list of development projects pursuant to the country’s Economic Growth and Development Strategy;
   (b) upon securing the approval from the Ministry of Economic Planning and Development referred to in (a) above, to satisfy the Agency that adequate expertise within that Government Authority exists to proceed with the PPP;
   (c) appoint a Project Officer from within or outside the Government Authority; and
   (d) appoint a transaction adviser if the Agency so advises.

3.2 The Ministry of Economic Planning and Development approval referred to in regulation 3.2 shall be regarded as Ministry of Economic Planning and Development Approval.

4 Feasibility study – Ministry of Finance Approval: Level I

4.1 To determine whether the proposed PPP is in the best interests of a Government Authority, the Controlling Officer of that Government Authority must undertake a feasibility study that –
   (a) explains the strategic and operational benefits of the proposed PPP for the Government Authority in terms of its strategic objectives and government policy;
   (b) describes in specific terms –
      (i) in the case of a PPP involving the performance of a Government function, the nature of the infrastructure facility concerned and the extent to which this function, both legally and by nature, may be performed by a partner; and
      (ii) in the case of a PPP involving the use of Government property, a description of the Government property concerned, the uses, if any, to which such Government property has been subject hitherto and a description of the types of use that a partner may legally subject such Government property to;
   (c) in relation to a PPP pursuant to which a Government Authority will incur any financial commitments, demonstrates the affordability of the PPP for the Government Authority;
   (d) sets out the proposed allocation of financial, technical and operational risks between the Government Authority and the partner;
   (e) demonstrates the anticipated value-for-money to be achieved by the PPP; and
   (f) explains the capacity of the Government Authority to procure, implement, manage, enforce, monitor and report on the PPP;
4.2 A Government Authority may not proceed with the procurement phase of a PPP without prior written approval of the Ministry of Finance for the feasibility study.

4.3 The Ministry of Finance approval referred to in regulation 4.2 shall be regarded as Ministry of Finance Approval Level I.

4.4 If at any time after Ministry of Finance Approval Level I has been granted in respect of the feasibility study of a PPP, but before the grant of Ministry of Finance Approval III in respect of the PPP agreement recording that PPP, any assumptions in such feasibility study are materially revised, including any assumptions concerning affordability, value for money and substantial technical, operational and financial risk transfer, then the Controlling Officer of the Government Authority must immediately –

(a) provide the Ministry of Finance through the Agency with details of the intended revision, including the purpose and impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility study; and

b) ensure that the Ministry of Finance is provided with a revised feasibility study after which the Ministry of Economic Planning and Development may grant a revised Ministry of Finance Approval Level I.

5 Procurement – Ministry of Finance approvals: Levels IIA and IIB

5.1 Prior to the issuing of any procurement documentation for a PPP to any prospective bidders, the Government Authority must obtain through the Agency approval from the Ministry of Finance for the procurement documentation, including the draft Public-private partnership agreement.

5.2 The Ministry of Finance approval referred to in regulation 5.1 shall be regarded as Ministry of Finance Approval Level IIA.

5.3 The procurement procedure must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective and consistent with the provisions of the Act;

5.4 After the evaluation of the bids, but prior to appointing the preferred bidder, the Government Authority must submit a report through the Agency for approval by the Ministry of Finance, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid and including any other information as required by the Ministry of Finance.

5.5 The Ministry of Finance approval referred to in regulation 5.4 shall be regarded as Ministry of Finance Approval Level IIB.

6 Contracting Public-private partnership agreements – Ministry of Finance Approval: III
6.1 After the procurement procedure has been concluded but before the Controlling Officer of a Government Authority concludes a Public-private partnership agreement, that Controlling Officer must obtain approval from the Ministry of Finance –
(a) that the Public-private partnership agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as approved in terms of regulation 4.2 or as revised in terms of regulation 4.4;
(b) for a management plan that explains the capacity of the Government Authority, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and
(c) that a satisfactory due diligence including a legal due diligence has been completed in respect of the Controlling officer’s and the proposed partner in relation to matters of their respective competence and capacity to enter into the Public-private partnership agreement.

6.2 The Ministry of Finance approval referred to in regulation 6.1 shall be referred to as Ministry of Finance Approval Level III.

7 Management of Public-private partnership agreements

7.1 The Controlling Officer of the Government Authority that is party to a Public-private partnership agreement is responsible for ensuring that the Public-private partnership agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain with the assistance of the Agency such mechanisms and procedures as approved in the Ministry of Finance Approval Level III for –
(a) measuring the outputs of the Public-private partnership agreement;
(b) monitoring the implementation of and performances under the Public-private partnership agreement;
(c) liaising with the partner;
(d) resolving disputes and differences with the partner;
(e) generally overseeing the day-to-day management of the Public-private partnership agreement; and
(f) reporting on the Public-private partnership agreement in the Government Authority’s annual report.

7.2 A Public-private partnership agreement involving the performance of an infrastructure facility does not divest the Controlling Officer of the Government Authority concerned of the responsibility for ensuring that such infrastructure facility is effectively and efficiently performed in the public interest or on behalf of the public service.

7.3 A Public-private partnership agreement involving the use of Government property by a partner does not divest the Controlling Officer of the Government Authority concerned of the responsibility for ensuring that such Government property is appropriately protected against forfeiture, theft, loss, wastage and misuse.
8 Amendment and variation of Public-private partnership agreements

8.1 The prior written approval of the Ministry of Finance is required for any material amendments to a Public-private partnership agreement, including any material variations to the outputs therein, or any waivers contemplated or provided for in the Public-private partnership agreement.

8.2 The Ministry of Finance will approve a material amendment only if it is satisfied that the Public-private partnership agreement, if so amended, will continue to provide –
   (a) value for money;
   (b) affordability; and
   (c) allocation of risks.

8.3 The Controlling Officer must substantially follow the procedure prescribed by regulations 4 and 6 for obtaining such Ministry of Finance approval.

9 Agreements binding on the Government

9.1 A Public-private partnership agreement or an agreement amending a Public-private partnership agreement, binds the Government only if the agreement was entered into on behalf of a Government Authority –
   (a) by the Controlling Officer of that Government Authority; and
   (b) if all Ministry of Finance approvals required in terms of these regulations have been granted by the Ministry of Finance in respect of the PPP.

Selection of the Concessionaire

23. The selection of the concessionaire shall be conducted in accordance with the provisions of this Act and the Regulations.

Procedures for pre-selection proceedings

24. (1) The Government Authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

(2) The invitation to participate in the pre-selection proceedings shall be published in accordance with the Regulations issued pursuant to the provisions of this Act.

(3) To the extent not already required by the Regulations, the invitation to participate in the pre-selection proceedings shall include at least the following –
   (a) A description of the infrastructure;
   (b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the Government Authority;
   (c) Where already known, a summary of the principal terms of the concession required by the Government Authority;
(d) The manner and place of submission of applications for pre-selection and the
deadline for the submission, expressed as a specific date and time, allowing
sufficient time for bidders to prepare and submit their applications; and
(e) The manner and place for solicitation of the pre-selection documents.

(4) To the extent not already required by the Regulations, the invitation to participate in
the pre-selection documents shall include at least the following-
(a) The pre-selection criteria in accordance with Section 25;
(b) Whether the Government Authority intends to waive the limitation on
participation of consortia set forth in Section 26;
(c) Whether the Government Authority intends to request only a limited number
of pre-selected bidders to submit proposals upon completion of the pre-selection
proceedings in accordance with Section 26(2) and, if applicable, the manner in
which this selection will be carried out; and
(d) Whether the Government Authority intends to require the successful bidder
to establish an independent legal entity established and incorporated under the
laws of Malawi in accordance with Section 13(1);

(5) For matters not provided for in this Section, the pre-selection proceedings shall be
conducted in accordance with the Regulations.

**Prequalification criteria**

25. In order to qualify for the selection proceedings, interested bidders must meet
objectively justifiable criteria that the Government Authority considers appropriate in
the particular proceedings, as stated in the pre-selection documents. These criteria shall
include at least the following-

(a) Adequate professional and technical qualifications, human resources,
equipment and other physical facilities as necessary to carry out all the phases of
the project, including design, construction, operation and maintenance;
(b) Sufficient ability to manage the financial aspects of the project and capability
to sustain its financing requirements; and
(c) Appropriate managerial and organisational capability, reliability and
experience, including previous experience in operating similar infrastructure
facilities.

**Formation of bidding consortia**

26. (1) The Government Authority, when first inviting the participation of bidders in the
selection proceedings, shall allow them to form bidding consortia. The information
required from members of the bidding consortia to demonstrate their qualifications in accordance with Section 25 shall relate to the consortium as a whole as to its individual participants.

(2) Unless otherwise authorised by the Agency and stated in the pre-selection documents, each member of the consortium may participate, either directly or indirectly, in only one consortium at the same time. A violation of this requirement shall cause the disqualification of the consortium and of the individual members.

(3) When considering the qualifications of the bidding consortia, the Government Authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the public investment project.

**Evaluation of expressions of interest**

27. (1) The Government Authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the Government Authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the Government Authority to submit proposals in accordance with Sections 24 to 35.

(2) Notwithstanding subsection 28(1) above, the Government Authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number of bidders that best meet the pre-selection criteria. For this purpose, the Government Authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the list, the Government Authority shall apply only the manner of rating that is set forth in the pre-selection documents.

**Procedures for request for proposals**

28. (1) The Government Authority shall provide a set of the request for proposals and related documents issued in accordance with Section 29 to each pre-selected bidder that pays the price, if any, charged for those documents.

(2) Notwithstanding the above, the Government Authority may use a two-stage procedure to request proposals from pre-selected bidders when the Government Authority does not deem it to be feasible to describe in the request for proposals the
characteristics of the project such as project specifications, performance, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

(3) Where a two-stage procedure is used, the following provisions apply-

(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the Government Authority.

(b) The Government Authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The Government Authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the Government Authority;

(c) Following examination of the proposals received, the Government Authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators, financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposal and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The Government Authority shall indicate in the record of the selection proceedings to be kept pursuant to Section 44 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the Government Authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with Sections 24 to 35.

Information to be contained in Request for Proposals

29. To the extent not already required by the Regulations, the request for proposals shall include at least the following information-

(a) General information as may be required by the bidders in order to prepare and submit their proposals;
(b) Project specifications and performance indicators, as appropriate, including the Government Authority’s requirements regarding safety and security standards and environmental protection;
(c) The contractual terms proposed by the Government Authority, including an indication of which terms are deemed to be non-negotiable;
(d) The criteria for evaluating proposals and the thresholds, if any, set by the Government Authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion and the manner in which the criterion and thresholds are to be applied in the evaluation and rejection of proposals.

Request for Proposals to set out principal terms
30. (1) The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security;
(2) A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of-
   (a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;
   (b) Failure to enter into final negotiations with the Government Authority pursuant to Section 35(1);
   (c) Failure to submit its best and final offer within the time limit prescribed by the Government Authority pursuant to Section 35(2);
   (d) Failure to sign the concession contract, if required by the Government Authority to do so, after the proposal has been accepted; and
   (e) Failure to provide required security for the fulfilment of the concession contract after the proposal has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

Amendment of the request for proposals
31. The Government Authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in Section 26. The Government Authority shall indicate in the record of the selection proceedings to be kept pursuant to Section 44 the justification for any revision to the request for proposals. Any such deletion,
modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

Criteria for evaluating technical and financial proposals

32. (1) The criteria for evaluation and comparison of the technical proposals shall include at least the following-

(a) Technical soundness;
(b) Compliance with environmental standards;
(c) Operational feasibility;
(d) Quality of services and measures to ensure their continuity.

(2) The criteria for evaluation and comparison of the financial and commercial proposals shall include, as appropriate-

(a) The present value of the proposed tolls, unit prices and other charges over the concession period;
(b) The present value of the proposed direct payments by the Government Authority, if any;
(c) The costs for the design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
(d) The extent of financial support, if any, expected from a public authority of the Republic of Malawi;
(e) The soundness of the proposed financial arrangements;
(f) The extent of acceptance of the negotiable contractual terms proposed by the Government Authority in the request for proposals;
(g) The social and economic development potential offered by the proposals.

Evaluation of proposals

33. (1) The Government Authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

(2) For the purposes of subsection (1) above, the Government Authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.
**Resubmission of qualifications statement**

34. The Government Authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The Government Authority shall disqualify any bidders that fails to demonstrate its qualifications if requested to do so.

**Ranking of proposals and ensuing negotiations**

35. (1) The Government Authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

(2) If it becomes apparent to the Government Authority that the negotiations with the bidder invited will not result in a concession contract, the Government Authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the Government Authority does not find the proposal acceptable, it shall terminate the negotiations with the bidder concerned. The Government Authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The Government Authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

**Negotiation of concession contracts without competitive procedures**

36. Subject to the joint approval of Directorate of Public Procurement and the Agency, the Government Authority is authorised to negotiate a concession contract without using the procedure set forth in this Act in the following cases-

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in this Act would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the Government Authority nor the result of the dilatory conduct in its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount set forth in the Second Schedule hereto;

(c) Where the project involves national defence or national security;

(d) Where there is only one source of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;
(e) In cases of unsolicited proposals falling under Section 38;
(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgment of the Government Authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award within the required time frame;
(g) In other cases where the Minister through the Agency authorises such an exception for compelling reasons of public interest.

**Engagement of concessionaire without following procedures in the Act**

37. Where a concession contract is negotiated without using the procedures set forth in Sections 24 to 35, the Government Authority shall-
   
   (a) Except for concession contracts negotiated pursuant to Section 36(c), cause a notice of its intention to commence negotiations in respect of a concession contract to be published in the Gazette;
   (b) Engage in negotiations with as many persons as the Government Authority judges capable of carrying out the project as circumstances permit;
   (c) Establish evaluation against which proposals shall be evaluated and ranked.

**Unsolicited Proposals**

38. As an exception to the provisions contained in Sections 24 to 35, the Government Authority is authorised to consider unsolicited proposal pursuant to the procedures set forth in Sections 37 to 39, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

**Procedures for dealing with unsolicited proposals**

39. (1) Following receipt and preliminary examination of an unsolicited proposal, the Government Authority shall promptly inform the proponent whether or not the project is considered to be potentially of public interest.

(2) If the project is considered to be potentially in the public interest under subsection (1) above, the Government Authority shall invite the proponent to submit as much information on the project as is feasible at this stage to allow the Government Authority to make a proper evaluation of the proponent’s qualifications and the technical and economic feasibility of the project and to determine whether the project is likely to be
successfully implemented in the manner proposed in terms acceptable to the Government Authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environment impact study and satisfactory information regarding the concept or technology contemplated in the proposal.

(3) In considering an unsolicited proposal, the Government Authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the Government Authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the Government Authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

When an unsolicited may be considered

40. (1) Except in the circumstances set forth in Section 36, the Government Authority shall, if it decides to implement the project, initiate a selection procedure in accordance with this Act if the Government Authority considers that-

   (a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

   (b) The proposed concept or technology is not truly unique or new.

(2) The proponent shall be invited to participate in the selection proceedings initiated by the Government Authority pursuant to subsection (1) and may be given an incentive or a similar benefit in a manner described by the Government Authority in the request for proposals in consideration for the development and submission of the proposal.

Government Authority to establish a basis of comparison for unsolicited proposal

41. (1) If the Government Authority determines that the conditions of subsections 38(1) (a) and (b) are not met, it shall not be required to carry out a selection procedure pursuant to the provisions of Sections 24 to 35 this Act. However, the Government Authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out subsections 2 to 4 of this section.

(2) Where the Government Authority intends to obtain elements of comparison for the unsolicited proposal, the Government Authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties
to submit proposal with the invitation for other interested parties to submit proposals within a reasonable period.

(3) If no proposals in response to an invitation issued pursuant to subsection 2 above are received within a reasonable period, the Government Authority may engage in negotiations with the original proponent.

(4) If the Government Authority received proposals in response to an invitation issued pursuant to subsection 2 above, the Government Authority shall invite the proponents to negotiations in accordance with the provisions set forth in Section 35. In the event that the Government Authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the Government Authority shall request the submission of proposals pursuant to the provisions of this Act, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with Section 38(2).

Proposals shall be treated confidentially

42. The Government Authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the Government Authority and a bidder pursuant to Sections 26(3), 35, 34, 35 or 39(3) and (4) shall be confidential. Unless required by law or by a Court Order or permitted by the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

Summary of essential terms of a concession contract to be published

43. Except for the concession contracts awarded pursuant to Section 34(c), the Government Authority shall cause a notice of the contract award to be published in the Gazette. The notice shall identify the concessionaire and include a summary of the essential terms of the concession contract.

Government Authority to keep record of proceedings

44. The Government Authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with the Public Procurement Act, 2003.

Prohibition against officials participating in Public-private Partnership Arrangements
45. No member of the Cabinet, staff member of the Government Authority, or staff member of the Ministry of Finance, or board member of the Agency or of a committee of the Agency and no employee of the Agency or consultant to the Agency or respective intimate family member shall participate in public-private partnership arrangement or a company set up for that purpose directly or indirectly.

Bidder may file a claim for loss, etc

46. A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the Government Authority by the law may seek review of the Government Authority’s acts or failures to act in accordance with Public Procurement Act, 2003.
PPP Needs Assessment and Project Selection

The first step in determining the technical profile, operations, service delivery targets, and future income and costs of the project is to perform a demand analysis. All PPP infrastructure projects should be “demand driven,” meaning that the interest on the part of Government to promote the project should be driven by a commensurate desire on the part of consumers to use the services.

Demand analysis requires that surveys be taken, which is probably one reason why demand analysis is often overlooked when governments decide to sponsor PPP projects. It is important to keep in mind that PPP projects must be financially viable, so consumer demand as a key driver of future revenues for the financial projections must be confirmed by consumer surveys. The demand analysis confirms key components that will drive the financial projections (see text box above).

Once consumer demand has been established by the survey, the selection of which PPP project to propose for Government participation, and the ranking or prioritization of those projects, is a matter of internal policies and priorities of the proposing institutions. The prospective private partners in the PPP projects will have to perform their own detailed research and analysis to confirm consumer demand, affordability, and willingness to pay. The research and analysis performed by Government institutions proposing PPP projects will be only an initial indication of consumer acceptance of the project and its tariffs.

PPP Project Evaluation and Feasibility Analysis

After completing the demand analysis to confirm that future users of the services want to have those services and are willing and able to pay the level of tariff necessary to attract private investment and increase the quantity and quality of service delivery, the next step is to perform Options Analysis and the Feasibility Study.

Options Analysis

Examining options means exploring the various ways that the desired services can be most efficiently and effectively provided. This is a complex and time-consuming process and one that is often passed over because of the complexity and time consumption. The international experience has been that potential project sponsors simply put together an “off the shelf” list of projects and propose them to the PPP Unit. What then often happens is consultants are engaged, at considerable expense, to perform the feasibility analysis and at the end of that process the fatal flaws that have previously
caused that project to not be implemented are discovered and confirmed again, the result of which is a lot of time and expense wasted and no progress toward improved service delivery.

Options analysis means staying focused on the targeted service delivery and examining all possible options for delivering those services, regardless of what projects might have already been developed or planned to a certain degree by the potential project sponsor. In performing options analysis, many factors have to be taken into consideration regarding how the potential project could impact other related forms of service delivery.

In practice, options analysis often becomes compromised by political factors. For example, if an agency proposes a light rail transit system and the options analysis reveals that it would be better to widen the highway, then a political conflict could emerge between the agency that does rail transit and the agency that does highways. There are also personal factors that come into play, as some degree of engineering and planning has to be invested before proposing a new project. The investment of these resources makes it hard for an agency to accept that a different option could be more effective and efficient.

Options analysis is a good way to ferret out possible corruption in the early stages of project development. When a government official becomes irrationally in opposition to the selection of an option other than the one he/she has proposed, then there could be a hidden financial reason why the person continues to support the first option.

Feasibility Analysis

Once the options analysis has been done, the project sponsor should conduct a pre-feasibility study. The first component of the feasibility study is the results of the demand and willingness to pay study described earlier. The reason this section is the first area of focus in the feasibility study is all well-designed PPP projects must be “demand driven.”

The second component is the options analysis described above. That analysis will show that the proposed project is likely to be the optimal method of providing the services that the user demand study revealed as being desirable and affordable to the users. This options analysis section will quickly address any fundamental issues that are likely to arise among stakeholders considering the proposed project.

Once user demand, willingness to pay, and affordability, and elimination of other options to the proposed project have been demonstrated as described above, then the next section of the feasibility study should be a detailed description of the project. In order to prepare this section, there will be a need to conduct some preliminary engineering and capital expenditure analysis. This technical and financial design and analysis does not have to be highly detailed because all of that will be done by the private partner. This is an important feature of PPP projects. Having the private partner do the detailed technical and financial design takes a burden (and cost) off of Government, and encourages private sector innovation and efficiency.
The final section of the feasibility study is the financial projections. The first part of the financial projections must be an Inputs sheet that draws data from the user demand study. Also on the inputs sheet are the capital expenditure estimates obtained from the initial engineering review. At the bottom of the sheet should be key financial indicators such as Financial Internal Rate of Return (FIRR), Economic Internal Rate of Return (EIRR), Net Present Value (NPV), Return on Equity (ROE) or Equity FIRR, and Return on Investment (ROI).

Normally, feasibility analysis is conducted in two stages: (1) a pre-feasibility study, consisting of preliminary research and analysis along with data from previous studies, is prepared to enable the PPP Unit to issue a Request for Expressions of Interest; and (2) a feasibility study, which builds upon the pre-feasibility study by providing new research and detailed analysis, to enable the PPP Unit to issue a Request for Proposals. Bidders will have to perform their own due diligence and prepare the comprehensive feasibility studies that will be required to secure project financing. Feasibility research and analysis performed by PDF consultants will be limited in scope, designed only to provide data and analysis necessary to produce reliable tender documents that have enough information and analysis to enable bidders to submit responsive proposals.

**PPP Procurement and Contracting**

The tendering and procurement process for PPP is different from standard procurement, and more complex in some ways. While standard procurement requires governments to do most of the design and engineering, and then publish tenders to invite the private sector to provide those facilities at the lowest price, PPP procurement requires governments to do only the basic design and engineering, because the tender is for delivery of the outputs rather than delivery of the facilities. Private sector providers complete the design and engineering, indicating their planned approach in their proposals, and demonstrate how this approach will comply with the service delivery requirements. This infuses private sector innovation into the project design. In PPP contracting, there are often the terms: (a) Outputs; and (b) Service Delivery Standards.

Although private sector innovation is encouraged in PPP procurement, government still has the responsibility of preparing a baseline project design, along with pre-feasibility and feasibility studies to demonstrate basic due diligence and to forecast the financial performance of the project. A pre-feasibility study is sufficient to begin the process, with a Request for Qualification (RFQ), but by the time the Request for Proposals (RFP) is issued, a complete feasibility study should have been completed to ensure that any data derived from prior reports has been updated and to ensure that government has completed enough of its due diligence and analysis to be reasonably assured that the information in the RFP is accurate. Inaccurate information in an RFP can later lead to contract disputes.

Detailed provisions regarding PPP procurement are provided in the Regulations pertaining to the PPP Act. In applying those provisions, stakeholders are reminded to adhere to these principles:
Fairness – the procurement process must be fair to all parties, i.e. the rights of all parties must be protected at each stage of procurement, and then in contract management;

Transparency – the procurement process must keep as much information as possible in the public domain, and as much information as practicable must be shared equally with all bidders, especially the methodology for selection;

Competition – in order to avoid possible conflict of interest, and in order to ensure that the most qualified bidder is selected, the procurement process must provide competition sufficient to ensure that vested interests and/or corruption do not influence selection; and

Accountability – decisions made by the parties must be open to review by stakeholders, and decision makers must be held accountable for their decisions.
Model Request for Qualifications (RFQ)

Independent Power Producer (IPP) Project

Pre-Qualification Information and Instructions to Potential Applicants

1. Scope of Bid

1.1. Public Power Company (PPC) hereby invites applications for prequalification from interested parties for the generation and supply of electricity to PPC, through the development on a Build-Own-Operate (“BOO”) basis the ____ Plant Project, of ____ MW ± 10 % and its associated Transmission Line (“Special Facility”), located in _____ area, Malawi. The plant will be connected via double phi connection to the existing _____ Substation, or to a future ____ Substation.

1.2. PPC intends to purchase the electric capacity and associated energy generated by the above mentioned Project, which is offered to private sector IPPs to be selected through a competitive bidding process. The Project’s ___ kV Transmission Lines and associated substation, including expansion bay of PPC existing substation, shall be built by the Developer and transferred to PPC as a special facility.

1.3. PPC intends to prequalify parties to undertake the design, engineering, financing, procurement, construction, Uniting, operation, and maintenance of the above-mentioned Project. The period of operation shall be not less than ___ years.

2. General

2.1 Prequalification is open to interested parties, either domestic or foreign, provided that in the opinion of their auditors they are financially healthy, and their financial statements are prepared in accordance with Generally Accepted Accounting Procedures.

2.2 The Applicant shall be a party, or parties forming a consortium. Each such party shall be a properly constituted company, corporation, firm, joint venture or other legal entity, whether or not having separate legal personality, duly organized and existing and registered under the laws of its country.

2.3 Only Applicants that have been prequalified under the procedure described in this document will be invited to bid. Applicants meeting or exceeding the Qualification Criteria specified in this document will be prequalified. Applicants must continue to meet or exceed the Qualification Criteria at all times during the tender process. If changes affecting an Applicant or its constituent members, result in it no longer meeting the Qualification Criteria, the Applicant’s prequalification shall be terminated.
2.4 Applicants who pre-qualified for the _________ Project will be automatically pre-qualifed for this Project, provided that:

- Filled in Form 7 and Form 6 (if any) are attached; and
- The Applicant is identical to that of the _________ Project pre-qualification, in terms of consortium members and share composition.

2.5 Applicants operating an existing IPP in Malawi of a size not less than 300 MW will be automatically pre-qualified for this project, provided that:

- Filled in Form 2, Form 3, Form 6, and Form 8 are attached; and
- The Applicant is identical to the owner of the existing IPP in terms of the consortium members and share composition.

2.6 General information about the Project is provided in Section 4 herein. The Request for Proposals will include details of the Project, including the model of PPA that the Project Company will be required to enter into with PPC.

2.7 PPC reserves the right to:

(a) amend the scope of the Project;

(b) reject or accept any application; and

(c) cancel the prequalification process and reject all applications.

PPC shall neither be liable for any such actions nor be under any obligation to inform the Applicant of the grounds for its actions as described in this section.

3. Submission of Applications

3.1 Applications for prequalification must be either delivered by hand or by registered mail, to the following address:

PPC
IPP Tender Committee
Address 1
Address 2
Address 3
Malawi
Fax:

not later than 16:00 _______ Time on _________, 200_.

and be clearly marked “Application to prequalify for Development of the Project.” Applications received by PPC after the time stipulated above shall be rejected.
3.2 The package to be submitted to PPC must include the name of contact person and mailing address, and office phone/facsimile number of the Applicant. All responses must be in English.

3.3 Failure to provide information deemed by PPC as essential to evaluate the Applicant’s qualifications, or failure to provide timely clarification or substantiation of the information supplied, may result in disqualification of the Applicant.

3.4 The results of the prequalification process shall be announced within 15 days after the closing date for the submission of applications. The decision of the IPP Tender Committee shall be final.

3.5 Each applicant shall bear all his own costs relating to any of its activities associated with participation in the prequalification or the bidding process.

4. **Information for Applicant**

4.1 The Project is to be a _____ fired _____ power plant of _____ MW ± 10% Net Output to the grid and associated ____ kV transmission lines / substation.

4.2 The Project Company shall sell electric capacity and associated energy to PPC under the terms of the Power Purchase Agreement (PPA). The facilities are expected to be in operation as soon as practicable but not later than ______________.

4.3 In accordance with the PPA the Project Company shall:

- Prepare an Environmental Impact Analysis, Environmental Management Plan, and Environmental Monitoring Plan and comply with legal requirements and environmental requirements;
- Apply and obtain appropriate permits and licenses from the responsible authorities,
- Prepare design, and procure power plant and equipment, construct the Facility and related infrastructure, and Unit the Facility;
- Own, operate and maintain the Facility for the term of the agreement and receive revenues from the sale of electricity to PPC;
- Arrange for supply of fuel; and
- Arrange for the construction of the substation at the power plant side and associated T/L to via double phi connection to existing ____ kV T/L ______ or to PPC future ____ kV __________ Substation. The interconnection point will be at the ___ kV PPC dead end tower or through double phi connection. Associated transmission lines and additional bays in future ___ kV ______ Substation shall be built by Project Company as a Special Facility.
5. **Qualification Criteria**

5.1 Prequalification will be based on meeting the minimum pass/fail criteria in any one of the categories specified below, as well as on achieving an overall score higher than the specified minimum score. The three categories represent the Applicant’s ability to develop IPP projects, its power generation experience, and its financial strength.

5.2 An Applicant’s score will be based on its responses to this prequalification document as contained in the forms attached to the Letter of Application (refer Form 1 up to Form 6).

5.3 Prequalification will be based on the Applicant’s performance in the three stated categories (see below). The Applicant shall meet the required prequalification standards by completing the attached forms in respect of each category.

5.4 **IPP Development Track record** – The Applicant shall demonstrate a track record of successfully financing and developing IPP projects on a BOO basis for projects of comparable scale and complexity as the subject Project with capital size of not less than USD ____ million. The Applicant shall set out its general BOO experience in the format provided in Form 4.

5.5 **Power Plant Experience** – The Applicant shall have sufficient experience as EPC Contractor, or principle plant Supplier, or operating successfully power plants of size minimum ____ MW each unit for ____ fired plant or ____ MW per unit / ____ MW per block for non ____ fired plant. The Applicant shall set out its particular experience in power generation projects in format provided in Form 5.

5.6 **Financial Strength** – The Applicant’s financial capability shall be sound and satisfactory and will be evaluated in terms of net assets and net profit. A copy of its audited financial statements together with audit opinion (including a translation into USD equivalent) for the last 2 years shall be submitted and must demonstrate the soundness of the Applicant’s financial position. Where necessary, PPC will make inquiries with the Applicant’s bankers with the Applicant’s consent. The Applicant shall set out its financial position in the format provided in Form 6. The Applicant shall have net profit of minimum USD ____ Million p.a. and total assets of not less than USD ____ Million for a consortium.

5.7 **Scoring Points**

Evaluations for prequalification will be performed in two (2) stages, firstly pass and fail evaluation, secondly scoring criteria. To pre-qualify, the Applicant must pass both evaluations.

For **Stage 1: Pass and Fail Criteria**, the Applicant, either single applicant or total of the consortium, shall pass the minimum requirement for the following three categories: (i) IPP Development Track Record, (ii) Power-Plant Experience, and (iii) Financial Strength.
The Applicant, having qualified for Stage 1 criteria, will proceed to the Stage 2 criteria. Each Applicant’s performance will be scored under three “Categories”, with categories being subdivided into several “Factors.” A hierarchical scoring will then be used to determine the Applicant’s score.

6. **Documents to Accompany Prequalification Application**

The Applicant shall submit the following documents to comply with prequalification requirements. As applicable, such documents must be provided in respect of each legal entity or person being a member of its bidding consortium. The forms shall be completed and initialed by the person signing the documents.

(a) Letter of Application (Form 1) signed by the legally authorized representative of the Applicant and duly completed.

(b) Forms 2 to 6 inclusive, duly completed with supporting documentation provided as requested or as required to support the information provided.

(c) Certificate prepared by a competent authority verifying the legal status of the Applicant.

(d) Copy of a power of attorney, giving the person filing the prequalification application authorization to submit the documents to PPC on behalf of the Applicant or the bidding consortium, as the case may be,

(e) Statement certifying that the Applicant has no material overdue debts of any kind towards the tax authorities, the customs, or any statutory dues in Malawi.

(f) Statement certifying that the Applicant is not currently involved in bankruptcy or restructuring proceedings of any sort.

(g) Financial statements of the Applicant for the most recent three (3) fiscal years, audited by duly licensed chartered or public accountants, and an opinion letter from the accountants indicating that the financial statements accurately reflect the financial condition of the Applicant as of the dates of the financial statements.

(h) Other documents the Applicant considers important to demonstrate its ability and confirms its capacity to undertake the Project.

(i) The Applicant shall provide information about each and every member of the consortium bidding for the project.

(j) The Applicants who pre-qualified for _______ pre-qualification shall submit Form 7 and Form 6, as necessary.
(k) An Applicant who owns an existing IPP of not less than ____ MW per unit in Malawi shall submit Form 2, Form 3, Form 6, and Form 8.

7 Updating Prequalification Information

At the time of submitting its bid, the Prequalified Applicant shall be required to update the financial information used for prequalification to confirm its continued compliance with the qualification criteria and verification of the information provided. A bid will be rejected if the Applicant’s qualification thresholds are no longer met at the time of bidding.
Model Request for Proposals (RFP)

Public Power Company (PPC)

REQUEST FOR PROPOSALS

FOR THE DEVELOPMENT OF
_______ ____ FIRED _____ POWER PLANT

_______ MW ______, Malawi

This Request for Proposal comprises 2 [two] volumes, which, along with their annexes, schedules, and exhibits, shall be referred to as the “Request for Proposal Document” or “RFP”
Contents of RFP

PART 1 : Bid Document
PART 2 : Model PPA (Provided under Separate Cover)
PART 3 : Sample of Levelized Tariff Calculation
DISCLAIMER

This RFP has been prepared in compliance with PPC’s Guidelines for developing and managing Private Sector Infrastructure Projects, and follows relevant Government’s Guidelines.

PPC in good faith furnishes the information given in this RFP. PPC disclaims all or any responsibility whatsoever to anyone for information contained in this RFP or for any representation or statement herein, whether expressed or implied.

Without prejudice to the generality of the foregoing, this RFP does not contain, nor does PPC, any Instrumentality of the Government of Malawi (“Government Instrumentality”) or their Representatives, make any promise, representation or warranty whatsoever, whether expressed or implied (and no such Representatives have any authority to make such representations and warranties), that information contained in this RFP is accurate, complete or reasonable or that it constitutes all the information necessary to prepare a Proposal or develop the Plant.

All such persons expressly disavow any obligation or duty (whether in contract, tort or otherwise) to any Bidder and disclaim any and all liability based on or relating to any such information or representations or warranties (expressed or implied) contained in, or errors or omissions from, this RFP or based on or relating to the use of this RFP or any other written or oral communication transmitted to or information provided to or otherwise acquired by a Bidder.

Each Bidder accepts full responsibility for conducting an independent analysis of the feasibility of the Plant and for gathering and presenting all necessary information. No Bidder is entitled to rely on the involvement of PPC, any Government Instrumentality or their Representatives in the preparation of this RFP or in the solicitation process as a basis for bidding on or developing the Plant. Except as otherwise stated, the information provided in this RFP shall form no part of the Model PPA or any other document defining the agreements with PPC and Government Instrumentalities, or of any Proposal submitted in response to this RFP. No adjustments will be made to any Proposal, or to any agreements between PPC and Government Instrumentalities based on a Bidder’s interpretation of the information provided.

In submitting a Proposal in response to this RFP, the Bidder certifies that it understands, accepts and agrees to the disclaimers on this page. Nothing contained in any other provision of the RFP, nor any statement made orally or in writing by any person or party shall have the effect of negating or superseding any of the disclaimers on this page.

Queries relating to the information contained in this RFP shall be directed only to the contact persons referred to herein in the circumstances stated. No other person, whether employee, agent, adviser or other, has been authorised to give any information or to make any representations in respect of the RFP or the project and, if given or made, such information or representation may not be relied upon as having been authorised by PPC or any Government Instrumentality.

This RFP is confidential and personal to the Bidders, it is provided on the understanding that it is not to be duplicated or distributed to any other person.
Public Power Company

REQUEST FOR PROPOSALS FOR THE DEVELOPMENT OF
_______ MW ________ MW _______ _____ FIRED _____ POWER PLANT

BID DOCUMENT

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INFORMATION FOR BIDDERS

Overview of the Bid Solicitation

Solicitation for the Concession

PPC is promoting the development of the Plant (as defined in 2.1.1 below) as a private sector project and will award a Build-Own-Operate (BOO) concession to develop and operate the Plant to a private operator. Proposals are invited from interested prequalified parties. The proposals will be evaluated, and the Model PPA executed, in accordance with the terms and conditions of this Request for Proposals (RFP) document.

PPC, in its evaluation of Proposals, will place emphasis on the offered tariff but, to ensure an expeditious solicitation and award process, Proposals will also enjoy favour according to their adherence to the RFP. The process of bidding, finalising of Model PPA, evaluation of Proposals, and award of concession is described in Sections 4 and 6.

The Bidder, if successful, together with PPC through its subsidiary, shall establish a project company (the Seller) that will finance, design, procure, construct, test, Unit, operate, and maintain the Plant.

RFP Document

Except where the context requires otherwise, this Part 1 will be interpreted in accordance with the rules set out in Annex I-1, and words and expressions will have the meanings given in Annex I-2. The RFP comprises:

- Bid Document Part 1
- Model PPA Part 2
- Sample of Levelized Tariff Calculation Part 3

PPC for the purpose of soliciting Proposals from pre-qualified parties has made the RFP to embody commercial values and risk allocations consistent with the interests of investors and their lenders contemplating limited-recourse financing of the Project.

While PPC considers the assumptions made in preparing this RFP to be reasonable, whether to rely on them in preparing Proposals is a matter solely for the Bidders to judge and neither PPC nor any Government Instrumentality nor their Representatives shall take responsibility for the Bidders’ decisions. Bids shall be made at the Bidder’s sole cost and risk and the finalisation and execution of the Model PPA will be at the sole cost and risk of the successful Bidder.

Generation Planning

The Plant is designed to meet PPC’s Long Term Generation Expansion Plan (LTGEP). PPC’s generation expansion plans are prepared annually and are available to the Bidders on request. Bidders are cautioned that, in the event that prices and/or demand
for electricity in the future deviates substantially from the levels projected in the LTGEP, the ability of PPC to purchase all of the output of the Plant, at projected price levels, could be compromised. This represents a form of commercial risk that is 100% allocated to the private operator of the Plant.

Institutional Framework

The power sector in Malawi is organised under the Ministry of Energy and Mineral Resources. The State-Owned Power Company SPC has historically been responsible for the majority of Malawi’s generation and was the monopoly provider of transmission, distribution, and retail supply of electricity in Malawi.

Under the Electricity Law and other legislation, the Indonesian electricity industry is being reformed. SPC is being restructured with generation being provided by separate companies. Devolution of authority is planned with SPC being restructured into strategic business units with considerable discretion over operations and capital investment.

PPC is a separate legal entity from SPC, but its ownership is substantially or in part SPC and it is therefore subject to SPC influence over its decisions, and may from time-to-time find it necessary to request assistance from SPC to meet its contractual obligations under this and other Power Purchase Agreements (PPAs).

Private Sector Participation

The private sector has been playing, and is expected to continue to play, an increasing role in power sector development activities. To date, IPP projects totalling around ____ MW have been implemented, and there is significant privately owned captive capacity installed throughout the country.

In financing IPP projects, developers are customarily required to contribute equity of at least 30% of total project cost. It is understood that developers will raise the balance of the money required for their projects from a range of sources including commercial banks, export credit agencies, infrastructure investment funds and other international or domestic financial institutions.

To attract interest from proven and reputable developers, due regard is given to their right to a reasonable return on their investment and to the legitimate security interests of their lenders. These factors are reflected in the terms of this RFP.

Government Support

PPC intends the Project to be financed without any direct or indirect Government guarantees. The Seller’s financiers must look to revenues earned through the effective and efficient operation of the Plant for returns on investment and the service of debt. Accordingly, Bidders’ Proposals shall not assume or rely on any privileges, concessions or guarantees from the Government or Government Instrumentalities. Any assumptions made by any bidder in preparing their bid to the contrary may be regarded as a material deviation and may result in the rejection of the Proposal.
PROJECT DESCRIPTION

The Plant

General

This RFP solicits Proposals from Bidders for the financing, design, procurement, construction, Uniting, operation, and maintenance of a ___ Fired ___ Power Plant in __________, Malawi along with support facilities (the “Plant”).

The project is expected to commence operation in Year ____.

The Plant shall comply with the relevant Minimum Functional Specifications, as specified in the PPA.

Station Load Profile

The Plant is intended for base load operation. The Plant will be required to operate according to Dispatch Instructions from PPC Load Dispatch Center ________, which will dispatch the Plant according to merit order dispatch procedures.

Generating Plant Location and Interconnection

The location of the Plant is at Bidder’s discretion, but should be in close proximity to PPC Grid. High voltage transmission of electricity is carried out at 150 kV. The Plant is to be interconnected to:

As part of the Plant, the Seller shall provide an on-site 150 kV Substation and a Special Facilities including transmission line Interconnection Point as required for interconnecting the Plant to PPC System. The Bidders shall prepare the drawing showing (i) the location of Connection Point and Metering Point (ii) an electrical single line diagram showing the Connection and metering arrangement.

Any connection point of the Plant to PPC system shall be consulted and approved in writing by PPC Load Dispatch Center.

Fuel Supply

The Seller shall be responsible for arranging and maintaining a reliable coal supply for the Plant to enable it to meet its obligations under the Model PPA. The Seller shall have complete discretion over the type of coal it uses, including securing supplies from
primary and secondary coal suppliers. All responsibilities, costs and risks associated with the development of infrastructure, purchasing, delivery, storage and use of coal shall be borne by the Seller.

The Plant Site

**Description of the Plant Site**

- 1 x 600 MW
- Estimated COD 2009/10,
- Plant site is to be determined by the Bidders, but should be in the area in general vicinity of ______ as described herein.

**Plant Site Layout**

The Plant Site comprises the following elements:

(i) The power station block, occupying a section of land in respect of which the Seller will have exclusive use for constructing and operating the Plant;

(ii) The Plant Site Services Corridors, being the corridors of land in respect of which the Seller will have rights-of-way for the purposes of locating site services including cooling water conduits, coal handling facility, fly-ash dumping area, and electrical cabling.

The Bidders shall prepare a Preliminary Plant Site Plan which would show indicative plant and building layouts to guide Bidders in locating and orienting their Plants to optimise the use of the land with other possible land uses within or adjacent to the Plant Site. PPC reserves the right to refine the Site Plant if required before finalising the Model PPA.

**Plant Site Utilities**

The Seller may apply to PPC for a 20 kV connection to the Plant Site for power during the Construction Phase if available, or Seller may provide its own construction power. The connection would be made and power supplied on the same terms and conditions as apply at the time for applicable PPC’s consumers Tariff.

**Environmental and Permitting Considerations**

The Model PPA will bind the Seller to meet the Environmental Standards as set out in the Legal Requirements and in the Environmental Assessment and Management Plan. Bidders shall inform themselves of the full extent of such requirements. Bidders shall assess the likely impacts of their proposed Plant and make due allowance in their Proposal for, amongst others, the costs of:
• preparing all studies required pursuant to the Legal Requirements, including the Environmental Assessment and Management Plan;

• obtaining and maintaining all required approvals, consents, permits and licenses including those set out in Appendix Q of the Model PPA;

• meeting or exceeding all Environmental Requirements and Standards as set out in Appendix N of the Model PPA;

Bidders shall base their environmental assessments on the type and specification of coal they propose to burn over the Operating Phase of the PPA.

Data related to the preparation of the Environmental Assessment and Management Plan may be obtained from the Government Instrumentalities.
MODEL POWER PURCHASE AGREEMENT (PPA)

Introduction
Following preparation and evaluation of Proposals, the successful Bidder will enter into the Power Purchase Agreement with PPC.

The Model PPA is interdependent, with interlocking, back-to-back provisions to transfer project risks to the parties according to the risk allocation expectations of the market.

Subject to a party exercising early termination rights or the Term being extended or reduced in accordance with the provisions of the Model PPA, termination will occur on the thirtieth anniversary of the Commercial Operation Date.

The Model PPA shall be governed by and interpreted in accordance with the Indonesian law. Disputes not amicably resolved shall be referred to the agreed expert.

Overview of Model PPA

General
The following paragraphs of this Section 3.2 list some features of the Model PPA. The list is intended only as an introduction and shall not take precedence over the Model PPA.

The Power Purchase Agreement
The parties to the PPA are the Seller and PPC. The PPA relates to the sale and purchase of capacity and energy from the Plant and provides for, amongst others:

- Division of the PPA Term into a Preliminary Phase, a Construction Phase and an Operating Phase;

- Satisfaction of the Conditions Precedent, including provision of the Performance Security Stage I and Performance Security Stage II (Performance Security), and achieving Financial Close, by the specified Financing Date;

- Preliminary Phase obligations of the Seller, include:
  - execution of the Project Documents;
  - preparation of Preliminary Special Design;

- Construction Phase obligations of the Seller, include:
  - construction of the Plant in accordance with the Minimum Functional Specifications;
  - construction of the Interconnection Facilities;
- construction of the Special Facilities;
- energising, synchronising, Uniting and testing the Plant;
- implementing the Health and Safety Plan and Environmental Assessment and Management Plan

- Operation Phase obligations of the Seller, include:
  - operating and maintaining the Plant;
  - complying with Operating and Dispatch Procedures and Rules, and Dispatch Instructions;

- Exclusive right of PPC (or its successor) as Buyer to purchase capacity and electrical energy from the Plant throughout the Operating Phase.

- Liquidated damages for:
  - failure to achieve the Required Commercial Operation Date;
  - breach of performance warranties

- Payments to the Seller including:
  - Capacity payment;
  - Energy Payment
  - Start-Up Allowances.

- Obligation of the Seller to maintain specified insurances;

- Provision for early termination in specified circumstances with buy-out.

INSTRUCTIONS TO BIDDERS

Introduction

**Bidding Environment**

Generation to be provided by the Plant is a key component of PPC’s Long Term Generation Expansion Plan for the Java Grid and the failure to complete the Project by the Required Commercial Operation Date would result in the dispatch of higher cost generation.

The bidding and award procedures and evaluation criteria have been structured to maximise the likelihood of achieving the Project milestone dates. Proposals that promise a smooth, swift and assured process for executing the Model PPA and achieving Financial Closure will be favoured.
Tender Committee

A Tender Committee has been established by PPC to guide the Project through the process of pre-qualifying parties, soliciting bids, evaluating Proposals, and finalising the Model PPA.

The Tender Committee reports to PPC’s Director of Generation and Primary Energy.

Description of Solicitation

Selection Process

The following provides an overview of the intended process by which the successful Bidder will be selected:

1. PPC has prequalified a number of parties who meet the Prequalification Criteria and are invited to submit Proposals in response to this RFP.

2. A Pre-Bid Meeting will be held to clarify issues and answer questions on any matter related to implementation of the Project.

3. Bidders shall submit their Proposals by Bid Closing, being the date as specified in the RFP. Save any non-material deviations notified in Section H, Proposals shall conform to the RFP.

4. Bids Proposals shall be submitted in two-envelopes system, where the first Envelope is the Administrative & Technical Proposal including Bid Security, while the second envelope is the Price Proposal as detailed in Section [6]. Written clarification may be conducted during the above process as considered necessary by PPC.

5. On completion of the evaluation, the Tender Committee will prepare a recommendation for PPC’s Board of Directors (BOD) approval proposing:
   - The three top-ranked Bidders with the lowest prices are short-listed; and
   - The Bidder ranked first is the preferred Bidder and will be invited to discuss and to finalise Model Power Purchase Agreement (PPA).

6. After approval by PPC’s BOD and after the objection period, a Letter of Intent will be issued to the preferred Bidder. Upon counter-signing the Letter of Intent, the preferred Bidder will be invited to enter into discussions with PPC to finalise the PPA. If discussions with the preferred Bidder are unsuccessful or are not making satisfactory progress, the next-ranked from the top ranked Bidders will be invited to enter into discussions with PPC with a view to finalise the PPA.

7. Upon successfully concluding discussions, the successful Bidder will be awarded the Project and will:
• execute the PPA;
• submit Performance Security Stage I valid up to the Financing Date;
• fulfil the Conditions Precedent in the PPA.
• prior to the Financing Date, submit Performance Security Stage II valid up to the COD;

8. If the Conditions Precedent have not been met by the Financing Date/Funding Date has not met the Conditions Precedent, PPC may terminate the PPA and be paid the full amount of the Performance Security Stage I specified in item (7) above (refer Schedule 4 of PPA).

Solicitation Timetable

The timetable for solicitation, submission and evaluation of Proposals, execution of the Model PPA are as follows:

<table>
<thead>
<tr>
<th>Issuance of RFP</th>
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<tbody>
<tr>
<td>Pre-Bid Meeting</td>
</tr>
<tr>
<td>Issuance of Minutes of Pre-Bid Meeting</td>
</tr>
<tr>
<td>Final submission of clarifications</td>
</tr>
<tr>
<td>Final responses to clarifications</td>
</tr>
<tr>
<td>Bid Closing (for all Proposals)</td>
</tr>
<tr>
<td>- Bid Opening of Administration and Technical Proposal</td>
</tr>
<tr>
<td>- Bid Opening of Price Proposal</td>
</tr>
<tr>
<td>Announcement of the successful Bidder</td>
</tr>
<tr>
<td>Objection period</td>
</tr>
<tr>
<td>Issuance letter of intent to the successful Bidder</td>
</tr>
<tr>
<td>Discussion and Finalisation of PPA</td>
</tr>
<tr>
<td>Approval Process to respective Authorities</td>
</tr>
<tr>
<td>Signature of PPA</td>
</tr>
<tr>
<td>Financial Closing</td>
</tr>
<tr>
<td>Commercial Operation Date</td>
</tr>
</tbody>
</table>

Note: The above date subject to change (if required) which, will be notified in writing to all Bidders.

Pre-Bid Meeting

Pre-Bid Meeting and site visit will be held at a place designated by PPC.

At least one senior representative of each Bidder is expected (but is not obliged) to attend the Pre-Bid Meeting. Non-attendance at the Pre-Bid Meeting will not be a cause for disqualification of the Bidder. Bidders are asked to confirm their attendance in writing to the Tender Committee at least three (3) days before the meeting and to give the names of proposed attendees.
The purpose of the Pre-Bid Meeting will be to answer questions Bidders may have concerning technical matters, contractual issues and the bidding and selection processes. Bidders are asked to submit their questions by way of a request for clarification in accordance with Section 4.4. Provided they are received no later than 4 (four) Business Days before the Pre-Bid Meeting, such questions will receive a response at the meeting. PPC may reserve its position on any questions or requests for clarification made at the Pre-Bid Meeting.

Amendments to the RFP (including the Model PPA) arising from matters raised at the Pre-Bid Meeting will be made through the issue of Addenda and not through the minutes of the meeting.

The following will be transmitted without undue delay to all Bidders:

- Minutes of the Pre-Bid Meeting; which includes all questions and requests for clarification raised during the Pre-Bid Meeting along with answers.
- Additional Notifications which includes all questions and request for clarification, which includes all questions and request for clarification, raised after Pre-Bid Meeting along with answers.
- Amendments to the RFP if any.

Any Additional Notifications or Addenda will be issued in accordance with Section 4.4. In the case of any discrepancy between any answer given at the Pre-Bid Meeting and that confirmed later by Additional Notification or Addendum, the Additional Notification or Addendum shall prevail.

Clarifications and Amendments

Requests for Clarifications

Bidders seeking clarification of information in the RFP shall submit their requests in writing to the Tender Committee.

Requests for clarification or interpretation shall be submitted using the form set out in ________. The Tender Committee will reply to such requests for clarification or interpretation by way of an Additional Notification issued within seven (7) days from the date of receipt of the request. Additional Notifications will be sent to all Bidders. Bidders are cautioned that no Representative of PPC or any Government Instrumentality is authorised to explain or interpret the RFP, and that any interpretation or explanation, if not given in the form of an Additional Notification or Addendum, must not be relied upon.

Requests for clarification shall be received no later than four (4) weeks prior to Bid Closing for the bids, and no Additional Notification, Addenda or other reply shall be made with respect to requests received later than this deadline.
Amendments to the RFP - General

Only amendments to the RFP (including the Model PPA) made by the issuance of Addenda by PPC shall be considered binding on PPC.

PPC may issue Addenda at any time up to three (3) weeks prior to Bid Closing. A copy of each Addendum shall be sent to all Bidders, in hard copy as well as soft copy by email, on the same date. Bidders shall promptly acknowledge by facsimile or email receipt of Addenda and shall note in their Proposals all Addenda received. Late receipt of an Addendum by the Bidder or failure to acknowledge receipt thereof shall not relieve the Bidder of being bound by such Addendum.

In order to afford Bidders reasonable time in which to take a clarification or amendment into account in preparing their Proposals, PPC may, at its discretion extend the Bid Closing in accordance with Section 4.10.4.

Amendments to Model PPA

It is important that the Model PPA is executed and the Project expedited without protracted negotiation or delay. The Model PPA provided in the RFP is therefore written to offer adequate incentives to prospective investors and protection to their Lenders.

Bidders are encouraged to minimise deviations to the Model PPA. Proposals containing material deviations to the Model PPA subject to rejection. However, Bidders may seek changes to the Model PPA not later than four (4) weeks prior to Bid Closing by following the procedures stipulated below.

If Bidders have concerns with the Project that in their view are not satisfactorily addressed in the Model PPA, the Bidders may propose amendments to the Model PPA in the format specified in Annex V, “Proposed Amendments to Model PPA“.

Prior to deciding its response to Bidders’ proposed amendments, PPC may invite Bidders, individually or collectively, to discuss the proposed amendments. PPC may, at its sole discretion, accept proposed amendments and accepted amendments will be incorporated into the Model PPA through Addenda issued pursuant to Section 4.4.2.

In proposing amendments to the Model PPA, Bidders shall allow sufficient time for the Tender Committee to consider such amendments, discuss them with Bidders (if appropriate and desirable), determine a response and issue Addenda (if appropriate).
Bidder’s Proposals shall be based on the Model PPA as amended by Addenda. Bidders are asked to confirm in their Proposal their acceptance of, and willingness to execute, the amended Model PPA, save only for non-material deviations as expressly advised in Section H of the Bidders’ Proposals. Deviations not notified in the prescribed format shall not be considered to be part of a Bidder’s Proposal and the Bidder may not rely on them in scooping and pricing the Proposal.

Bidders

**General**

For the purpose of this RFP generally, a Bidder is any pre-qualified party who has received this RFP. The Bidder shall be an individual party, or parties to a bidding consortium, each party being a properly constituted company, corporation, firm, joint venture or other entity, whether or not having separate legal personality.

A pre-qualified party or a party as a member of pre-qualified consortium may submit only one bid under this RFP. If a party submits more than one bid, singly or in a consortium, all Proposals that include that party will be rejected. For the avoidance of doubt, this rule will not apply in respect of parties who participate in these bids as a supplier or contractor, nor in respect of bids that include contractors or suppliers who are proposed by more than one Bidder.

The successful Bidder shall constitute a Project Company in a form of Limited Liability Company according to laws and regulations of Malawi and will be required to enter into a PPA with PPC.

**Bidder Prerequisites**

Bidders shall meet the following criteria:

- Throughout the period up to execution of the Model PPA, Bidders shall continue to meet the criteria under which they were pre-qualified. If the Bidder no longer meets the prequalification criteria, its prequalification will lapse and it will be prevented from further participation in the bid solicitation. The Bidder may add to its members if it is a consortium.

- No Bidder, or member of the Bidder’s consortium, or their parent or affiliate companies, shall have:
  - suspension or blacklisting imposed on them by PPC or any Government Instrumentality for any reason whatsoever,
  - a record of unsatisfactory past performance, including breach of contract, untimely completion, poor claims history and defective workmanship,
  - inordinate overdue debts toward the insurance, revenue or customs authorities of Malawi or of their country of incorporation,
- a record of criminal or civil court cases pending or decided against them involving non-payment of tax, duty or other undertaking with PPC or any Government Instrumentality.

**Consortiums**

The Bidder, preparing a Proposal as a consortium, joint venture company or other form of partnership, shall meet the following conditions:

- The Bidder shall identify a lead member who shall undertake to maintain not less than twenty five (25) % of the share of the Project Company for a period of not less than 5 years from the Commercial Operation Date. The lead member shall be responsible for all communications with and for the Bidder. The lead member shall submit with the Proposal powers of attorney, in terms acceptable to PPC, executed by all members authorising the lead member to execute the Proposal on behalf of the consortium.

- The lead member shall also submit resolutions from the Board of Directors of each member company authorising that member's participation in the Proposal.

- In the case of a company or incorporated joint venture, the Bidder shall provide its memorandum and articles of association; in the case of some other form of partnership agreement, it shall provide a memorandum amongst its members demonstrating their commitment to the Project and stating the proposed equity contributions.

- The Proposal shall be signed so as to legally bind all members, jointly and severally, and the Proposal shall be submitted with a copy of the consortium agreement providing the joint and several liabilities with respect to the Project.

- The Bidder shall include at least one member who shall undertake to maintain not less than twenty five (25)% of the share of the Project Company for at least 5 years from the Commercial Operation Date.

- The Bidder shall provide as part of its Proposal details of the role to be played by each of its members, their intended equity commitment and the organisation of the proposed project company.

- Once the Bidder has submitted its Proposal and for as long as the Proposal is under consideration by PPC, the members may not dispose of their interest in, or withdraw from, the bidding consortium prior to execution of the PPA, unless with prior consent from PPC.
In accordance with Indonesian Investment Regulations, in order for a bidder to submit its bid for this tender, the bidder will need to have, demonstrate and maintain at least a 5% local shareholding in the bidding consortium.

Proposals - General

Proposal Responsiveness

The Bidder shall submit only one substantially responsive proposal (the Proposal), i.e. one that conforms to the terms, conditions and specifications of the RFP without material deviation or reservation and otherwise fulfils the mandatory requirements specified in Section (4.7.5). Failure to comply with this instruction may result in rejection of the Bidder’s Proposal.

The Bidder may submit no more than one Proposal.

Bidder’s attention is drawn to the provisions of Section (1.5) and to the Bidder’s need to finance the Project without any direct and unconditional Government guarantees save those undertakings expressly described in this RFP.

Alternative Proposals

Alternative proposals are not acceptable and any such proposals received by the Tender Committee will be returned unopened to the Bidder.

Proposal Structure and Content

Language of the Proposal

The Proposal and all related correspondence, communications and documents in relation to this RFP shall be in the English language. Supporting documents and printed literature furnished by the Bidder with the Proposal may be in any other language and may be accepted for reference only, provided they are accompanied by an appropriate translation in the English language. Supporting materials that are not translated will not be considered.

Proposal Structure

Proposals shall comprise two separate parts; an Administrative & Technical Proposal and a Price Proposal. Bidders’ Proposals shall include the following documents (refer List of Annexes and List of Forms, as appropriate):

(i) Administrative & Technical Proposal Forms

- Bid Security (Annex II)
- Technical Proposal Letter (Form A)
- Qualifications of the Bidders (Form B)
- Project Milestones Schedule (Form C)
(ii) Price Proposal Forms

- Price Proposal Letter (Form G)
- Price Structure Data (Form I)

Proposal Preparation

If the Proposal consists of more than one volume, the Bidder shall clearly number the constituent volumes and provide an indexed table of contents for each volume. All pages of the Proposal shall bear the name of the Bidder.

The Proposal shall be typed using indelible ink and shall be clearly legible and suitable for copying. The person or persons duly authorised to sign for the Bidder shall initial each sheet and any erasures or changes. Any erasures and changes that are not signed, dated and legible will not be taken into consideration.

The Bidder shall complete the letters, securities and forms in the format specified in the Annexes and Forms and will otherwise provide information required under the RFP in the format requested. The Forms (and each sheet thereof) shall be initialled by the signatories (if more than one) of the Proposal letters. Signatures and initials shall be in black indelible ink.

Technical data as well as dimensions and measurements on the drawings submitted with the Proposal shall be quoted in SI units.

Bidder’s Duty to Inform Itself

Bidders’ attention is drawn to the Disclaimer at the front of Part I and to the Bidders’ duty to inform itself.

The submission of this Proposal will be construed as acknowledgement by the Bidder that it has satisfied itself as to the nature and location of the Project, the general and local conditions of the Plant Site and its environs, the services to be provided, and other matters which, if the Bidder’s Proposal is accepted, may affect the Bidder’s performance of its obligations under the Model PPA. In particular, in submitting its Proposal, the Bidder is deemed to have, amongst others:

(i) carefully examined and familiarised itself with this RFP, including the Model PPA;
(ii) familiarised itself with the Legal Requirements, including labour, environmental and financial laws, and satisfied itself that complying with these Legal Requirements has been fully considered;

(iii) carefully examined all available information not being part of the RFP including studies, maps, reports, charts, records, Legal Requirements, regulations and other sources as are available to the Bidder;

(iv) made its own interpretations, deductions, conclusions and assessment of the Plant Site, the geotechnical, meteorological, hydrological, atmospheric and all other ambient, surface and subsurface conditions in and around the Plant Site and the circumstances that the Bidder, if its Proposal is accepted, may experience or encounter in implementing the Project;

(v) informed itself of the restrictions, procedures, costs, timings and difficulties associated with:

- restrictions and constraints, if any, imposed by the existing infrastructure including roads, bridges and harbours;
- the local labour market and the visas, work permits and other approvals for expatriate personnel;
- customs clearances and other approvals for the importation of plant, equipment and materials;
- the market in Malawi for Coal
- financial and currency matters.

(vi) informed itself of the legal, regulatory and institutional reform processes in Malawi, particularly as they relate to relevant sectors such as the energy sector and financial sector;

(vii) made full allowance in its Proposal for the resources required to fulfil its obligations under the Model PPA.

The failure of any Bidder to receive or examine any form or document, or to otherwise fully inform itself shall not be grounds for the Bidder to subsequently alter its Proposal after submission, nor shall it in any way relieve the Bidder from any responsibility for successfully executing the Project within the terms of the Model PPA.

**Mandatory Proposal Requirements**

Failure to comply with the requirements of this Section (4.7.5) as set out below shall constitute grounds for rejection of the Proposal:

(i) **General Requirements**

Proposals may be rejected if the following events occur:
- The Bidder has been pre-qualified and a qualified member is replaced or is no longer in the consortium;
- The Proposal is not marked and sealed in accordance with the requirements of Section (4.10.2);
- The Proposal does not contain the information as required under this RFP and in the formats specified in the Annexes and Forms, as appropriate;
- The Proposal is valid for a period of less than six (6) months pursuant to Section (4.8) and is not accompanied by a Bid Security complying with the requirements of Section (4.9.1);
- A signed Technical Proposal letter is not duly signed;
- A consortium agreement or joint venture agreement is not provided where the various participants agree to jointly carry out their obligations pursuant to the RFP;
- Resolutions from the Board of Directors of each member company authorising their participation in the Proposal is not provided;
- Power(s)-of-attorney enforceable under Indonesian law are not provided with the requisite certificate of non-revocation confirming the authority of the signatories to sign for and on behalf of the Bidder.
- The deviations to the Model PPA set out in Form H of the Bidder’s Administrative & Technical Proposal represent a complete list of deviations it would seek to discuss and contain material deviations;
- The Proposal contains a memorandum from all intended subscribers of equity committing them to:
  - the full amount of the required equity, being less than 30% of the Project’s total capital requirements;
  - minimum Stand-by Equity of a further 10% of the Project’s total capital requirements;
  - disbursement of equity in accordance with Power Purchase Agreement requirements.
- The lead member of the Bidder shall retain less than 25% of the equity capital in the Seller for a minimum of 5 years from the Commercial Operation Date.

The Responsiveness Evaluation – General (refer Annex III A) will be applied in the First Step Evaluation (refer Section 6.4) to confirm general responsiveness of the Proposal.

(ii) **Technical Requirements**
The following will be grounds for rejection of the Proposal:

- The Plant that does not conform to the Minimum Functional Specification as stipulated in Appendix A and Appendix B of the Model PPA;
- Incomplete scope, ill-defined site or contractual interfaces, or open assumptions (e.g. subsurface conditions at the Plant Site, future market conditions for coal in Malawi);
- Relaxation of environmental standards;
- Proposed manufacturers of steam-generator, steam-turbine and electrical-generator plant without a track record of satisfactory commercial performance of similar equipment of no less than fifteen thousand (15,000) hours on at least one other project (with experience reference sheets to be provided to confirm compliance);

The Responsiveness Evaluation – Technical (refer Annex III B) will be applied in the First Step Evaluation (refer Section 6.5) to confirm technical responsiveness of the Proposal.

(iii) **Financial Requirements**

Proposals may be rejected under the following conditions:

- A signed Price Proposal letter is not provided with the form specified in Form G and the signature of a duly authorized official;
- The Tariff offered by the Bidder in the form I does not comply with the structure and pricing mechanisms specified in the Section 5.3.2;
- The Proposal rely on Government privileges, concessions and/or guarantees;

**Cost and Risk of Proposals**

Bidders shall bear all costs, including those of professional advisors, incurred by them in preparing and submitting their Proposals, executing the Model PPA and finalising financing regardless of the conduct or outcome of the evaluation process, or subsequent finance-ability of the Project. Neither PPC, nor any Government Instrumentality, nor any Representative of these parties shall have any liability whatsoever to any Bidder in respect of any decision taken by Bidders in relation to their bids whether or not in reliance on any matter supplied by PPC, any Government Instrumentality, or any of their Representatives.
Interest and Exchange Rate Movements

The Bidder shall bear all risks associated with movements in interest rates and exchange rates over the period up to the expiration of the original Proposal validity period. In the event that PPC asks the Bidder to extend the period of validity for a specified period, the Bidder may extend the bid validity as requested by PPC without any change in the proposal.

Proposal Validity

Each Proposal shall constitute a firm offer and one that shall remain valid and open for acceptance for a period of six (6) months following Bid Closing. During this period the proposed Tariff shall remain valid and no Bidder shall withdraw its Proposal. Any Proposal offering less than the stipulated Proposal validity period will be rejected.

Prior to the expiration of the original Proposal validity period, PPC may ask one or more of the Bidders to extend the period of validity for a specified period. The request for an extension to the original validity date and the responses to it shall be made in writing. If any Bidder does not agree to such extension, it may advise PPC of its decision in writing prior to the expiration of the original period without forfeiting its Bid Security, and withdraw its Proposal. If, following the issuance by PPC of a notice of extension, PPC prior to the expiration date of the original validity period does not receive a notice of withdrawal, the extension shall be considered to have been accepted by the Bidder and the Bidder shall extend the effective period of the Bid Security accordingly or be disqualified.

A Bidder agreeing to the request will not be permitted to modify its Proposal, and will be required to extend the validity of its Bid Security accordingly. The provisions of Section 4.9 regarding release and forfeiture of Bid Security shall continue to apply during the extended period of Proposal validity.

Securities

Bid Security

A Bid Security payable in Malawi shall be furnished to PPC with the Proposal. The Bid Security shall be to the value of:

(Amount)

This security shall be in the form of a bank guarantee issued by a reputable local bank or foreign bank operating in Malawi, in the form provided in Annex II. The Bid Security shall be valid for a period of not less than seven (7) months from Bid Closing. Any Proposal not accompanied by a Bid Security complying with this Section will be rejected.

The Bidder shall forfeit the Bid Security without any notice, demand, or other legal process:
if the Bidder withdraws its Proposal during the period of Proposal validity or prior to being notified that its Proposal is rejected by PPC; or

(ii) if the Bidder’s Proposal contains any false statements or material mis-representations; or

(iii) if a Consortium member of the Bidder disposes of or withdraws its interest in the Project prior to execution of the Model PPA so that it no longer complies with the prequalification requirements;

(iv) in the case of a short-listed (three chosen bidders) Bidder, if it fails to:

a. begin discussions of Model PPA within one month of being invited to do so by PPC; or

b. execute the Model PPA within three (3) months after finalising discussions; or

c. furnish the Performance Security Stage I by the time in the form specified in the PPA.

Bidders who decline PPC’s request to extend the validity of their Proposals pursuant to Section [4.8] shall have their Bid Security returned to them upon the expiration of their Proposal validity.

*After the short-listed Bidders have been selected and have extended the validity periods of their Proposals, if necessary, pursuant to Section 4.8, the Bid Security of those Bidders who were not short-listed will be returned.*

*The Bid Securities of short-listed Bidders will be returned upon the sooner of the expiration date of their Proposals or the execution of the PPA with the Seller formed by the successful Bidder.*

**Performance Securities**

Prior to the Execution Date and within the time specified in the PPA, the Bidder shall provide PPC with the Performance Security Stage I in the form specified in the PPA to the value of

(Amount)

issued by a reputable local bank or foreign bank operating in Malawi. The Performance Security Stage I may be forfeited in accordance with the provisions of the PPA.

The Performance Security Stage I will be returned upon achievement of all Conditions Precedent and the receipt of the Performance Security Stage II to the value of

(Amount) consisting of 4 (four) Bank Guarantees of (Amount) each.
issued by a reputable local bank or foreign bank operating in Malawi in accordance with the PPA. The Performance Security Stage II may be forfeited in accordance with the provisions of the PPA.

The Performance Security Stage II will be returned upon achievement of the Commercial Operation Date. The Performance Security Stage II may be forfeited in accordance with the provisions of the PPA.

If the developer fails to achieve Financial Closing date (FC) due to their mistakes, then the Performance Security Stage I shall be forfeit.

If the developer fails to achieve COD due to their mistakes, then for each month of the delay PPC will forfeit 25% of the Performance Security Stage II. The understanding of the first month of the delay shall include 1 day delay from the target COD.

Submission of Proposal

**Authorisation**

The Administrative & Technical Proposal Letter and the Price Proposal Letter shall be signed by the person or persons duly authorised to bind the Bidder to the Proposal. Proof of authorisation in the form of written power(s)-of-attorney and resolutions of each member's Board of Directors in terms acceptable to PPC from consortium members to authorise the signatories to sign on their behalf shall be attached to the Administrative & Technical Proposal Letter and Price Proposal Letter.

The forms for the Proposal letters and the Bid Security and other securities, as appropriate, shall be adopted without modification other than inclusion of dates, references to addenda, names of signatories, addresses and the like.

**Format, Sealing and Marking**

The Bidders shall submit their Proposals in two Envelopes. In First envelope, Bidders shall submit: one original of the Administrative & Technical Proposal (clearly marked “Original”) and one copy (clearly marked “Copy”). In second Envelope, Bidders shall submit one original of the Price Proposal (clearly marked “Original”) and one copy (clearly marked “Copy”). Any discrepancy between the original and a copy will be resolved in favour of the original.

The Proposals, comprising the Administrative & Technical Proposal and Price Proposal shall be delivered in a sealed package labelled in bold letters.

The Proposal shall be submitted to the following address no later than the Bid Closing for each Step:

(Name and address)
If the Proposal is not sealed and marked as specified below, PPC may reject it as non-conforming and will assume no responsibility for its misplacement or premature opening. The package shall also clearly state the Bidder’s name and address.

(i) **Inner Package 1**: The Administrative & Technical Proposal shall bear the following identification:

```
ADMINISTRATIVE & TECHNICAL PROPOSAL FOR
1 x 600 MW ______ ______ Fired ______ Power Plant
Bidder’s Full Name : 
..............................................................
Address ..............................................................
```

Within this package will be two sealed envelopes:

- One envelope, containing one set of the Administrative & Technical Proposal documents including original Bid Security clearly marked “Original” on the front and back pages; and
- The other envelope, containing two copies of the Administrative & Technical Proposal clearly marked “Copy” on the front and back pages.

(ii) **Inner Package 2**: The Price Proposal shall be enclosed in the Proposal package in a separate inner sealed envelope bear the following identification:

```
DO NOT OPEN

PRICE PROPOSAL FOR
1 x 600 MW ______ ______ Fired ______ Power Plant
Bidder’s Full Name : 
..............................................................
Address ..............................................................
```

The Price Proposal shall contain in one sealed envelope consist of:

- One envelope, containing one set of the Price Proposal documents with clearly marked “Original” on the front and back pages; and
The other envelope, containing two copies of the Price Proposal clearly marked “Copy” on the front and back pages.

The name and address of the Bidder shall be written on each of the inner packages allowing the return of the Proposal unopened in the event of revision or withdrawal prior to Bid Closing or late delivery.

**Modification and Withdrawal of Proposal**

At any time prior to Bid Closing Step a Bidder may modify or withdraw its Proposal after submission, provided that the modification or withdrawal is received in writing by PPC prior to Bid Closing Step and complies with the following:

(i) A Bidder’s modified Proposal shall be prepared, sealed, marked and delivered in accordance with the requirements for submission of Proposals, including those specified in Section 4.10.2 (including Bid Security), with seal package additionally marked "MODIFICATION". On receipt of the modified Proposal PPC shall return to the Bidder its prior unopened Proposal.

(ii) A Bidder may request in writing that its unopened Proposal be withdrawn and, provided such request is received prior to Bid Closing, such Proposal (including Bid Security) shall be returned to the Bidder. Withdrawal of a Proposal during the interval between the Bid Closing and before the expiration of the period of Proposal validity specified in the Proposal Letter will result in the forfeiture of the Bid Security pursuant to Section 4.9.1.

**Bid Closing**

Bid Closing shall be 13:30 Malawi on (Date) for the Administrative and Technical Proposal and also for the Price Proposal. Proposals must be received by PPC at the address stipulated in Section 4.10.2 by Bid Closing.

Proposal submission must be made to the address specified in Section 4.10.2 by Hand-delivery. Proposals submitted by other means will not be accepted.

PPC may, at its discretion, extend the deadline for submission of Proposals by issuing an Addendum.

**Late Proposals**

Any Proposal received after Bid Closing will be rejected and returned unopened regardless of the reason for the delay. It is the sole responsibility of the Bidder to comply with the provisions of this RFP for submission of Proposals.

Proposal Opening

**Administrative & Technical Proposals**

For all Proposals properly lodged with the Tender Committee, the envelopes containing the Administrative & Technical Proposals and the corresponding Bid Securities will be
opened by the Tender Committee at the same date of the Bid Closing at 14.00 WIB at a place to be announced. Bidders choosing to attend the opening shall sign a register evidencing their attendance.

At the opening of the Administrative & Technical Proposals, the Tender Committee will examine the Proposals and record Bidders’ names, any withdrawals, the presence or absence of Bid Securities, whether the documents have been properly signed and complete and such other details as PPC may consider appropriate. The Tender Committee will prepare minutes of the openings of the Administrative & Technical Proposals and will immediately announce:

- the names of the Bidders;
- the value of the Bid Security and the name of the issuing agency;
- whether both the Administrative & Technical Proposal and Price Proposals have been received.

Information of a commercially sensitive nature to each Proposal will not be disclosed.

Proposals for which a notice of withdrawal has been received pursuant to Section [4.10.3] will not be opened.

**Price Proposals**

Price Proposals of the Bidders whose Administrative & Technical Proposals have passed the First Step e Evaluation, Their Price envelope shall be opened by the Tender Committee at the date specified at (Time) at a place to be announced. Those Bidders whose Administrative & Technical Proposals have passed the First Step e Evaluation and wish to attend the opening of the Price Proposals, may do so.

At the opening of the Price Proposals, the Tender Committee will examine the Proposals and record Bidders’ names, Summary of Price Proposal, any discount, whether the documents have been properly signed and complete and such other details as PPC may consider appropriate. The Tender Committee will prepare minutes of the openings of the Price Proposals.

**Confidentiality**

After Proposals have been opened, information relating to the examination, clarification, evaluation and comparison of Proposals and recommendations concerning the short-listing of Bidders and award of the Project shall not be disclosed to Bidders or other persons not officially concerned with such process except as provided for herein.

Neither PPC, nor any Government Instrumentality, nor any of their Representatives will be liable for any loss or damages resulting from any disclosure before, during and after the bidding process.

Any effort by a Bidder to influence PPC, or any Government Instrumentality or any of their Representatives in the process of examining, clarifying, evaluating and comparing
Proposals, and in decisions concerning award of the Project, may result in the rejection of the Bidder’s Proposal and forfeiture of the Bid Security.

Penalty for Non Performance during Operation

Non-performance with respect to the Availability Factor will be penalized in accordance with the provisions of Model PPA (Part II of RFP).

PROPOSAL REQUIREMENTS

General

In preparing their Proposals, Bidders shall clearly distinguish between their Administrative & Technical Proposal and Price Proposal in the material submitted. Any information related to the Tariff and any document containing such information, shall not be included in or enclosed with the Administrative & Technical Proposal, but should form part of the Price Proposal.

Administrative & Technical Proposal

Presentation

The Administrative & Technical Proposal shall demonstrate a sound knowledge of the requirements of the Project, an understanding of the obligations of the Seller, and a capacity to undertake the Project in compliance with the Model PPA.

The Administrative & Technical Proposal shall be submitted under cover of a letter that shall be in the form specified in Form A of the List of Forms. The information provided in the Technical Proposal shall be presented in the formats specified including those provided in Forms B to E of the List of Forms. Failure to provide this information in full and in the form specified shall be grounds for rejecting the Proposal as non-responsive.

The Administrative & Technical Proposal shall respond to the request for information under this Section 5.2 and other provisions of this RFP (unless the information forms part of the Price Proposal). To the extent that the Forms do not accommodate information requested in the RFP (other than information forming part of the Price Proposal), then Bidders shall append such information to the Administrative & Technical Proposal. Bidders may also submit such other documents as may further demonstrate their ability to undertake the Project in accordance with the Model PPA.

Project Technical Details

Bidders shall provide general technical information, with technical document where available, to enable PPC to fully understand the Plant proposed by the Bidder and to make judgements about, amongst others, its efficiency, durability, reliability and general compliance with the Minimum Functional Specification.
The information to be provided, as part of the Technical Proposal, shall include amongst others:

(i) Design

- Applicable standards for design, materials, manufacture, mechanical and electrical works, civil and structural works, communications, fire protection, heating and ventilation, operation and maintenance, and all other works to be undertaken to fulfil the requirements of the Model PPA. Such applicable standards will be consistent with an efficient operating life of the Plant of no less than thirty (30) years.

- Indicative Plant Site layout drawings showing locations of key features of the proposed Plant including buildings, coal and ash handling facilities, water facilities, services, interconnection, access roads, as appropriate. Such locations shall be within the areas designated on the Indicative Plant Site Plan as being available for the particular purposes. The Indicative Plant Site layout drawings shall nominate the location of drainage and effluent discharge points. The location of the 150 kV substation and 150 kV transmission line route shall be shown.

- The Bidder’s transportation plan for transporting plant, equipment and materials to the Plant Site.

(ii) Generating Plant and Auxiliaries

- Plant shall be brand new,

- Plant Site civil works including all site utilities and services, raising building platforms, constructing dykes as necessary and constructing effective drainage and dewatering systems to prevent flooding of buildings and plant facilities.

- The Net Dependable Capacity of the plant in MW at Site Conditions and burning the coal, proposed by the Bidder. The Net Dependable Capacity, as adjusted for differences between ambient conditions and Site Conditions, is guaranteed by the Bidder.

- Outline design of the Plant’s electrical plant and systems, including redundancy levels to be provided and in particular the mode of connection to PPC Grid System.

- Outline design of Plant auxiliaries, services and systems including Coal and Ash handling system, cooling water system, lube oil, hydraulic oil, service water, heating and ventilation system, fire detection and protection system and exhaust systems. Related data, with details of equipment redundancy levels, shall be provided.
• Details of generating plant including:
  - Manufacturer, type and model of each Unit, the number of Units
  - Start-up times, loading rates and other dynamic parameters.
  - Steam turbine.
  - AVR, exciters including reactive power control and related equipment.
  - Auxiliary plant and accessories.

• Confirmation that the proposed Plant would employ proven technology. Experience reference sheets or similar evidence of proven performance on other projects shall be provided in respect of major plant items.

(iii) Water Supply

• The water requirements for the operation of the Plant and the water facilities and on-site storage to be provided as part of the Plant.

• Effluent limits of segregated wastewater system and location of effluent discharge point.

(iv) Coal Supply

• Choice of Coal and Coal Supplier and the Technical Proposal shall specify, amongst others, the following:
  - Name and details of the Coal Supplier;
  - Location of coal mine and method of transportation to the plant site
  - Type and specification of Coal;
  - Key parameters of the Long Term Coal Supply Contract;
  - Commercial track record of the Coal Supplier.

• Details of Coal and Ash Handling Facilities as may be required at the Plant Site to meet or exceed the requirements of the Minimum Functional Specification.

(v) Electrical Interconnection

• Single line diagram up to the Interconnection Point showing all circuit breakers, isolators, Metering Point, current and potential transformers for metering and protection, earthing switches, lightning arrestors, power transformers and generators.

• The maximum make and break fault contributions to PPC’s Grid System from the Plant at 150 kV, including motor and generator contributions.

(vi) Instrumentation and Control

• Instrumentation, control and protection systems including the relay protection scheme proposed by the Bidder for line, busbars, transformers, generators, etc.
including fire protection. Protection schemes may have interfacing with PPC’s equipment and these protective schemes are subject to concurrence of PPC.

- Communications systems and equipment for:
  - direct digital communications of dispatch instructions
  - voice communication with the Dispatch Centre
  - normal voice, email and facsimile communication
  - SCADA

- Metering devices and proposed location of Metering Equipment and Check Metering Equipment.

(vii) General

- All other details necessary to enable PPC to ascertain if the proposed Plant will meet the Minimum Functional Specification.

**Target Availability**

The Seller will contract under the PPA to achieve availability levels with respect to the Net Dependable Capacity (taking into account planned maintenance outages, forced outages and partial de-ratings) as follows:

(i) Target Availability from Commercial Operation Date shall be at least 80%;

(ii) Projected Availability for each Contract Year to be as nominated by the Bidder in its Proposal (referred Form D) and agreed between the Parties prior to the Execution Date;

**Organisation Plans**

The Bidder shall submit a detailed organisational chart, staffing plan and proposed quality assurance program in accordance with the requirements outlined in Form E.

**Insurance Plan**

The Bidder shall submit a detailed insurance plan for the Plant. The plan shall accord with the Model PPA and shall specify the type of insurances, the amount of cover.

**Domestic Participation**

Bidders shall provide information on the proposed domestic participation in the Project, identifying the extent to which they plan to employ local contractors, suppliers and labour in each of the Construction Phase and Operating Phase.
Services and Utilities

The Seller will be required to arrange or provide all services and utilities for the Project unless otherwise expressly stated.

The Seller may apply to PPC during the Construction Phase for an 20 kV connection (if available), which will be provided on the same terms and prices as apply at the time for applicable PPC’s consumers Tariff, in the case such supply from PPC is not available, Seller should provide by its own construction power.

Environmental Obligations

The Seller will be required to prepare an Environmental Assessment and Management Plan that complies with relevant Legal requirements and Environmental Requirements. The Seller shall apply for, and obtain, an appropriate licence from responsible organisation and shall meet the conditions of that license at all times during the Construction Phase and Operating Phase.

The Bidder shall describe qualitatively and quantitatively the potential environmental impacts of the Plant it proposes and shall support its submission with details including, among other things:

- A description of environmental mitigation and protection measures to be implemented.

- The quantities and types of all liquid and solid effluents, including sewage system, that will be produced at the Plant Site, and the methods to be employed for neutralising these effluents. The proposed methods for disposal of all liquid and solid wastes from the power station including any Coal and Ash / Wastes Handling should be clearly outlined in the Proposal.

- The quantities and rates of emissions of pollutants, including the types of pollutants, and details of the proposed methods of pollution control and types of pollution control equipment (e.g. dust control, electric precipitator and if necessary desulphurization device), and other mitigation measures. Guaranteed emission rates should also be provided.

- The effects on marine, estuarine or riverine environments, as appropriate, including water temperature, morphology and aquatic biodiversity. The location of abstraction and discharge points and other such details shall be provided.

- Construction effects (e.g. impacts associated with to transportation of plant to the Plant Site, construction within the Plant Site Services Corridors, etc.).
Project Milestones Schedule

The Bidder shall submit a Project Milestones Schedule pursuant to the requirements set out in Form C. The Project Milestones Schedule shall provide a realistic schedule by which Commercial Operation Date will be achieved.

Price Proposal

Presentation

Bidders shall complete the Price Proposal strictly in accordance with the RFP and, where specified, the required information shall be provided in the requested format including those formats defined in the Price Proposal Forms (refer to the List of Forms). The Price Proposal shall include:

(i) Price Proposal letter, and
(ii) completed Forms, and other information as required pursuant to this RFP, and
(iii) any additional documents as may be required to meet specified information requirements or to demonstrate the Bidder’s capacity to undertake the Project in accordance with the Model PPA.

Failure to provide such information in full shall be grounds for rejection of the Proposal on the basis of non-responsiveness.

Tariff

For the simplification and evaluation purposes, the Tariff structure shall be consisting of:

(i) Fixed Payment

- A component designated for capital cost recovery in cent USD/kWh, which is not subject to escalation and would be offered in flat basis or not more than 2 stages.
- B component as Fixed O & M charge in cents USD/kWh, which is indexed 50% portion to the US Consumer Price Index (USCPI) and 50% portion to the Malawi Consumer Price Index (CPI);
- E component (if any) designated for capital cost recovery of the associated transmission lines, in cent USD/kWh, and would be offered in flat basis or not more than 2 stages.

(ii) Variable Payment

- C component as Fuel charge in cent USD/kWh, which reflects the CIF Coal price, high caloric value and net plant heat rate, and is of pass through
concept. The developer will procure the coal based on the bid document approved by PPC, and price agreed by PPC. In the case price is not agreed by PPC, then PPC will supply the coal for a certain short period of time, while the developer will re-tender the coal supplier. For more details please refer to Appendix S of the Model PPA.

- D component as Variable O & M in cent USD/kWh, which is indexed 25% portion to the US Consumer Price Index (USCPI) and 75% portion to the Malawi Consumer Price Index (CPI);

All the Tariff in cents USD/kWh mentioned above, should be based on the following conditions: (a) AF (availability factor) of 80% and CF (capacity factor) of 80%, (b) binding proposed Net Plant Heat Rate table, and (c) 30 years term of the contract.

The structure and pricing mechanism offered in the Proposal will be converted into structure and pricing provisions in the Appendix G of the Model PPA.

In the PPA, the agreed Tariff/Charge will be stated in Kwacha, while Foreign Component could be based on a Reference Exchange Rate and adjusted accordingly from time to time, according to the provision of PPA Appendix G.

In addition, provision is made for payment of Start-up Allowances according to the number of cold starts, warm starts and hot starts.

**Cash Flow**

The basis of sale and purchase of capacity and energy will fall into two (2) distinct regimes as follows:

(i) **Uniting Phase:** This is the Uniting period of the Plant. During the Initial Uniting Phase, no Capacity Payment will be payable. However, payments will be made by PPC to the Seller of the Coal components of the Energy Payment for metered energy during the Uniting period starting from synchronization to PPC grid provided that the plant continuously operates for more than 6 (six) hours;

(ii) **Operating Phase:** This is the commercial operation period of the Plant. Capacity Payments and Energy Payments will be payable for Available Capacity and metered energy. Start-Up Allowance will also be payable for Start-Ups requested by PPC in this period.

**Project Cost**

The Seller should seek to cover the service and repayment of all project debt and to provide a return on invested equity through the Capital Cost Recovery (CCR) component of the Capacity Payment.
Electricity Payments and Supporting Cost Data

The Forms submitted by Bidders in compliance with the requirements for the Price Proposal shall provide the required base rates for calculating the Capacity Charge and Energy Charge components in their relevant currencies.

Bidders may be required to justify their calculations of electricity prices and provide supporting documentation and cost data, as requested. Such information provided by the Bidder will be treated as confidential.

The contracted Capacity Charge, Energy Charge and other scheduled electricity payments shall be paid in accordance with the terms and conditions of the PPA. All payments for the purchase of capacity and energy from the Plant will be calculated in Indonesian Kwacha and will be paid in Kwacha. Conversion of Kwacha to US$ or other currencies for the payment of costs and dividends outside Malawi shall be the sole responsibility of the Seller.

Deviations from the Model PPA

Should the Bidder wish to propose non-material deviations from the Model PPA, they shall be entered into the Form provided as Form H. The determination of whether a change proposed by a Bidder is material or non-material shall always be at the discretion of PPC’s Tender Committee. Any changes other than to correct numerical errors, to incorporate specific information about the bid or change wordings to clarify sentences in the PPA shall be deemed to be a material change. Each proposed deviation shall be described and explained. The Bidder shall also specify in “mark-up” form the precise wording of the amendment it proposes to the relevant Project Document provision.

The Bidder shall confirm in its Proposal its acceptance of, and willingness to execute, the Model PPA without amendment save only the amendments made through the issue of Addenda prior to Bid Closing and the non-material deviations noted in Form H.

Proposal Letters and Forms

Introductory Notes

The Proposal to be prepared by the Bidder shall include the documents and Forms specified in the RFP. The Bidder’s attention is drawn to the Instructions to Bidders, and in particular to the requirement that the Bidder shall complete the Forms and respond to the questions in the specified format and in compliance with the RFP.

Where the Bidder is a consortium with two or more members, each being a properly constituted company, corporation, firm, joint venture or other entity, each member shall, where relevant and applicable, separately complete the Forms and otherwise responds
to the RFP so that the Proposal contains the required information about each constituent member of the Bidder.

The Bidder’s attention is drawn to the requirements of Section 5 of Instructions to Bidders and in particular to the general need to fully describe it’s Proposal. To the extent that information additional to that specifically requested in the Forms is required, the Bidder may include such information on other sheets and attach them to the Proposal.

**Inclusions in the Proposal**

The Bidders’ attention is drawn particularly to the provisions of Section 4.7.5 Mandatory Proposal Requirements and to the responsiveness requirements of the Responsiveness Evaluation (Annex III). Failure to properly complete the Forms and to otherwise satisfy the requirements of these provisions will be grounds for rejection of the Proposal as non-responsive.

**EVALUATION PROCEDURE**

Outline of Evaluation Procedure

The evaluation process is a stepped process:

**Step One:** Administrative and Technical Evaluation

The Proposal is reviewed for completeness and substantial responsiveness in accordance with the Responsiveness Evaluation (refer Annex III: Responsiveness Evaluation – General Responsiveness).

The Technical Proposals are evaluated for responsiveness (refer Annex III: Responsiveness Evaluation – Technical Responsiveness) and compliance with the requirements of the RFP and with the Minimum Functional Specification, in particular.

**Step Two:** Price Evaluation

The Price Proposals of those Bidders who has successfully passed stage one will be opened and evaluated. Three (3) Bidders with the highest rankings will be short-listed.

**Evaluation**

PPC intends to select three preferred Bidders.

The First Rank Bidder will be selected first and invited to discuss terms for executing the Model PPA. If the discussions for the finalization of the PPA are not successful with the First Rank Bidder after three months, the Second Rank Bidder will be selected and
invited to discuss terms for executing the Model PPA conditioned on the Second Rank Bidder accepting the First Rank Bidder’s proposed tariff.

If the discussions with the Second Rank Bidder prove unsuccessful after three months, PPC will enter into negotiations with the Third Rank Bidder to finalize the Model PPA conditioned on the Third Rank Bidder accepting the First Rank Bidder’s proposed tariff. PPC may terminate the tender process or initiate discussions with lower rank Bidders, if the discussions with the Third Rank Bidder do not result in agreement with respect to the Model PPA after three months.

Clarification of Proposals

During the examination, evaluation and comparison of Proposals, the Tender Committee may, at its discretion, ask the Bidders for clarification of their Proposals. Request for clarifications and responses shall be in writing and no change in the Tariff or substance of the Proposal shall be sought, offered or permitted.

Right to Reject Proposals

PPC reserves the right to accept or reject any Proposal and to annul the bidding process and reject all Proposals at any time prior to the signing of the Model PPA, without thereby incurring any liability to the affected Bidder or Bidders on the grounds of PPC’s action. Bidders who submit Proposals do so without recourse against PPC or any Government Instrumentality or their Representatives for either rejection by PPC or failure to execute the Model PPA for any reason whatsoever.

PPC reserves the right to reject the Proposal of any short-listed Bidder who has qualified on the basis of misrepresentation, suppressed or incomplete information.

Step One Evaluation: Administrative

In the First Step Evaluation of Proposals, the Tender Committee will determine whether each Proposal is responsive. A Proposal may be disqualified and excluded at this step from further consideration for a failure to meet all conditions of this Section 6.4 or for any other valid reason including those listed below:

- Failure to be responsive, as determined by the “Responsiveness Evaluation - General” (refer Annex III).

- Receipt by the Tender Committee of a Proposal after the Bid Closing.

- Failure to submit supporting documentation or any other clarification or any documents requested by the Tender Committee within the required time frame.

- Material misrepresentations in the Proposal.
• Illegal conduct or attempt to influence PPC, or any Government Instrumentality or any of their Representatives in their evaluation of a Proposal other than by means expressly sanctioned in the RFP.

• Determination by the Tender Committee that the Bidder is unlikely to be able to fulfil the terms or conditions of the Proposals and of the Model PPA.

• Form H (Deviations to the Model PPA), contains material deviations. Immediately upon opening the Price Proposals, the Form H submissions will be referred to the Tender Committee for determination on the nature of the proposed deviations and, if any are determined to be material, the Proposal will be rejected unless material deviations are promptly and unconditionally withdrawn immediately upon notification from Tender Committee without other adjustment to the Proposal.

• Lack of a statement from the Consortium that (using Bidder’s own form):

  - the lead member of the Bidder shall retain not less than twenty five (25)% of the share of the Project Company for a period starting on Bid submission through five (5) years from COD;
  
  - at least one member shall retain not less than twenty five (25)% of the share of the Project Company for a period starting on Bid submission through five (5) years from COD.
  
  - the full amount of the required equity, being not less than 30% of the Project’s total capital requirements;
  
  - additional minimum Stand-by Equity of a further 10% of the Project’s total capital requirements will be available;
  
  - disbursement of equity in accordance with Power Purchase Agreement requirements.

Proposals accepted by the Tender Committee in accordance with these principles will qualify for further consideration for the Technical evaluation, as described below. If a Proposal is found to be not substantially responsive, it will be rejected by PPC and may not subsequently be made responsive by correction or withdrawal of non-conforming deviations or reservations.

Stage One Evaluation: Technical

**Compliance with Minimum Functional Specification**

The evaluation will be conducted to confirm compliance with the Minimum Functional Specification and with other obligations of the Seller as set out in the Model PPA. The Technical Proposals will be examined initially using the “Responsiveness Evaluation – Technical” (refer Annex III) to confirm that they are responsive. They will then be
assessed according to their technical compliance with the Model PPA and the Bidders’ satisfactory responses to the RFP information requirements. Among the issues to be satisfied are:

(i) **Plant Design Requirements** (refer to Form D)

- The Technical Proposal shall include an outline design of the Plant conforming to the Minimum Functional Specification.
- Plant shall be brand new
- The proposed steam turbine manufacturer shall have at least five years experience in the manufacture of steam turbines and equipment of similar rating and design to that proposed and such turbines and equipment shall have seen satisfactory service on other projects over a minimum period of 15000 hours.
- The proposed steam generator manufacturer shall have at least five years experience in the manufacture of steam generators and equipment of similar rating and design to that proposed and such steam generators and equipment shall have seen satisfactory service on other projects over a minimum period of 15000 hours.
- The proposed electric generators manufacturer shall have at least five years experience in the manufacture of electric generator and equipment of similar rating and design to that proposed and such generator and equipment shall have seen satisfactory service on other projects over a minimum period of 15000 hours.
- Expressions of Interest shall be included from the prospective plant suppliers confirming their commitment to supply the key items of plant including steam coal plant and coal handling system, steam generators, electrical generators, and steam turbines.

(ii) **Construction Phase Requirements**

- A construction schedule in the required format shall be provided showing, amongst others, Required COD being achieved.
- The timetable given in the RFP and the scheduled operation dates in the PPA are accepted unconditionally.
- An undertaking is provided that construction impacts specified in the PPA are not exceeded;
- Proposed Construction Contractors shall have successfully completed Power Plant Project of at least 600 MW size
Expressions of Interest are included from any subcontractors and suppliers responsible for providing key works or plant.

(iii) Operating Phase Requirements

- Emissions, discharges, noise and other impacts during the Operating Phase are within the limits specified in Clause 5.2 of Schedule 4 of the PPA.
- The principal O&M contractor proposed by the Bidder has past experience in operating and managing a power plant of at least 600 MW size.
- An Expression of Interest is enclosed from the O&M contractor(s) proposed by the Bidder.
- The Organisation Plan complies with the minimum requirements and is complete, containing an organisational structure of the proposed Seller, a comprehensive staffing plan for the Plant and a proposed quality assurance program.
- The Target Availability of the Plant over the Operating Phase shall be no less than the availability levels proposed in Section 5.2.3.

Technical Non-compliances

Where Technical Proposals contain material non-compliances, the Bidder will be disqualified for the Stage Two Evaluation and the Proposal will be rejected. Proposals passing the Stage One of the evaluation process will proceed to the Stage Two Evaluation.

Step Two Evaluation: Price Proposal

Responsiveness of Price Proposal

Price Proposals will be examined initially using the “Responsiveness Evaluation – Financial” (refer Annex III) to confirm that they are responsive. Unresponsive Price Proposals will be rejected. Criteria to be satisfied in meeting responsiveness include:

- The Price Proposal is complete, with all letters, annexes and Forms duly completed and properly signed as stipulated in the RFP;
- The Price Proposal letter is provided in the required form;
- Contract Base Price have been completed and the Tariff offered by the Bidder complies with the structure and pricing mechanisms specified in simplified structured as shown in Form I.
The proposed Components A and E shall not be subject to escalation. Components A and E proposals may be containing a staged structure of not more than 2 stages.

**Assessment and Ranking**

The proposal will be assessed using the levelized tariff method as demonstrated in the Part 3 Sample of Levelized Tariff Calculation. The followings shall be taken into account in calculating the levelized tariff:

(i) **Discount Factor**

The discount factor is the rate at which the Tariff is discounted to arrive at the levelized price. A discount rate of 10% will be applied in the levelizing of Tariffs for the purposes of evaluation.

(ii) **Escalation**

For the purposes of evaluation, all escalating components of the Tariff (B component and D component) are assumed to be escalated at a rate of 1.5% per annum from a base year (COD). Components A and E would not be escalated and Component C will have predetermined structure (flat or staged).

(iii) **Transmission losses adjustment**

For the purposes of evaluation, transmission losses will be taken into account with the base of 0.02% of total proposed base price per km for 150 kV and 0.01% for 500 kV.

The total evaluated levelized tariff will be ranked from the lowest tariff to the highest tariff.

**Short-listing and Award**

The Project will be awarded to a Bidder according to the following procedure:

1. On completion of the evaluation, the Tender Committee will prepare a recommendation for PPC’s Board of Directors (BOD) approval proposing:
   - The three top-ranked Bidders are short-listed;
   - The Bidder ranked first is the preferred Bidder and will be invited to discuss and to finalise Model Power Purchase Agreement (PPA).

2. After approval by PPC’s BOD the Letter of Intent will be issued to the preferred Bidder. Upon counter-signing the Letter of Intent, the preferred Bidder will be invited to enter into discussions with PPC to finalise the PPA. If discussions with the preferred Bidder are unsuccessful or are not making satisfactory progress, the next-ranked from the top ranked Bidders will be invited to enter into discussions with PPC with a view to finalising the PPA.
3. Upon successfully concluding discussions, the successful Bidder will:
   - form the project company (the Seller);
   - execute the PPA;
   - submit Performance Security Stage I valid up to the Financing Date;
   - fulfil the Conditions Precedent in the PPA.

4. Upon finalisation of the Model PPA and prior to Execution Date, the successful Bidder will:
   a. provide PPC with documentation from the Bidder’s Lenders confirming their intended participation in the Project; and
   b. form the project company and provide PPC with duly certified copies of the following:
      - certificate of the Seller’s incorporation
      - list of members of the Seller’s board of directors
      - location of the Seller’s registered office
      - copy of the resolution of the Seller’s board of directors authorising persons to witness the affixing of the Seller’s seal.
   c. reach formal agreement with its Lenders, and PPC, as applicable, on the final wording of the Sponsor’s Agreement;
   d. deliver to PPC the Performance Security Stage I.

5. Upon execution of the Model PPA with the Seller, PPC will return the Bid Securities of unsuccessful Bidders, save Bid Security of the successful Bidder which will be retained until the Performance Security Stage I is provided in accordance with the provisions of the PPA.

6. PPC will have the right to reject all Proposals and not make an award.

Cost of Finalising Model PPA
The successful Bidder (or Bidders) shall bear all costs incurred by it in relation to any and all discussions and finalisation of the Model PPA, including those of professional advisers. Neither PPC, nor any Government Instrumentality nor their Representatives shall have any liability whatsoever to the Bidder in relation to its decisions or actions in finalising and executing the Model PPA, whether or not it has acted in reliance on any matter supplied or represented by PPC, or Government Instrumentality or their Representatives.
Model Clauses for Concession Contracts

The contract must specify its duration, along with the Commencement Date that may or may not be the date of contract signing. The Commencement date is normally before the Service Period and the duration of the contract must be long enough to cover all of the Service Period. The choice of duration should be made in consideration of the following:

The service requirements of the Contracting Authority, in conjunction with the consumer expectations identified in the demand and willingness to pay survey;

Anticipated uses of assets that will remain with the Contracting Authority after the end of the Service Period, and the impact that contract duration will have on their condition when the Contracting Authority takes control of the assets;

The amount of time it will take the private investor to achieve its targeted return on investment. This is the most important factor in setting the Service Period, and a good reason for not defining Service Periods in enabling legislation because it is impossible for legislators to anticipate how long each PPP project’s concession period should be. They may elect, however, to set a maximum Service Period;

The affordability of the Service for the Contracting Authority, taking into account the expected useful life of the assets. A longer Service Period could enable the Authority to cover its share of the cost of such assets over a longer period, thereby lowering the level of periodic payments and related strain on budgetary resources;

The cost of periodic asset refurbishment and related increases in such costs if the Service Period is relatively long;

The terms of the project’s debt financing. While the term of the Service period may need to be extended in order to enable targeted returns on equity investing, it should not be extended beyond the time limits of available debt financing; and

Certain components of the contract may have a different duration than the duration of the contract as a whole, for example a 20-year concession may have a monopoly provision that lasts only 5 years.

In determining the Service Period, Contracting Agencies should also evaluate the profile of assets that will be used in providing services required by the contract. If there are assets that have useful lives in excess of the contemplated Service Period, alternative uses for those assets should be identified so that the Agency is not pressured into extending the Service Period to fully recover the cost of those assets, or pressured into increasing its payments over the contemplated Service Period in order to fully recover the cost of those assets before their useful lives have been expended.
Commencement of Service Delivery

After signing of the PPP contract, there will usually be a period of construction or project development to put in place all the service delivery mechanisms. There is considerable risk associated with this period, in particular the risk of delays and/or cost over-runs for the construction effort. The contract must include provisions that specify how the public sector partner will be compensated in the event that the private sector operator fails to complete construction within the agreed timeframe. On the contractor’s side, they will need provisions in the contract that assure them the Contracting Agency will accept the constructed facilities if they meet certain specifications.

A key issue in this area of contracting is to what extent the Contracting Authority will be involved in activities conducted during the construction or development phase. There must be clearly defined parameters of such involvement in the contract. The design, construction, maintenance, and performance of any asset procured or developed for the purpose of meeting output specifications of the contract are all the Contractor’s risks. In most cases, the Authority should not accept any role before Service Commencement other than the following:

- Review of the Contractor’s designs, maintenance, and operation procedures;
- Observation and testing of the plant and equipment being developed;
- Observing periodic testing of the equipment being installed;
- Discussing with the Contractor any proposed changes to agreed specifications;
- Auditing the Contractor’s activities to enforce agreed quality standards; and
- Verifying the existence of all agreed factors at Service Commencement.

In performing the audit function referenced above, it is essential that the Authority keep close track of any drawdowns on loan facilities that the Contractor may have for funding the construction or development period. It is unfortunately common practice for firms to submit very low cost proposals with the intent to draw down on loan facilities faster than attaining the percentage completion targets specified in the loan agreement. The auditing will prevent a Contractor from representing that percentage completion targets have been met before they have actually been met, thereby causing the loan to be drawn down faster than it should. Fraudulent practice in this area is common, and the methodology is the Contractor draws down a large portion of the loan while having only attained a relatively small percentage of construction completion.

When the fraudulent practice is noticed, the Contractor files for bankruptcy protection and leaves the country with inflated profits. In other words, the Contractor had never intended to complete construction within the low budget that it provided in its Cost Proposal and at the end of the process the Contracting Authority is left with construction that has not been completed. Because of this practice, Cost Proposals must be reviewed for reasonableness, rather than simply selecting the bidder who submits the lowest cost proposal. Usually, problems of this sort can be sorted out in the BAFO process.

In providing contract terms that allow the Contracting Authority to check the percentage of completion claimed by the Contractor at various stages during construction period, it
is important that such provisions do not have the affect of transferring construction risk to the Authority. All design risks should rest with the private sector partner, and this can be achieved by tying the contract to the schedules and specifications provided in the bid.

The role of the Authority to confirm percentage of completion is intertwined with the “step-in rights” of the lenders. The contract between the Authority and the Contractor must be consistent with the loan agreements, so that the interests of the Authority and the lenders are protected in a consistent and complementary manner. The Authority and the lenders should both be focused on the objective: timely commencement of the quantity and quality of services specified in the contract. Procedures for submitting and receiving comments on design issues should enable protection of this fundamental goal.

Before Service Commencement, the Contractor should be obligated to demonstrate that the assets and systems put into production meet the Output Specifications in the contract. The method of demonstration could include: (a) inspection of assets; (b) trial operations; and (c) other performance tests or inspections. No payments should be made to the Contractor by the Authority until Service Commencement. Partial payments during the construction period should be avoided if possible. This keeps the construction and design risk firmly upon the Contractor.

**Remedies for Delayed Service Delivery**

Both the Contracting Authority and the Contractor have strong incentives to get service delivery going on time. The Authority is under pressure from stakeholders who will use the service, and the Contractor needs payments from the Authority in order to make loan payments and service other cash flow needs. As indicated in the preceding section, the Authority should not make any payments to the Contractor until Service Commencement unless services can be commenced incrementally as construction continues.

Protections for the Authority can be arranged in the contract, e.g. performance bonds, completion bonds, guarantees from the Contractor’s parent company, and provisions for liquidated damages in the event that completion is delayed. Events that cause delays in completion and which are beyond the reasonable control of either party should be included in the definitions of Force Majeure in the contract, thereby exempting either party from the obligation to pay damages in the event of delays. Contractors should take extra care to include the cost of relatively short delays in their financial planning. Rather long delays create problems for which advance budgeting cannot provide protection.

Normally, contracts will have a provision allowing the Contracting Authority to terminate the contract in the event of a prolonged delay in Service Commencement. The contract should also provide rewards for early Service Commencement. Provisions for liquidated damages in the event of prolonged delays should have very specific formulas to calculate the amount owed, and very specific timelines for payment of the amounts owed. If the Authority will not suffer any losses due to prolonged delay then it should
not be entitled to liquidated damages. To protect against late Service Commencement, senior lenders will usually require Sub-Contractors to cover the debt service when the Contractor is required to pay liquidated damages. The Sub-Contractor will price this requirement into its contract with the Contractor. This will result in increased cost to the Authority, so the Authority should not require payment of liquidated damages unless absolutely necessary. Such a situation may exist in cases where the Authority has provided substantial assets to the Contractor, for its use in service delivery, and in doing so the Authority has lost the opportunity to put those assets to use in other important service delivery activities.

Supervening Events

A supervening event is an event that prevents the Contractor from being able to comply with Service Commencement obligations. One type of supervening event, as mentioned in the preceding section, is a Force Majeure event. There are also Relief Events, in which the Contractor bears some responsibility but not to the extent at which the Authority’s rights of early termination would arise. There are also Compensation Events, in which the Authority has the obligation to compensate the Contractor. Normally a Compensation Event is one that takes place when the risk of late completion is very high, or completion was delayed by factors largely under the control of the Authority. Change in Law is often treated as a Compensation Event because the Authority is a Government institution and law is under the control of Government.

Information Warranties & Disclaimers

The contract should clearly indicate which party bears the risk of accuracy for each category of information provided within the contract. This provides the other party with recourse in the event that such information is inaccurate. It also covers latent defects in assets put under the control of a party by the other party. A common feature of PPP contracts for infrastructure service provision is that Government places assets it owns under the control of the concessionaire. Government warrants that the assets are in a particular condition, and the concessionaire warrants that at the end of the contract it will return those assets to Government in the same condition, less normal wear and tear.

Verification of the condition of such assets, along with confirmation of representations made by Government in the RFP, are generally included in Contractor’s due diligence. In practice, however, Government is legally bound to exercise reasonable care in making its representations and warranties regarding statements it makes in the RFP and contract. Despite the usual disclaimers of liability governments commonly put into tender and bid documents and their related contracts, there is a responsibility to exercise reasonable care.

Authorities should seek to minimize the extent of any warranties it makes unless it is the sole source of information or such information cannot reasonably be verified by the private partner at reasonable cost, the Authority is confident in the accuracy of such
information, or if the Authority will obtain better value for money if it accepts liability for statements made in the tender and bid documents and their related contract.

Service Requirements & Availability

The focus of PPP is service delivery, so unavailability of the service should result in a reduction or elimination of payment by the Authority to the Contactor. The issue in PPP contracts is what constitutes service availability. This is a key issue because contracts for PPP projects usually require the Contracting Authority to pay the Contractor for service made available, rather than service actually used.

For example in a water concession, in which the Contractor is to build and operate a new water treatment plant, the Contracting Authority (in this case a water utility) is obligated to pay the Contractor for the quantity of treated water made available, not the quantity of water actually consumed by the Authority. Another example would be a light rail transit system. In such a system, the Authority would be obligated to pay the Contractor for the availability of service, provided that the Contractor meets specified quantity (number of trains per route per time period) and quality standards provided in the contract, regardless of the actual number of passengers using the service. Another example would be hospital services. Generally, the Authority is obligated to pay the Contractor for making services available, regardless of the number of patients.

Unfortunately, the availability (or capacity) principle of PPP contracting has the effect of putting most of the commercial risk onto Government. To mitigate this an international trend has emerged in which commercial risk is transferred to the private operator by giving the Contractor access to the revenues derived from the service provision. For water projects, the trend is to have private operators provide not only the water treatment facility but also the distribution network, thereby giving them access to consumers and the responsibility of collecting on receivables. In a light rail transit system, the private operator is given the right to collect tolls. In a hospital, the provider of the hospital and its service delivery systems is given the right to access consumers through the provision of health care services to patients who can afford to pay. The definition of unavailability is more straightforward in some sectors than in others.

Payment for availability will vary according to the type of service made available. In the case of accommodation availability is normally expressed in terms of the number of units available, e.g. office places, student places, prisoner places. Where service is divided into areas, the contract must specify which areas are most important, i.e. define which are “core” services. In hospitals, accommodation “units” are normally divided into three categories: (1) emergency, operating, and intensive care facilities; (2) waiting areas and clinical support areas; and (3) office and education facilities.

The conditions under which service will be deemed to have commenced must be clearly defined in the contract. Also, if service is made available before the required date, there must be a provision that specifies the reward owed to the Contractor for early delivery. In the same manner, conditions in which service will be deemed to not have commenced must be clearly defined in the contract. When “unavailability” occurs must also be very
clearly defined, because this is an area in which disputes can easily arise and the resulting financial penalties for service unavailability can create animosity between the parties.

**Maintenance of Assets & Service Delivery**

When the Contractor submits its financial proposal, it will include the cost of ordinary repairs and maintenance. The risk associated with determining what needs to be replaced and the cost of making such replacements is entirely upon the Contractor. This transfer of risk to the Operator is best achieved by expressing the service requirements in terms of output specifications. Bidders should be allowed to propose their own methods of repair and maintenance, within the parameters set by the output specifications. This encourages private sector innovation, a key objective of PPP contracting.

The contract clauses that ensure adequate repairs and maintenance of assets should specify that: (1) the service is continuously available; (2) the assets are maintained in a manner that will enable them to reach their full working life; and (3) assets provided by the Authority for use by the Contractor will be returned to the Authority at the end of the contract period in a condition complying with the requirements of this clause.

The contract must include provisions for the transfer of assets at the end of the contract, or upon early termination of service. In projects where the assets are unlikely to revert to the Authority on termination, and the Contractor is taking the risk of their residual value, it is in the best interests of the Contractor to properly maintain those assets. In contrast, if the assets are likely to revert to the Authority at termination, then the Authority will have to ensure that the price it is paying for the service includes coverage for maintenance.

**Performance Monitoring & Compliance**

The contract should clearly specify: (a) the level of performance required; (b) the means by which the Authority will measure the Contractor’s performance; and (c) consequences to the Contractor in event of a failure to meet the required level of performance.

In setting the required level of performance, the contract should clearly specify the output requirements rather than specifying how the services will be delivered. The negotiated performance regime will become a key element of the risk transfer mechanism. When setting the output specifications, if a benchmark (e.g. another PPP service provider that is already performing satisfactorily) is available that can be used as a reference point in the specification of output requirements.

The contract should also specify the mechanism for monitoring performance. It is best practice to disclose such monitoring mechanisms in the tender and bid documents. Such monitoring generally includes the collection of data by the Authority or its designee for performance monitoring, and the contract should indicate what kinds of data is to be
collected, in what manner, in what time intervals, and what the methodology will be for evaluation of the data that is collected.

Contractors are responsible for the performance of their sub-contractors, so the contract should include provisions in which the Authority can require the Contractor to replace one or more of its sub-contractors. Normally, the Authority retains the right to accept or not accept a proposed replacement sub-contractor.

Monitoring normally takes place at three levels: (1) systematic monitoring by Contractor through a quality management system that measures performance; (2) periodic review of the quality management system by the Authority; and (3) users reporting performance problems via a system that should be in place for customer satisfaction tracking.

**Price and Payment Mechanisms**

Price and payment mechanisms are key tools with which PPP contracts allocate risks and responsibilities between the parties to the contact. Price and payment is also the means by which performance is rewarded, with bonuses for superior performance and penalties for inferior performance. The principle features of a contract payment mechanism are:

- No payments are made until the Service is available;
- There is a single Unitary Charge for the Service, rather than separate independent charges relating to availability or performance;
- The single Unitary Charge should only be paid to the extent that the Service is available, i.e. proportionate to the number of units; and
- Deductions should reflect the severity of the failure, e.g. no service will result in no payment, while a minor failure will result in only a minor deduction unless the minor failure is repetitive in which case the deduction will increase.

The payment mechanism will usually include provisions relating to changes in the level of price or tariff, e.g. indexed to inflation. Delays in adjusting the Unitary Charge for the price changes provided in the contract will result in financial damages to the Contractor and commensurate exposure on the part of the Authority to potential claims. Many such claims arise when tariff adjustments provided for in the contract are delayed, despite the good faith efforts of the Authority. Accordingly, Contracting Authorities must take care that they will actually be able to make tariff adjustments in a timely manner. This creates the need to confirm political arrangements with other government institutions involved in tariff regulation, e.g. municipalities, sector ministries, and sector regulators.

Payment mechanisms generally fall into two categories:

The Unitary Charge (the fee that the Authority pays the Contractor for making the service available) is based on the number of available units. Such units can be spaces,
rooms, railway cars, passenger seats, airplanes, ships docked, or any other unit that can be used as a component of the service provided; or

The Unitary Charge is based on the full provision of the overall service. The payment mechanism starts with an assumption of full payment, and in the event of superior or inferior performance the payment is adjusted upward or downward through the use of performance points.

The payment mechanism should not guarantee payment of the Contractor’s debt service. The full risk of project finance must rest on the Contractor. However, payments from the Authority can be earmarked to cover debt service before the remaining balance is made available for other uses by the Contractor. This can give some comfort to lenders without transferring the project financing risk to the Authority.

The contract should provide that the Authority may deduct liquidated amounts due to it when making the Unitary Payments. This is called a set-off provision. Standard contract language for such set-offs is as follows:

- The Contractor shall not be entitled to retain or set off any amount due to the Authority, but the Authority may retain or set off any amount owed to it by the Contractor under this Contract that has fallen due and payable against any amount due to the Contractor under this Contract; and
- If the payment or deduction of any amount referred to in paragraph (a) above is disputed, then any undisputed element of that amount shall be paid and the disputed element shall be dealt with in accordance with the dispute resolution provisions of this Contract.

Change in Service by Authority or Contractor

Changes to the service requirements may be necessary if such changes fall outside of the changes anticipated at the time of contract formation. It is not unusual for advances in technology to motivate a Contractor to modify the technology it uses in service delivery. Normally, such changes are accepted by the Authority because they are improvements, but consultation with the Authority before making the change is a prudent requirement.

A proposed change may involve construction or operational charges. Depending on the nature of the change, costs may be incurred that may not have been anticipated. Changes to the service requirements that involve additional capital expenditure or operating costs may not be easily accommodated within the contract if the additional costs cannot be covered by the contingency reserves put in place by the contractor. Because of this, the financial projections submitted by the Contractor should be checked by the Authority to ensure that they include contingency reserves. In particular, capital expenditures during construction phase should always show reserves to cover 10-15 percent overages in construction costs and/or construction period.

The contract should be flexible enough to enable the Authority to make minor changes in capital or operating costs without requiring contract amendments. In cases where it is the Authority that requests the change, such cases should be limited to specified types of
such changes in the contract. Changes that will not be allowed need to be specified also, such as asking the Contractor to reduce the length of a runway to an unsafe level. Care must be taken to not phrase service delivery requirements in a manner that could result in unanticipated, major increases in service delivery requirements. An example what to avoid would be a contract that requires the Contractor to provide all of the street lighting needs for a particular community. If the community experiences a growth in population that is far greater than expected, this service requirement would become unreasonable. In all PPP contracts there is a delicate balance between cost and flexibility.

Authority changes during the construction period should be kept to a minimum. For the Contractor, the construction period represents one of the most significant areas of risk, so any changes of a material nature could have a profound impact on the profitability of the project for the Contractor. Further, the project’s financiers are not likely to allow the Contractor to accept any changes that would significantly increase finance risk and the projects financial rates of return.

If the change by the Authority requires additional capital expenditure during construction phase, then generally the Authority should meet such costs by payment of reasonable and customary costs to the Contractor, unless the Contractor is able to fund the changes and amortize them over a long enough period to keep targeted financial returns within the boundaries that are acceptable to the project’s financiers. If such is the case, the Unitary Charge can be adjusted to compensate the Contractor, rather than having the Authority pay for the changes directly. An increase in operating costs, rather than capital costs, can generally be compensated by an upward adjustment in the Unitary Charge.

Price Variations & Adjustments

Every PPP contract should have a provision whereby the prices charged for the services will be automatically adjusted at regular intervals in accordance with a specified index. In the bidding documents, this index should be identified so that bidders do not submit proposals that use different indices, thereby compromising the comparability of the bids submitted. The Authority should take into account its affordability constraints when it selects the index to be used. It should also consider that the Contractor will charge a higher price if the index is not likely to provide cover for its costs.

Price variations and adjustments that cannot be covered by indexing can be determined by using either benchmarking or market testing. Benchmarking involves reference to the prices of an existing provider of the same type of service. Market testing involves review of the prices charged by other providers of the same type of service.

Sub-Contractors & Employees

Authorities tend to view the selection and performance of Sub-Contractors as something it needs to control, whereas Contractors tend to view the selection and performance of its Sub-Contractors as an area under which it should have exclusive control. In general,
any attempt by an Authority to control Sub-Contractors is not advised and is in most cases also unnecessary. In certain limited cases, there may be overriding reasons why an Authority should have a degree of control over sub-contractors, for example projects in which there are national security or public interest concerns.

As is the case with sub-contractors, Authorities generally should not seek control over the employees of the Contractor or its Sub-Contractors. Exceptions can be appropriate in defense projects, prison projects, school projects, and other projects in which there is an overriding public concern regarding what kinds of people are involved in service delivery. In projects requiring a security clearance for persons providing services, the Contractor should consider that such clearances may be outside the Authority’s control.

**Assignment & Change of Ownership**

As many PPP projects involve the construction and operation of infrastructure, contract periods can be very long, commonly 15-20 years and in some cases as long as 40 years. In view of this, some changes in ownership on the part of the Contractor are possible, even likely and the Authority should take care to anticipate such changes in drafting the wording for the contract. Similarly, over such a long period of time the business profile of the Contractor may change, making assignment of certain service delivery tasks to other entities a necessity. The contract should, therefore include provisions that will allow for assignment of tasks under certain specified conditions.

Certain restrictions will be in the contract, such as the Contractor may not assign, novate, or transfer its rights except as provided in the lenders’ security agreement. If the lenders appoint a new Contractor, the rights of the original Contractor should be transferred. In the Contract there will also be restrictions on the Authority’s right to transfer its rights or obligations without the consent of the Contractor. Any attempt to provide restrictions on the lenders in the Contract should be met with concern. It is very difficult to restrict the identity of lenders or their assigns, especially when bond financing is involved.

Changes of ownership can be of considerable concern to Authorities when the ownership profile of the Contractor is changed. Any attempt to restrict the transfer of ownership in the Contractor is likely to be met with considerable resistance, so the best an Authority can expect to achieve is a requirement to be notified of such changes.

**Treatment of Assets at End of Service Period**

There are essentially two options for treatment of assets as the end of the service period:

The Authority takes control of the assets on expiration of the Contract. This includes assets for which the long-term public sector demand is clear, and for which there is no practical alternative use of the assets; and

The residual value of the assets is transferred to the Contractor. These kinds of assets are usually generic and have alternative use outside the public sector.
In most PPP projects, the Authority’s long-term objectives are best served by having the assets transfer to the Authority at the end of the service period. This is one reason why so many PPP infrastructure projects are structured at Build-Operate-Transfer (BOT). There are many examples, such as highways. The Contractor cannot be a highways authority, so the highways that it builds and operates must be transferred to the Authority at the end of the service period. Care must be exercised, however, in the transfer of assets to the Authority at the end of the service period because international experience has shown that such transfers can bring back the same problems that existed when such assets were under government control and management, i.e. the inefficiencies that caused PPP to be developed for a solution. An example is the power generating facilities in the Philippines that were developed using BOT. Many of those facilities have reached the ends of their concession periods and have reverted to government ownership and operation. The same inefficiencies that existed prior to the PPP program are re-emerging. Governments need to view the asset transfer at the end of a concession contract to be an opportunity to have a new round of bidding to secure a new private operator rather than an opportunity for government to re-take control of service delivery.

In cases where the assets are transferred to the Authority at the end of the service period, the contract should specify what conditions the assets must be in at the time of transfer, and should provide for recourse in the event that the assets are not in the condition that is specified in the contract. This applies to assets that will still have useful life at the time of transfer. For assets that will have expended their useful life by the time of transfer, it is not necessary to provide for compensation if they were not properly maintained. Most equipment will have expended its useful life by the time of transfer to the Authority. The Authority should focus on value for money rather than capturing residual asset value.

In most cases, it is advantageous to provide an incentive to the Contractor to maintain the assets in good condition. Such incentive can be provided by a provision in the contract whereby the Contractor will be paid for the assets at time of transfer, at a price that is a function of the condition of the assets. Another method is to provide for an optional renewal of the contract if the assets are in good condition. If the assets have an alternative use at the end of the contract period, there are two main options for determining amounts payable to the Contractor at the end of the service period: (1) the market value of the assets; or (2) an amount bid by the Contractor when negotiating the original contract.

**Early Termination & Payment for Early Termination**

The Contractor should be allowed the right to terminate the contract if the Authority acts in a way that renders the contractual relationship untenable or completely frustrates the Contractor’s ability to deliver the service. In determining the compensation to be paid in event of default or breach by the Authority, the objective should be to ensure that the Contractor and the financiers are no worse off than they would have been had the default not occurred. The contract must provide a formula for such early
termination payment. Such formula can be based on either of the following three options:

- Compensation to reflect the base case IRR for equity and junior debt for the duration of the contract;
- Compensation to reflect the market value of both equity and junior debt for the duration of the contract; or
- Compensation to reflect the base case return for equity and junior debt for the remainder of the duration of the contract.

In event of termination due to Contractor default, the contract must deal comprehensively with the possibility of such termination event, and must achieve a fair balance between the Authority’s desire to be able to terminate for inadequate service provision and the interests of the Contractor and financiers to restrict termination to only the most severe of defaults. Termination should be the Authority’s last resort.

Generally, the Authority should have the right to terminate in the event of a consistent breach by the Contractor. A common definition of “persistent breach” is a breach that could have been rectified with reasonable efforts by the Contractor, and which has taken place several times over a 6 months period after the dates of the final warnings provided to the Contractor by the Authority. The contract should specify where the rectification process for such termination will involve re-tendering or not.

Termination due to events defined as Force Majeure does not require either party to pay compensation or liquidated damages to the other party.

Dispute Resolution & Authority Step-In Provisions

A popular dispute resolution process for PPP contracting is as follows:

- The Authority and Contractor consult with each other for a fixed period of time in an attempt to come to a mutually satisfactory agreement;
- If consultation fails, the parties may then put their case before an expert to decide. The expert is appointed from a panel whose appointment is regulated by contract, and a separate financial expert may be appointed to handle disputes relating to price variations, financial returns, etc.; and
- If either party is not satisfied with the expert’s decision, it may refer the matter to arbitration or to the courts for a final and binding decision. The method by which the arbitrator will be appointed should be set out in the contract.

In many cases, step 3 is required to be binding arbitration because both parties to the PPP contract agree that referring the matter to the courts will be too costly. Although this is a good way to avoid litigation, parties to the contract should check to see if the decisions reached in a binding arbitration will be honored by local courts. In many countries, such decisions are not really binding unless a local court ratifies them. In such cases, binding arbitration has little value and such cases might as well go directly to the courts.
In some circumstances, the Authority may wish to take action in order to prevent or to mitigate the damages that would be caused by an interruption of service during disputes. Such a right is normally referred to as a step-in right and it involves the Authority taking over all or part of the Contractor’s service delivery functions.

Authority step-in on breach by the Contractor will generally occur through the contract monitoring arrangements. The Authority should continue to pay the Unitary Charge for service delivery that continues to be conducted by the Contractor, i.e. the areas in which there has been no breach of the contract. Such payments will be offset by the costs that the Authority incurs in providing service in areas into which it had to step in. The step-in provisions should not interfere with the contract’s early termination provisions.

In the section below is the Model Concession Contract developed by the United Nations Committee on International Trade Law (UNCITRAL).
UNCITRAL Model Concession Contract

Model provision 28. Contents and implementation of the concession contract (see the Legislative Guide, recommendation 40 and chap. IV, paras. 1-11)

The concession contract shall provide for such matters as the parties deem appropriate, such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire (see chap. IV, para. 1);

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire’s rights under the concession contract (see recommendation 5);

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30 (see recommendations 42 and 45 and model provision 30);

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 31 to 33 (see recommendations 44 and 45 and model provisions 31-33);

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority (see recommendations 46 and 48);

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility (see recommendation 52);

(h) The extent of the concessionaire’s obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (see recommendation 53 and model provision 38);

(i) The contracting authority’s or other public authority’s right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the

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37Enacting States may wish to note that the inclusion in the concession contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.
services are provided in accordance with the applicable legal and contractual requirements (see recommendations 52 and 54, subpara. (b));

(j) The extent of the concessionaire’s obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations (see recommendation 54, subpara. (a));

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled (see chap. IV, paras. 73-76);

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire’s own shareholders or other affiliated persons (see recommendation 56);

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project (see recommendation 58, subparas. (a) and (b));

(n) Remedies available in the event of default of either party (see recommendation 58, subpara. (e));

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control (see recommendation 58, subpara. (d));

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination (see recommendation 61);

(q) The manner for calculating compensation pursuant to model provision 47 (see recommendation 67);

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire (see recommendation 69 and model provisions 29 and 49);

(s) The rights and obligations of the parties with respect to confidential information (see model provision 24).

Model provision 29. Governing law (see the Legislative Guide, recommendation 41 and chap. IV, paras. 5-8)

The concession contract is governed by the law of [the enacting State] unless otherwise provided in the concession contract. 38

38Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the Legislative Guide (see chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also the Legislative Guide, chap. VII, “Other relevant areas of law”, paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of an infrastructure project (see generally the Legislative Guide, chap. VII, “Other relevant areas of law”, sect B).
Model provision 30. Organization of the concessionaire (see the Legislative Guide, recommendations 42 and 43 and chap. IV, paras. 12-18)

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [the enacting State], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the concession contract consistent with the terms of the request for proposals.

Model provision 31. Ownership of assets\(^3\) (see the Legislative Guide, recommendation 44 and chap. IV, paras. 20-26)

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

(a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

Model provision 32. Acquisition of rights related to the project site (see the Legislative Guide, recommendation 45 and chap. IV, paras. 27-29)

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire

\(^3\)Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see the Legislative Guide, “Introduction and background information on privately financed infrastructure projects”, paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see the Legislative Guide, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 20-26). Irrespective of the host country’s general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire’s ability to create security interests in project assets for the purpose of raising financing for the project (see the Legislative Guide, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.
or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with [the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest].

Model provision 33. Easements (see the Legislative Guide, recommendation 45 and chap. IV, para. 30)

Variant A

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws].

Variant B

1. The concessionaire shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws].

2. Any easements that may be required for the implementation of the project shall be created in accordance with [the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest].

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46The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see the Legislative Guide, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 30-32).
Model provision 34. Financial arrangements (see the Legislative Guide, recommendations 46, 47 and 48 and chap. IV, paras. 33-51)

1. The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [in accordance with the rules established by the competent regulatory agency].

2. The contracting authority shall have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

Model provision 35. Security interests (see the Legislative Guide, recommendation 49 and chap. IV, paras. 52-61)

1. Subject to any restriction that may be contained in the concession contract, the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:
   
   (a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;
   
   (b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [the enacting State].

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41Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the Legislative Guide as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see the Legislative Guide, chap. II, “Project risks and government support”, paras. 30-60). The cost at which public services are provided is typically an element of the Government’s infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity” (see the Legislative Guide, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 36-46).

42These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.
Model provision 36. Assignment of the concession contract (see the Legislative Guide, recommendation 50 and chap. IV, paras. 62 and 63)

Except as otherwise provided in model provision 35, the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire’s technical and financial capability as necessary for providing the service.

Model provision 37. Transfer of controlling interest in the concessionaire (see the Legislative Guide, recommendation 51 and chap. IV, paras. 64-68)

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

Model provision 38. Operation of infrastructure (see the Legislative Guide, recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2))

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire’s obligations to ensure:

   (a) The modification of the service so as to meet the demand for the service;

   (b) The continuity of the service;

   (c) The provision of the service under essentially the same conditions for all users;

   (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

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42The notion of “controlling interest” generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of “controlling interest” may need to define the term in regulations issued to implement the model provision.
2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

Model provision 39. Compensation for specific changes in legislation (see the Legislative Guide, recommendation 58, subpara. (c), and chap. IV, paras. 122-125)

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire’s performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

Model provision 40. Revision of the concession contract (see the Legislative Guide, recommendation 58, subpara. (c), and chap. IV, paras. 126-130)

1. Without prejudice to model provision 39, the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire’s performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

   (a) Changes in economic or financial conditions; or
   (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

   (a) Occur after the conclusion of the contract;
   (b) Are beyond the control of the concessionaire; and
   (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.
Model provision 41. Takeover of an infrastructure project by the contracting authority (see the Legislative Guide, recommendation 59 and chap. IV, paras. 143-146)

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

Model provision 42. Substitution of the concessionaire (see the Legislative Guide, recommendation 60 and chap. IV, paras. 147-150)

The contracting authority may agree with the entities extending financing for an infrastructure project and the concessionaire to provide for the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.\(^{44}\)

IV. Duration, extension and termination of the concession contract

1. Duration and extension of the concession contract

Model provision 43. Duration and extension of the concession contract (see the Legislative Guide, recommendation 62 and chap. V, paras. 2-8)

The duration of the concession shall be set forth in the concession contract. The contracting authority may not agree to extend its duration except as a result of the following circumstances:

(a) Delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;

(b) Project suspension brought about by acts of the contracting authority or other public authorities;

\(^{44}\)The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see the Legislative Guide, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders’ security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.
(c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs without such extension; or

(d) [Other circumstances, as specified by the enacting State].

2. Termination of the concession contract

Model provision 44. Termination of the concession contract by the contracting authority (see the Legislative Guide, recommendation 63 and chap. V, paras. 14-27)

The contracting authority may terminate the concession contract:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For compelling reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

(c) [Other circumstances that the enacting State might wish to add].

Model provision 45. Termination of the concession contract by the concessionaire (see the Legislative Guide, recommendation 64 and chap. V, paras. 28-33)

The concessionaire may not terminate the concession contract except under the following circumstances:

(a) In the event of serious breach by the contracting authority or other public authority of its obligations in connection with the concession contract;

(b) If the conditions for a revision of the concession contract under model provision 40, paragraph 1, are met, but the parties have failed to agree on a revision of the concession contract; or

(c) If the cost of the concessionaire’s performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, for instance, pursuant to model provision 28, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the concession contract.

43The enacting State may wish to consider the possibility of having the law authorize a consensual extension of the concession contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 26.

44Possible situations constituting a compelling reason of public interest are discussed in the Legislative Guide, chap. V, “Duration, extension and termination of the project agreement”, para. 27.
Model provision 46. Termination of the concession contract by either party (see the Legislative Guide, recommendation 65 and chap. V, paras. 34 and 35)

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party’s reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

3. Arrangements upon termination or expiry of the concession contract

Model provision 47. Compensation upon termination of the concession contract (see the Legislative Guide, recommendation 67 and chap. V, paras. 43-49)

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

Model provision 48. Wind-up and transfer measures (see the Legislative Guide, recommendation 66 and chap. V, paras. 37-42 (for subpara. (a)) and recommendation 68 and chap. V, paras. 50-62 (for subparas. (b)-(d))

The concession contract shall provide, as appropriate, for:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority;

(b) The compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority;

(c) The transfer of technology required for the operation of the facility;

(d) The training of the contracting authority’s personnel or of a successor concessionaire in the operation and maintenance of the facility;

(e) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.
V. Settlement of disputes

Model provision 49. Disputes between the contracting authority and the concessionaire (see the Legislative Guide, recommendation 69 and chap. VI, paras. 3-41)

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.\(^\text{17}\)

Model provision 50. Disputes involving customers or users of the infrastructure facility (see the Legislative Guide, recommendation 71 and chap. VI, paras. 43-45)

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

Model provision 51. Other disputes (see the Legislative Guide, recommendation 70 and chap. VI, para. 42)

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

\(^\text{17}\)The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.
Annex D. Detailed Job Descriptions

POSITION: Director General

AGE: Not a consideration, other than mature, expected to 40 +

EDUCATION: A degree with post graduate qualification in economics, accountancy, financial or business management will be essential. Additional qualification in technical related areas, would be an advantage.

EXPERIENCE: Will have worked at a similar level with a management team, reporting to board of management with a proven track record of success will be essential. A high level professional manager with minimum 10 years work experience in private sector finance management will be desirable. Experience of working with Government Agencies would be an advantage. Experience of management of leading a team of professional staff and handling administrative matters including HR function would be an advantage.

He/she must have a proven record in achieving results through people, project and financial management. Experience of change management process, and developing a new organisation accounting and working procedures is essential. He/she must be IT literate.

PERSONALITY: Open, friendly, good listener, while being firm and assertive in approach. Must have a natural ability to meet and work with people. He/she should be hoverer more a people orientated than a technician in approach.

CIRCUMSTANCES: Prepared to accept a fixed term contract, living in Lilongwe
Job Title: DIRECTOR GENERAL OF PPP UNIT

Reports to: Principal Secretary MoF or OPC or Chairperson PPP Board/Unit

Staff Responsibility: All PPP Unit Staff

Main Purpose of Position:
To development of the PPP Unit by ensuring the organisation has sufficient resources (including budget) and the necessary skills to meet its objectives set out by legislation and as reflected in the up-dated PPP Unit Business Plan and Organisational Objectives.

There are three critical and distinct areas of accountability within the job outline: (i) statutory obligations (ii) Ministerial and or Unit or Board requirements and (iii) staff and organisation leadership

Criteria of Success:
Key staff responsibilities, tasks, targets are clearly and formally set, accepted and resourced. Costs must be equal to or less than budgeted. Service and delivery quality levels must meet ‘stakeholder’ requirements.

KEY TASKS:

1. Director General of PPP Unit

To act as a Director General of the PPP Unit, supporting its objectives and the fulfilment of statuary duties. To support the PPP Unit in the development of operational policies for the day to day working. To oversee the implementation of policy decisions and review progress against agreed time-scales.

Criteria of Success
The PPP Unit staff and the stakeholders are satisfied with the progress of PPP project implementation against agreed time-scales.

Accountability
2. Work Planning

The development of up to date Work Plan with time scales for PPP deliverables within 3, 6, 9, & 12 months for self and each Director. To develop a planning process that involves staff in the formulation of ideas for implementation. Facilitate and resource ad hoc request within the PPP Units mandate.

Criteria of Success
The Work Plan reflects the plans of the PPP Units staffing levels and the stakeholders expectations.

Accountability
There are monthly PPP planning meetings scheduled and these are at least quarterly project and strategy reviews are undertaken with your Management Team (Directors). Changes are reflected in twice annual update of the Business Plan.

3. Organisation Leadership

Provide consistent leadership and direction for the development of the PPP Unit, both internal and externally. Internally by setting an example and creating the clarity of PPP Project strategies that are understood and acted upon by all staff. Externally helping to gain wider understanding of the positive benefits of PPP Units role in the community and the development of a public awareness campaign and education programmes. Organisation objectives are set and applied to every day work by all.

Criteria of Success
A flexible, loyal, expert and responsive staff with clear goals and objectives pursued in a co-ordinated and motivated manner. Externally there is a positive view of the work of the PPP Unit and the Governments economic development policies.

Accountability
Review quarterly results based on Units Directors contribution to these results as a Department/ team and on an individual basis. The PPP project plans and time-tables are published and slippages highlighted monthly.

4. PPP Unit Resource Management

a) Internal Resources
To identify and recruit and develop staff necessary to meet the PPP Units updated Work Plans.
Criteria of Success
Sufficient staffs are in place with the requisite skills.

b) Budget Management
To ensure a sustainable budget is set for each year that meets the PPP Units plans for each Department

Criteria of Success
Costs are less than or equal to budget.

Accountability (a) and (b) There are monthly and quarterly planning and budget reports that reflect the provision of adequate resources to meet the PPP Units needs.

5. Transparency & Governance

Ensure that the transparency and quality of approach follows best international governance practices. The integrity of the PPP Unit is beyond question, staff and procedures of services of the PPP procurement set down by Office of the Director Public Procurement (ODPP), and PPP law requirements.

Criteria of Success
The manner PPP Unit discharges its responsibilities by providing information on its governance and Procurement approach through its policies of open communications.

Accountability
Publish Annually Report on good governance and procurement protocols for each PPP project undertaken, including financial undertaking.

6. Public Awareness & Communications

Ensure that there is a positive public reaction from special interest groups to the process being adopted to support the government’s public PPP policies and programme. Ensure that there is a planned public information service available including full briefing of public representative’s etc.

Criteria of Success
There is a positive understanding of the PPP process for the State and the benefit of the public.

Reporting System
Communicate by all types of media at all levels within the community, with a quarterly review of progress.
7. Performance, Training & Development

A performance planning review system and competency tools are applied and set out in the procedures for all Directors and professional staffs. Short falls in performance are addressed through the appropriate development programmes. Planned and clearly identified training and development programmes are in place. A series of ‘in-house’ programmes are identified to build common competencies with core support staff.

Criteria of Success
Performance measures are met or exceeded and deficiencies are resolved.
All performance exceptions are being positively brought to a conclusion.
Training and development plans are identified for all the employees of the PPP Unit.

Accountability
Six monthly appraisals are undertaken with all Directors. Training Plans are implemented to meet development needs.

Director of PPP Projects

AGE: Director 30 years plus

EDUCATION: A post graduate qualification in management and or accounting and or engineering; additional qualification in technical related areas for utility position would be an advantage. He/she must have proven communication, report written and oral presentation skills.

EXPERIENCE: He or she have worked at a senior level within the private sector in a related industry. Experience of a reporting to a formal management team/ board structure. Having lead private and public sector transaction to successful negotiation and conclusion would be essential perquisite for the position. As a Director, he/she will expected to have had a broad commercial management experiences with the capacity to contribute to the overall organisation issues, including policies, strategies and staff management issues; working within a Management Team and reporting formally to Board level. He/she must have experience of leading a high level professional management team, with minimum 10 years work experience within a related industry sector environment.
He/she must have a proven record in achieving results in a business environment to support sensitive commercial transactions. In addition must be capable of applying strict project ‘project management’ and or related IT project management support systems to the all the transactions allocated to him or her.

Specialist Utility (e.g. energy, transport, communications & water) , / commercial expertise are essential for Directors working in utilities. Experience of working with or as a consultant would be an advantage. Understanding of Government organisations and working would be an advantage

PERSONALITY: Must have a natural ability to meet and work with people. He / she should be both people orientated while having a strong technical understanding. Excellent report writing and communication skills will be essential.

CIRCUMSTANCES: Prepared to accept a fixed term contract for the duration of the project or a maximum of three years duration, with the possibility of renewal

Job Title: Directors of PPP Projects
Reports to: Director General
Staff Responsibility: Projects Transaction Managers (4) and Departmental Specialist Personnel, Economic Analysis, Banking and Investment Manager

Main Purpose of Position: To support the PPP Unit policies, work programmes and ensure the organisation has sufficient competent personnel resources necessary skills to meet PPP Projects Directorates work plans.

Overview of Role
In the job outline below recognises there are two dimensions to the Director of PPP Projects role. First: is the ‘external’ management of PPP transactions with line ministries; with the appointment of Project Transaction Managers. There is now need to place greater emphasis on the skills of management of Project Transaction Managers of supporting line ministries and working with external consultants. Secondly: there is the ‘internal’ PPP contribution to managing the complexities of a dynamic PPP project management IT systems. This is to enable the accuracy of information to recoded and communicated to all stakeholders on the PPP project team.

There are three central components to the Directors of PPP Projects role:

- **a) Conduct and manage Feasibility Studies** e.g. to assess project potential, affordability, value for money and risk transfer

- **b) Managing the ‘due diligence’ of PPP** e.g. Share holdings, labour & employment issues; land and property ownership; legal authority to undertake PPP transaction; common PPP enterprise marketing information for PPP transactions to secure investment; due diligence at each stage of the PPP feasibility approvals and negotiation.

- **c) PPP project management procedures and leadership** e.g. information systems to monitor internal & external PPP project components. PPP Transaction project management electronic data storage and retrieval systems.

**KEY TASKS:**

This is a board job outline addressing seven key areas for the role of a Director of PPP Projects, these are:

1. **Project Feasibility Work Planning:** weekly, monthly and annual with line ministries and investors
2. **Project Resource Management:** internal personnel, external consulting resources (procurement) and feasibility budgets
3. **Project Approvals:** securing MoF approvals for each stage of the feasibility study
4. **Project ‘due diligence’ & PPP compliance Information**
5. **Management Information Systems (MIS) & Communications**

We set out below the general description of these seven activities, including when you will be considered successful and how you will be accountable.

1. **Project Feasibility Work Planning**

The **Project Feasibility Work Planning** for public private partnerships (PPP) and or privatisations are articulated in the PPP Units annual work plans, prepared each
November/December and critically reviewed quarterly. There are details for all current projects identifying resource requirements and timelines for the successful delivery of stakeholder (line ministries and potential investors) requirements, with the additional capacity to facilitate ad hoc requests.

**Criteria of Success:** Plans are identified meeting stakeholder requirements with solutions put in place and articulated in the PPP Unit’s annual work plan.

**Accountability:** Monthly progress monitoring and work planning meetings scheduled and quarterly performance reviews are undertaken for each PPP project.

### 2. Project Resource Management

**a) Internal Staffing Resources**
Identify the staff necessary to meet the current work plans for transactions over which you have responsibility in conjunction with the relevant Project Managers.

**Criteria of Success:** That sufficient staff with the requisite skills are in place to complete all the PPP feasibility stages.

**b) External Resourcing**
There is careful identification of the requirement for external resources (people and finance) to support PPP or privatisations transactions. That these resources are within the funding provisions of the PPP Unit and included in the annual work plans and within agreed procurement procedures.

**Criteria of Success:** There is an excellent balance of utilization of internal and external resources to deliver on work plans for commercialisation, public private partnerships (PPP) and privatisations.

**c) Budget Management**
To set in conjunction with the Director of Finance and Risk Management a sustainable budget for each project that meets the delivery of work plans.

**Criteria of Success:** Cost are less than or equal to budget.

**Accountability (a), (b) and (c).** There are monthly project planning and budget MIS (Management Information System) reports that reflect the provision of adequate resources to meet the stakeholders’ needs, with monthly and quarterly business performance reviews.

### 3. Project Approvals
To set in place the necessary operational structures and procedures to ensure that the organisation meets its Ministry of Finance (MoF) approval objectives for each stage of the feasibility study. There are accurate and timely reports with quality standards for PPP transaction. There is one common standard project management system operating across all project portfolios under the control of each Project Transaction Manager, supporting IT file management, tracking and retrieval system.

**Criteria of Success:** PPP Feasibility Approval quality standards are met in the presentation of Reports. Project Data is accurate, timely and well presented to enable dictions to make. That decisions are clearly communicated and accepted by those directly delivering on project deadlines.

**Accountability:** PPP Feasibility study are conducted to a quality standard. There are operating manual and IT systems and procedures including cross organisational quality ‘files’ maintenance standards in place, with key personnel trained to operate the system effectively. This is supported by holding weekly project staff communication and problem solving meetings. Outcomes are reviewed at Director level at cross organisational transactions meetings at least quarterly.

4. **Project ‘due diligence’**

To comply with international, legal, Government, Donor and local PPP Unit procedure in respect to due diligence for each PPP transaction. Maintaining of accurate records, providing timely information to meet fixed reporting deadlines for each transaction under your management. Procurement and Contract Department will set out strict procedures and process for PPP transaction to follow to ensure due diligence, in respect to the legality of the project at each stage of its MoF Approval(s). Your full co-operation and responsiveness will be important to support ‘transparency and integrity’ of the transaction process.

**Criteria of Success**
All monitoring reports are favourable on each transaction due diligence audit.

**Accountability**
There are monthly/quarterly due diligence standard reports completed for all transactions.

**PPP Project Management Information Systems**

The Project management information systems are standardise and utilised for all projects across the PPP Unit providing timely and accurate information to project teams and stakeholders e.g.
• Critical information is posted to the ‘intra-net’ in secure files, including reports made available for each project to the Director of Procurement & Contract Compliance
• Financial reports are submitted to the Director Finance and Risk Management Support Director on time to enable MIS to be published
• MoF Approvals scheduled, recorded and acted upon
• Timely reports to stakeholders & donors

Criteria of Success
Project management information system and communication with staff and stakeholders are accurate and up to date.

Accountability
Project management information system and communication are reviewed monthly at staff and management communication meetings.

Position: Finance & Risk Management Director (FRMD)

Reports to: Director General

Staff Responsibility: All Departmental staff

Main Purpose of the Position: To manage all financial accounting and administration matters, by providing management information system (MIS) addressing PPP Project Risk Management and act as trustee of the Project Development Fund (PDF)

Age: Over 30 years
(As it unlikely that anyone younger will have the working experience required).

Education: Must have a Master in Finance with emphasis on accounting or equivalent qualification. In addition it is expected that the successful candidate a professional accounting qualification from an international recognised body.

Experience: Has worked as Head of Finance of a medium to large, preferentially private sector, organisation. Knowledge of public service and donor (to world bank standards) procedures and control would be important. He/she must have served at a senior management position for at least 5 years leading a dedicated financial team. He/she must also be computer literate, familiar with IT accounting systems, administration controls and security. It is expected that the successful candidate will have experience in developing a both financial risk management assessment and ‘management information systems’ (MIS) to support organisational and departmental accountability.


Circumstances: Must be prepared to live and work in Lilongwe, energetic, mobile and willing to accept fixed term contract.

Position: Finance & Risk Management Director (FRMD)

Reports to: Director General of the PPP Unit

Staff Responsibility: All Departmental staff

Main Purpose of the Position: to develop financial accounting and reporting within the PPP Unit including the development and implementation of management information system (MIS), risk management.

Criteria of Success: Management accounts and the MIS are prepared on a monthly basis and presented to the DG and Directors on time and accurately.

Accountability: All financial statements (monthly management and annual audited) and monthly MIS data are prepared to a standard consistent with best practice and are presented within the defined timescales. Donors receive PDF accounts monthly.

KEY TASKS

1. Provide Monthly MIS Statements

Provide all departments with the critical management performance and financial information in a reliable and timely manner. Establish the necessary operational decision making structures and procedures to ensure the MIS is an effect working document and report mechanism.

Criteria of Success
The Management Team and its individual members are satisfied with the management information and the financial information that is provided to it, with emphasis on PPP transactions. The Board of management or management team and the Director of PPP Projects Transaction and Project Transaction Managers are confident in the procedures and systems

Accountability
There is a monthly and quarterly review of financial performance against control budget and PPP transaction business plan. The information provided is credible and consistent with the annual audited financial statements.

2. Financial Statements

Provide Monthly, Quarterly and Annual PDF financial statements for audit in a reliable and timely manner.

Criteria of Success
PDF Annual financial statements are presented for audit within three months of the financial year end. The auditors’ report is not qualified in any way.

Accountability
All stakeholders acknowledge that all financial information that emanates from BPE is both timely and reliable.

3. Risk Management Assessment Financial Statements

Provide Risk Management Assessment Financial Statements on a Monthly, Quarterly and Annual for audit in a reliable and timely manner.

Criteria of Success
Provide Risk Management Assessment statements are presented for audit within three months of the financial year end. The auditors’ report is not qualified in any way.

Accountability
The auditor’s management letter contains no indications of significant exposures arising from internal control weaknesses annually.

4. Financial Standards & Controls

Suitable procedures, controls and systems are in place to ensure that all PPP Transactions (historical and future) are accounted for in a manner that is consistent with the founding legislation, legitimate amendments thereto and best practice.

Criteria of Success
PPP Unit is regarded as being a transparent organisation that deals with receipts, payments, assets and liabilities in a manner that is consistent with the best interests of the State and investors including donors

Accountability
That all internal and external audit reports and other reports that may be United from time to time confirm Finance & Risk Management Director
(FRMD) has properly accounted for all transaction receipts, assets and liabilities and properly procured items of cost / expenditure.

5. **Business Plans & Control Budget**

To have the specific detailed operational responsibility for initiating and coordinating the business planning and control budget process for the PPP Unit. This to involve all of the departmental Directorates and to establish with them and their subordinates that the process as being a valid reflection and quantification of their own plans and of those of the PPP Unit.

**Criteria of Success**
PPP Unit has a three year business plan the first year of which is to be basis of the control budget. The business plan and control budget are prepared from inputs provided by each departmental director and that those Directors to be committed to its achievement.

**Accountability**
The Management Team carry out monthly, quarterly and annual reviews of the actual performance of the Directorates and PPP Unit. These reviews to compare actual performance against that planned and where necessary corrective or updated action initiated and agreed, monthly and quarterly.

6. **Staffing & Resourcing**

To identify in advance the internal staff necessary to meet the PPP project plans. In addition, plan, monitor, evaluate and review all financial aspect of the PPP project activities.

**Criteria of Success**
There are sufficient staff and external resources in place with the requisite skills whilst operating within budgets.

**Accountability**
There are monthly and quarterly planning and budget reports that reflect the provision of adequate resources to meet the Units needs.

7. **Staff Performance & Project Reviews**

There are project performance and self-assessment tools are applied to monitor, evaluate and progress against plans including the performance of individuals. That short falls in performance are addressed through the appropriate procedures on time. Action plans are identified from these reviews and co-ordinated.

**Criteria of Success**
Performance measures are met or exceeded, deficiencies are resolved. All performance exceptions are being positively brought to a conclusion.
Accountability
There are staged and planned project performance appraisals are undertaken with all those directly involved in the Department at least bi-annually.

Director of Procurement & Contract Compliance

AGE: Director 30 years plus

EDUCATION: A qualification on Law essential and a post-graduate qualification in management, administration and or accounting would be an advantage. He/she must have proven communication, report written and oral presentation skills.

EXPERIENCE: He or she have worked at a senior level within the public or private sector in a related activity. Experience of a reporting to a formal management team/board structure and managing a professional team of highly qualified people is essential. Having lead private and public sector transaction to successful negotiation and conclusion would be essential perquisite for the position. As a Director, he/she will expected to have had a broad commercial management experiences with the capacity to contribute to the overall organisation issues, including policies, strategies and staff management issues with minimum 10 years work experience within a legal contracting work environment.

He/she must have a proven record in achieving results in a business to negotiate sensitive commercial transactions. In addition must be capable of applying strict project ‘project management’ and or related IT project management support systems to the all the transactions allocated to him or her would be highly desirable.

Experience of working with a large utility e.g. energy, transport, communications & water or commercial banking would be an added advantage. Experience of contracting consultant and working with
Donors would be an advantage. In addition; an understanding of Government organisations and working would be an advantage.

PERSONALITY: Must have a natural ability to meet and work with people. He / she should be both people orientated while having a strong legal and procurement technical understanding. Excellent report writing and communication skills will be essential.

CIRCUMSTANCES: Prepared to accept a fixed term contract for the duration of the project or a maximum of three years duration, with the possibility of extension or renewal.

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**Job Outline**

**Position:** Director of Procurement & Contract Compliance (DPCC)

**Reports to:** Director General PPP Unit

**Staff Responsibility:** All Departmental staff

**Main Purpose of the Position:** To ensure that PPP Transactions are planned and implemented in a manner that is consistent PPP law, best international practice, good governance and procurement protocols.

**Criteria of Success:** There are no issues that cast doubts over the probity of a PPP Transaction, in whole or in part.

**Accountability:** All stakeholders including political opponents and the media are unable to legitimately report that international best procurement and contract compliance practices have been violated by the PPP Unit in any report.

**KEY TASKS**

1. **Procurement & Contract Compliance of PPP Transactions**

   At the outset of a PPP Transaction; to understand and approve the probity issues contained therein.

   **Criteria of Success**
That all PPP Transactions have, at the outset, a procurement and monitoring and compliance plan that is approved by the Director of Procurement & Contract Compliance (DPCC) and the Board of Management.

**Accountability**
Reports from DPCC will provided to the Director General, plus all exception reports to the Management Board and/or internal Procurement Committee and the Office of the Director of Public Procurement (ODPP) monthly. Such reports to be confirmed by the internal and the external financial auditors at least annually.

### 2. Procurement and Contract Compliant Procedures

The DPCC and his/her staff will set up all procumbent procedure specifications and standard which meet the Malawi law, ODPP standards and international World Bank guidelines for all PPP Unit transactions. The reporting and highlighting of any deviations will be handled in open and transparent manner reporting outside of the PPP Unit.

**Criteria of Success**
All procedure are in place and meet Malawi law, ODPP standards and international WB procurement guidelines for all PPP Unit transactions.

**Accountability**
There is continuous review of best practice and the PPP Unit it see as taking a pro-active role in publishing guidelines bi-annually to meet the required standards.

### 3. Staffing & Resourcing

To identify in advance the internal staff necessary, the external consultancy support required and set out in clear terms of reference (ToR’s) to meet the PPP project plans. In addition, plan, monitor, evaluate and review all aspect of the PPP project activities.

**Criteria of Success**
There are sufficient staff and external resources in place with the requisite skills whilst operating within budgets.

**Accountability**
There are monthly and quarterly planning and budget reports that reflect the provision of adequate resources to meet the PPP Units needs.

### 4. On going Probity Advice
During the course of PPP Transactions the DPCC will be available to the PPP Transaction Director, transaction manager or PPP project team to provide and advices on issue that have arisen but were not contemplated or dealt with at the time of the initial PPP Transaction plan.

Criteria of Success
That unplanned procurement and contract compliance issues to be professionally dealt with as and when they arise.

Accountability
Reports from DPCC provided to the Director General and the Board confirmed the corrective actions have been addressed monthly.

5. Procurement & Contract Compliance Sign Off

The entire procedure and processes to be reviewed at the completion of the PPP Transaction and formally reported on by the DPCC. Any items of concern / inconsistencies with either the original plan or any interim advices to be clearly reported on by the DPCC.

Criteria of Success
All involved persons will be aware of the entire probity process and the penalties associated with any violation.

Accountability
The Management Committee to be aware of those Transactions that are satisfactorily signed off and those for which special reports have been submitted by the ODCC monthly. For special reports are prepared for the Management Board or equivalent; to be fully briefed as to the violations and to be responsible for initiating the necessary actions as they arise.

6. Links and follow up with Internal Audit

The DPCC establishing strong links with the work of the ‘internal Audit‘ to ensure the his/ her actions are consistent with their practices, while seeking continuous improvements.

Criteria of Success
There is a plan of action agreed between Internal Audit and the Monitoring & Compliance office to support each others activities and set out a programme for improvement within the PPP Unit.

Accountability
The Internal Audit and the Monitoring & Compliance office review each others activities to ensure consistency at least quarterly.
7. **Staff Performance, Training & Development**

Staff of the Department meet the range of competency profiles requirement in terms of Legal, Contract Specialist, Bid Marketing and Promotions Specialist and Procurement and Contract Compliance. Short falls in performance are addressed through the appropriate training and development programmes. Bi-annual appraisals are undertaken with all Departmental staff, especially during the start up phase of the project. Training plans are implemented to meet development needs.

**Criteria of Success**
Performance measures are met or exceeded, deficiencies are resolved.
All performance exceptions are being positively brought to a conclusion.
Training and development plans are identified for all the employees of the Procurement & Contract Compliance Department.

**Accountability**
That planned and clearly identified training and development programmes are in place annually. A series of ‘in-house’ programmes are identified to build common competencies with core employees at least bi-annually.