



Republic of Namibia
Annotated Statutes

Public Private Partnership Act 4 of 2017

(GG 6357)

brought into force on 1 December 2018 by GN 335/2018 (GG 6785)

ACT

To provide a legal framework for public private partnership projects; to establish the Public Private Partnership Committee; to regulate public private partnership projects through the stages of initiation, preparation, procurement, conclusion of public private partnership agreement and implementation; and to provide for incidental matters.

(Signed by the President on 9 June 2017)

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BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

PART 1
PRELIMINARY

Definitions

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

“accounting officer” means an accounting officer of a public entity;

“affordable” means -

- (a) that the financial commitments to be incurred by the public entity in terms of the public private partnership agreement are estimated to be met by funds within existing or future budgetary allocations of the public entity; and
- (b) the cost of delivering an infrastructure asset or service through the public private partnership agreement is not expected to impose an unreasonable financial burden on the end user of the asset or service;

“applicant” means a private party which has submitted or is likely to submit an application;

“application” means the submission made in response to a request for qualification;

“bid” means an offer or proposal submitted in response to a request for proposal;

“bidder” means a private party that has submitted or is likely to submit a bid;

“Committee” means the Public Private Partnership Committee established under section 5;

“contingent liability” means -

- (a) guarantees provided to banks or financial institutions for repayment of the principal debt or interest on loans related to a public private partnership project;
- (b) explicit contingent liabilities, which include formal commitments provided by the public entity to a private entity, involving a legal obligation on the part of the public entity; or
- (c) implicit contingent liabilities, which arises where the public private partnership project relates to an infrastructure asset or service that is strategically important and where the public entity has an obligation to incur costs to continue to provide a public service;

[The verb “arises” should be “arise”.]

“feasibility assessment” means an assessment undertaken to explore the technical, financial, legal, social and environmental feasibility of undertaking an infrastructure asset or service as a public private partnership project;

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“financial offer” means the commercial offer made by a bidder on the basis of the financial criteria specified in the request for proposal;

“management plan” means the management plan referred to in section 34;

“management team” means the management team appointed in terms of section 33;

“Minister” means the Minister responsible for finance;

“Ministry” means the Ministry administering matters relating to finance;

“preferred bidder” means the bidder whom has been ranked number one in accordance with the process and criteria set out in the request for proposal;

“prescribed” means prescribed by the Minister by regulations made under this Act;

“Procurement Act” means the Public Procurement Act, 2015 (Act No. 15 of 2015);

“procurement committee” means a procurement committee of a public entity referred to in section 19;

“project officer” means an official or staff member of the public entity who is designated by the accounting officer as the project officer in respect of a public private partnership project;

“project value” means -

- (a) in case of public private partnership projects where the private entity is expected to make capital investments, the value of the infrastructure asset to be constructed including the cost of land, if the cost of land is to be borne by the private entity; or
- (b) in case of public private partnership projects where the private entity is not expected to make substantial capital investments, the current replacement value of the infrastructure asset, whose operation and maintenance is the responsibility of the private entity;

“private entity” in relation to a public private partnership project, means a private entity that has concluded a public private partnership agreement with a public entity;

“public entity” means any office, ministry or agency of the Government and includes -

- (a) a local authority council;
- (b) a regional council;
- (c) a public enterprise as referred to in the Public Enterprises Governance Act, 2006 (Act No. 2 of 2006); or

[Act 2 of 2006 has been replaced by the Public Enterprises Governance Act 1 of 2019.]

- (d) a body or trust that is -
 - (i) established by a statute; or
 - (ii) owned or controlled by the Government;

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“public private partnership project” means an agreement between a public entity and a private entity, in terms of which -

- (a) the private entity provides public infrastructure assets or services for use, either directly or indirectly, by the public;
- (b) investments are made by or management of the infrastructure asset or service is undertaken by the private entity for a specified time;
- (c) risk is optimally shared between the private entity and the public entity; and
- (d) the private entity receives performance linked payments;

“public private partnership agreement” means a written contract recording the terms of a public private partnership project concluded between a public entity and a private entity in accordance with the provisions of this Act;

“request for proposal” means the request for proposal referred to in section 25;

“request for qualification” means the request for qualification referred to in section 21;

“tender proceedings” means the process adopted by the public entity for the awarding of the public private partnership project;

“transaction advisor” means a person appointed in terms of section 16(2)(b);

“transaction approvals” mean approvals granted by the Committee in accordance with sections 18(3), 22(2), 26(2), 28(4) and 31(2);

“Treasury” means the Treasury as defined in section 1 of the State Finance Act, 1991 (Act No. 31 of 1991);

“Unit” means the Directorate of Public Private Partnerships within the Ministry;

“user fee” means the rate, toll, fee, or other charge imposed for the use of all or part of an infrastructure asset or service; and

“value for money” means that the public private partnership agreement results in a net benefit, to the public entity or users, defined in terms of cost, price, quality, quantity or risk transfer or a combination of cost, price, quality, quantity or risk transfer.

Objects of Act

2. The objects of this Act are to -
 - (a) promote private sector participation in the provision of public services through public private partnership projects;
 - (b) enable private sector investment in the provision of public infrastructure assets or services;
 - (c) to create frameworks and ensure oversight and governance on projects selected for development through the public private partnership mode;

[The word “to” at the beginning of paragraph (c) is superfluous.]

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- (d) enable the creation of adequate institutional capacity for processing and regulating public private partnership projects;
- (e) ensure fairness, transparency, equity and competition in the process of awarding public private partnership projects; and
- (f) provide for principles, framework and guiding procedures to assist public entities during the initiation, preparation, procurement, management and implementation of public private partnership projects.

Application of Act

3. (1) This Act applies to the initiation, preparation, procurement, management and implementation of public private partnership projects.

(2) This Act does not apply to the procurement of goods, works or services contemplated in the Procurement Act.

Principles of probity and transparency

4. (1) Every public entity must adhere to the following principles of probity and transparency during the initiation, preparation, procurement, management and implementation of public private partnership projects -

- (a) the public entity must carry out its responsibilities relating to the initiation, preparation, procurement, management and implementation of public private partnership projects with complete probity and in a fair and transparent manner;
- (b) the public entity may not include in the procurement documents any condition or specification which favours or is likely to favour any individual bidder or a group of bidders unduly;
- (c) the project officer, transaction advisor, procurement committee members and members of the management team, may not have direct or indirect interest in public private partnership projects that the public entity is intending to implement and must disclose such interest to the accounting officer before any decision is taken by the public entity with respect to a public private partnership project;
- (d) the accounting officer must -
 - (i) evaluate the conflict of interest contemplated in paragraph (c) and take the necessary action to prevent such continued conflict of interest, such as instructing the non-participation by the person concerned in any position where the conflict of interest could influence a decision by the public entity; and
 - (ii) keep or cause to be kept a record of disclosures made in terms of paragraph (c);

(2) The accounting officer must keep or cause to be kept a record of actions and decisions taken by the public entity in respect of a public private partnership project, including tender proceedings.

PUBLIC PRIVATE PARTNERSHIP COMMITTEE

Establishment of Public Private Partnership Committee

5. A committee to be known as the Public Private Partnership Committee is established.

Powers and functions of Committee

6. (1) The functions of the Committee are to -

- (a) provide for transaction approvals in respect of public private partnership projects;
- (b) develop best practice guidelines in relation to all aspects of public private partnership projects;
- (c) advise the Minister on policies relating to public private partnership projects;
- (d) oversee the functioning of the Unit; and
- (e) exercise powers imposed on and perform functions assigned to the Committee in terms of this Act.

(2) If a discrepancy arises as to the interpretation of a provision of this Act, the public entity concerned must refer such matter to the Committee for clarification.

(3) The Committee, in consultation with the Attorney-General, must provide final and binding clarifications to the interpretation queries raised in terms of subsection (2), to the public entity concerned.

Reporting to Minister

7. The Committee must -

- (a) report to the Minister; and
- (b) in the exercise of its powers or the performance of its functions under this Act, comply with such policy directives and guidelines which the Minister may issue to the Committee.

Composition of Committee

8. (1) The Committee must consist of seven (7) members, comprised of -

- (a) one senior staff member from the Ministry, nominated by the Minister, who is the chairperson of the Committee; and
- (b) such other persons, appointed by the Minister, who are suitably qualified, fit and proper persons, having knowledge and experience relevant to the functions of the Committee.

(2) In order to be eligible for nomination to the Committee a nominee must disclose their business and financial interests in a form prescribed by the Minister.

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(3) Before appointing a person to be a member of the Committee the Minister must be satisfied that such person does not have the interest contemplated in subsection (2) and if such an interest exists must request another nomination.

(4) In making appointments under subsection (1) the Minister must ensure that no gender is more than four in number.

(5) The Minister must, as soon as possible after an appointment has been made in terms of subsection (1) and section 9 -

- (a) make the appointments known in the National Assembly; and
- (b) announce in the *Gazette* the names of persons appointed as members and alternate members of the Committee and the date of appointment.

(6) Despite subsection (5), a failure to publish the names of members or alternate members of the Committee in terms of that subsection does not invalidate any action or decision taken by the Committee.

Alternate members

9. (1) The Minister, may appoint an alternate member for each member of the Committee with due regard to the requirements of section 8(1), (2), (3) and (4).

(2) The alternate to a member of the Committee may, in the event of the member's absence from a meeting of the Committee, attend the meeting in the capacity of a member.

(3) An alternate member of the Committee has all the functions of the member when acting in the member's place.

Disclosure of interests

10. (1) The members of the Committee must at all times act in the interest of the Committee and may not -

- (a) take part in any consideration or discussion of;
- (b) exercise a vote on;
- (c) lobby in respect of; or
- (d) discuss with a member,

a matter before the Committee, in which the member or his or her spouse, including a spouse in a customary union, child or any member of his or her household or a person who is related to a second degree of consanguinity to the member or any spouse of such a person or his or her partner, agent or business associate, has a material interest.

(2) If during the course of any deliberations held by the Committee, it occurs or appears that a member or his or her spouse, including a spouse in a customary union, child or any member of his or her household or a person who is related to a second degree of consanguinity to the member or any spouse of such a person or his or her partner, agent or business associate, has a material interest in the matter being discussed, such member must as soon as possible after the relevant facts have come to his or her knowledge, disclose the nature

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and particulars of such interest at that meeting, and such disclosure must be recorded in the minutes of that meeting.

(3) A member of the Committee who has made a disclosure contemplated in subsection (2) may not further attend that meeting nor participate in any deliberations or voting of the Committee in relation to the matter contemplated in that subsection.

(4) A member of the Committee who refuses or knowingly fails to disclose a material interest, as contemplated in this section, commits an offence and is liable on conviction to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

(5) Members of the Committee are required to disclose their interests to the Minister annually in a form prescribed by the Minister.

Disqualification to be member or alternate member of Committee

11. A person does not qualify to be a member or an alternate member of the Committee, if the person -

- (a) is a member of Parliament, a regional council or local authority council;
- (b) has, been convicted, whether in Namibia or elsewhere, of theft, fraud, forgery or perjury, an offence under any law on corruption or any other offence involving dishonesty during the period of 10 years before the date of appointment;

[The comma after the word “has” is superfluous.]

- (c) is an unrehabilitated insolvent;
- (d) has under any law been declared to be of unsound mind or under legal disability; or
- (e) has been removed from an office of trust during the period of 10 years before the date of his or her appointment as a member.

Term of office

12. A member or an alternate member of the Committee appointed in terms of sections 8 and 9, holds office for a period of three years from the date of his or her appointment and is eligible for reappointment at the expiry of that term, but a member may not be appointed for more than two consecutive terms.

Vacation of office

13. (1) A member or an alternate member of the Committee ceases to hold office, if he or she -

- (a) resigns his or her office, by giving not less than one month’s written notice to the Minister;
- (b) has been absent from three consecutive meetings of the Committee without leave of the Committee or being an alternate member has been so absent during the absence or vacancy in the office, of the member for whom he or she was appointed;
- (c) has become subject to any disqualification referred to in section 11; or

(d) is removed from office under subsection (2).

(2) The Minister may remove a member or alternate member of the Committee from office, if -

(a) the Minister is satisfied that such member is by reason of his or her physical or mental condition or for any other reason incapable of acting as such member; or

(b) such member is guilty of conduct which renders him or her unable or unfit to efficiently discharge the functions of the office as a member.

(3) The Minister may only remove a member or an alternate member of the Committee, in terms of subsection (2), after giving notice to such member and after affording that member a reasonable opportunity to be heard.

(4) If the office of a member or an alternate member of the Committee becomes vacant before the expiration of his or her term of office, the Minister must appoint, subject to sections 8, 9 and 11, another person to fill the vacancy for the unexpired portion of that term.

Meetings of Committee

14. (1) The Minister must convene the first meeting of the Committee at such time and place determined by the Minister and subsequent meetings of the Committee must be held at such times and places as the Committee or the chairperson of the Committee may determine.

(2) The chairperson of the Committee must, on the request of the Minister or on a written request signed by a majority of members of the Committee, call a special meeting of the Committee.

(3) The Committee must at its first meeting elect one of the members of the Committee as a deputy chairperson.

(4) The chairperson of the Committee or in the absence of the chairperson the deputy chairperson presides at meetings of the Committee or if both the chairperson and deputy chairperson are absent from the meeting or are unable to preside at the meeting, the members of the Committee must elect a member of the Committee to preside at the meeting.

(5) At a meeting of the Committee -

(a) a majority of the members of the Committee forms a quorum;

(b) all questions are decided by a majority of votes of the members present and voting; and

(c) the member presiding has a deliberative vote and in the event of an equality of votes also a casting vote.

(6) A decision taken by the Committee or an act performed under the authority of the Committee is not invalid by reason only of a vacancy in the membership of the Committee or by reason only of the fact that a person who is not entitled to sit as a member of the Committee was present when the decision was taken or the act was authorised, if the decision was taken or the act was authorised by the requisite majority of the members of the Committee who were present at the time and entitled to vote.

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(7) The Committee may invite any person who has expert knowledge of a matter before the Committee for determination to attend a meeting of the Committee and take part in discussions in relation to that matter, but such person may not vote at meetings of the Committee.

(8) The Committee must -

- (a) regulate its own proceedings; and
- (b) keep or cause to be kept minutes of proceedings and decisions at each meeting of the Committee.

Allowances

15. The Minister must pay members and alternate members of the Committee who are not in the full-time employment of the State allowances for their services, as the Minister may determine in consultation with the Minister responsible for public enterprises.

PART 3
PUBLIC PRIVATE PARTNERSHIP PROJECT INITIATION

Registration of public private partnership project

16. (1) As soon as a public entity has identified a project it intends to implement as a public private partnership project, the accounting officer must -

- (a) register the public private partnership project with the Committee;
 - (b) inform the Committee of the expertise available within the public entity to execute the project.
- (2) Before registering a project in terms of subsection (1) -
- (a) the accounting officer must designate a project officer within the public entity to be responsible for the public private partnership project from its initiation until the signing of the public private partnership agreement; and
 - (b) the public entity may, where necessary, appoint a transaction advisor that has the appropriate skills and expertise to -
 - (i) prepare a feasibility assessment;
 - (ii) prepare a public private partnership agreement; and
 - (iii) assist and advise the public entity on matters relating to the procurement, management and implementation of the public private partnership project.

PART 4
FEASIBILITY ASSESSMENT

Preparation of feasibility assessment

17. (1) The public entity must undertake or cause to be undertaken a feasibility assessment to determine if the public private partnership project is in the public interest.

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(2) In carrying out a feasibility assessment for a proposed public private partnership project, the public entity must -

- (a) consider all options to optimise capital and operating costs and must establish a strong case for the project's efficiency and cost effectiveness;
- (b) undertake an independent assessment of market demand, including a comprehensive justification of major assumptions and key findings and to ensure that the estimated project revenues are realistic and viable for the potential private entity;
- (c) ensure that the user fees, if applicable, from the public private partnership project are affordable to the end users and is socially and economically acceptable to the government;
- (d) ensure that the setting and revision of user fees, if applicable, is predictable and transparent and that the user fee setting and revision methodology is -
 - (i) established by the relevant sector regulator;
 - (ii) is periodically fixed through a duly recognised process;
 - (iii) is based on a formula agreed to in the public private partnership agreement;
or
 - (iv) is based on such other methods and processes that ensures transparency and accountability in the user fee setting process;
- (e) ensure that the direct financial commitments of the public entity or government has been quantified and reasonably estimated for the entire duration of the public private partnership project and are within estimated budgetary limits of the public entity or government;
- (f) must assess the contingent liabilities on account of the public private partnership project, if any, and must ensure that such liabilities are acceptable to the public entity; and
- (g) ensure that the public private partnership project does not pass on unreasonably high risk on the public entity in terms of direct financial commitments, indirect or contingent liabilities.

Review of feasibility assessment and Transaction Approval 1

18. (1) The public entity must submit the feasibility assessment undertaken in terms of section 17, to the Committee for its approval, along with other related assessments as instructed by the Committee from time to time.

(2) On receipt of the feasibility assessment report in terms of subsection (1), the Committee must -

- (a) submit details of all direct or contingent government funding requirements to the Treasury; and
- (b) obtain clearance from the Treasury, on the acceptability of government funding commitments, before approving the feasibility assessment.

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(3) On receipt of a response from the Treasury in terms of subsection (2), the Committee -

- (a) in consultation with the Minister, may approve the feasibility assessment and must in writing inform the public entity; or
- (b) may not approve the feasibility assessment, in which case it must provide written reasons for such decision to the public entity.

(4) The approval referred to in subsection (3)(a), is referred to as Transaction Approval 1.

(5) If, after approval is granted in terms of subsection (3)(a), but before obtaining Transaction Approval 4, any assumptions in terms the feasibility assessment are materially revised, the public entity must immediately -

- (a) provide the Committee with details of the intended revision, including a statement regarding the impact of the intended revision on the affordability, value for money and risk transfer evaluation contained in the feasibility assessment; and
- (b) ensure that the Committee is provided with a suitably revised feasibility assessment, after which the Committee may grant a revised Transaction Approval 1.

PART 5

PUBLIC PRIVATE PARTNERSHIP PROJECT PROCUREMENT

Procurement committee

19. The public entity -

- (a) must establish a procurement committee; or
- (b) may make use of a procurement committee which it has established in terms of the Procurement Act,

to evaluate bids and to recommend results of the procurement process to the accounting officer.

Procurement through competitive bidding process

20. (1) All public private partnership projects must be procured through a competitive bidding process, in the form of a two-stage process comprising a pre-qualification and a final selection stage, comprising of -

[The word “of” at the end of the introductory phrase is superfluous.]

- (a) the request for qualification stage; and
- (b) the request for proposal stage.

(2) The procurement committee may with the concurrence of the Committee adopt a single stage process for the procurement of public private partnership projects with a low project value, comprising a single request for proposal stage, which also includes the particulars of the request for qualification stage.

Request for qualification stage

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- 21.** The request for qualification stage is undertaken to -
- (a) make public the information on the public private partnership project and the infrastructure asset or services that the public entity intends to obtain;
 - (b) communicate the proposed timeframes and the qualification criteria for public private partnership project procurement to applicants;
 - (c) ascertain the level of interest in the public private partnership project and provide an avenue through which bidders can comment on the proposed public private partnership project; and
 - (d) allow the public entity to qualify applicants for the request for proposal stage that are most capable of meeting project objectives over the public private partnership project's intended duration.

Issuing of request for qualification and Transaction Approval 2A

22. (1) Before issuing the request for qualification to prospective applicants, the project officer must submit the request for qualification to the Committee for its approval.

(2) The Committee may approve the request for qualification with or without changes it consider necessary.

(3) The approval obtained in terms of subsection (2), is referred to as Transaction Approval 2A.

Evaluation of applications

23. The procurement committee must evaluate the applications using the criteria determined at the time of the issuing of the request for qualification.

Giving notice of pre-qualification

24. (1) After the evaluation of applications in terms of section 23, the project officer must promptly and in writing notify each applicant in writing whether the applicant has qualified or not.

(2) The project officer must on the request of an applicant, make available the names of all applicants that have qualified.

(3) Only applicants who qualified are entitled to participate further in the tender proceedings.

(4) The qualification process does not create any entitlement or obligations by the public entity in favour of applicants that are successful during the pre-qualification stage.

Request for proposal stage

- 25.** (1) The request for proposal stage is undertaken to -
- (a) formally solicit bids for the public private partnership project including financial offers from pre-qualified applicants;

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- (b) prepare and disseminate criteria and the method to be used for evaluation of bids; and
- (c) prepare and disseminate the draft public private partnership agreement, including clear articulation of roles and responsibilities, penalties in the case of non-performance and provisions for sharing of risks between the public entity and private entity.

(2) The evaluation criteria under the request for proposal must include a preference for the protection and advancement of previously disadvantaged persons, small and medium enterprises, nationally owned organisations or other such persons or organisations in compliance with the applicable legislation.

Issuing of request for proposal and Transaction Approval 2B

26. (1) Before issuing the request for proposals to any prospective bidder the project officer must submit -

- (a) the request for proposal along with the draft public private partnership agreement to the Committee for approval; and
- (b) the approval for the draft public private partnership agreement received from the Attorney-General.

(2) The Committee may approve the request for proposal with or without changes it consider necessary.

(3) The approval referred to in subsection (2) is regarded as Transaction Approval 2B.

Evaluation of bids

27. (1) The procurement committee, assisted by a transaction advisor, where necessary, must evaluate the bids using the criteria determined at the time of issue of the request for proposal.

(2) The procurement committee must keep minutes of the proceedings of the bid evaluation.

Selection of preferred bidder and Transaction Approval 3

28. (1) All bids that meet the threshold criteria in terms of the request for proposal must be ranked in accordance with the evaluation criteria specified in the request for proposal and the first ranked bidder must be referred to as the preferred bidder.

(2) After the evaluation of the bids, but prior to appointing the preferred bidder, the project officer must submit an evaluation report to the Committee for approval.

- (3) The evaluation report referred to in subsection (2), must demonstrate how -
 - (a) the criteria of affordability and value for money were applied in the evaluation of the bids; and
 - (b) the criteria referred to in paragraph (a), were satisfied in the preferred bid, including any other information as required by the Committee.

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(4) The Committee, in consultation with the Minister, may approve the report referred to in subsection (3) with or without changes it consider necessary.

(5) The approval referred to in subsection (4), is regarded as Transaction Approval 3.

Giving notice to bidders

29. (1) On receipt of Transaction Approval 3, the project officer must in writing inform all the bidders -

- (a) of the preferred bidder and its intention to enter into a public private partnership agreement with that bidder, and
- (b) that unsuccessful bidders may within 10 days of having been informed, submit queries to the public entity regarding the bid evaluation process.

(2) After the expiry of the 10 day period referred to in subsection (1)(b), the chairperson of the procurement committee must in duplicate issue a letter of award to the preferred bidder, who must within 10 days of receipt of the letter sign and submit the duplicate copy of the letter of award to the chairperson of the procurement committee.

(3) A letter of award issued in term of subsection (2) does not confer a right or obligation by the public entity in favour of the preferred bidder.

PART 6
PUBLIC PRIVATE PARTNERSHIP AGREEMENT

Exclusive competency of accounting officer

30. The public entity can enter into a public private partnership agreement only through the accounting officer of the public entity and with any additional signatories from the public entity as required by applicable laws.

Concluding the public private partnership agreement and Transaction Approval 4

31. (1) After the procurement procedure has been concluded but before the accounting officer of the public entity concludes a public private partnership agreement, the public entity must obtain approval from the Committee, with respect to the following -

- (a) that the public private partnership agreement meets the requirements of affordability, value for money and optimal risk transfer;
- (b) that the public entity's management plan, explains the capacity of the public entity and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the public private partnership project;
- (c) that a satisfactory due diligence including a legal due diligence has been completed in respect to the public entity and the proposed preferred bidder in relation to matters of their respective competence and capacity to enter into the public private partnership agreement; and
- (d) that the public private partnership agreement has been reviewed and approved by the Attorney-General.

(2) The Committee, in consultation with the Minister, may grant the approval referred to in subsection (1) and this approval is referred to as Transaction Approval 4.

(3) On receipt of Transaction Approval 4, the accounting officer may conclude the public private partnership agreement.

Amendment of public private partnership agreement

32. (1) Any material amendment, including material variations relating to the outputs or waivers provided for in the public private partnership agreement must only be made after receipt of a written approval by the Committee.

(2) The Committee may only approve an amendment in terms of subsection (1), if the Committee is satisfied that the public private partnership agreement, if so amended, will continue to provide value for money, affordability and optimum risk transfer to the private entity.

PART 7

MANAGEMENT OF PUBLIC PRIVATE PARTNERSHIP AGREEMENT

Management team

33. (1) Prior to the conclusion of a public private partnership agreement the public entity, must establish a management team -

- (a) to be headed by a manager, assisted by a team with financial, technical and legal expertise; and
- (b) which must include the project officer and the project officer must remain as a member of the management team until the public private partnership agreement is concluded.

(2) The management team established in terms of subsection (1), is responsible for the preparation and implementation of the management plan.

Management plan

34. (1) The management team must prepare a management plan, which -

- (a) defines the processes that enable the public entity and the private entity to meet their obligations in terms of the public private partnership agreement;
- (b) includes mechanisms to monitor performance by the public entity and the private entity in respect of their obligations in terms of the public private partnership agreement;
- (c) includes mechanisms to manage unanticipated developments and mitigating risks through efficient risk management; and
- (d) provides procedures to resolve disputes in an expeditious manner, with minimal impact on service delivery.

(2) The management plan serves as a repository of management procedures and resources and with respect to the public private partnership project must include -

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- (a) the public private partnership agreement;
- (b) all financing agreements as well as financial models;
- (c) the names, roles and contact details of key individuals of the public entity and the private entity; and
- (d) the implementation plan in respect of the development, construction, operations and exit phases of the public private partnership project.

PART 8
DISPUTE RESOLUTION

Dispute resolution

35. (1) The parties to a public private partnership agreement must endeavour to resolve disputes arising from the implementation of a public private partnership agreement amicably.

(2) Where the parties to the public private partnership agreement cannot resolve a dispute, the parties or one of the parties must apply to the Committee for mediation.

(3) The application referred to in subsection (2), must -

- (a) be made in writing and contain sufficient detail to make a determination under subsection (4); and
- (b) be lodged with the chairperson of the Committee.

(4) On receipt of an application in terms of subsection (3), the Committee must determine the merits of the dispute and must within 15 days of receipt of the application issue its decision in writing to the public entity, private entity as well as other persons and institutions identified by the Committee as stakeholders.

(5) The Committee must determine the procedures for mediation and must make the procedures available to the parties to the public private partnership agreement.

(6) If the parties or one of the parties to the public private partnership agreement does not agree with the decision of the Committee taken in terms of subsection (4), the parties may refer the dispute for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965) or may institute judicial proceedings within Namibia.

PART 9
AUDIT AND INFORMATION DISSEMINATION

Approach to audit

36. (1) The public entity or the private entity may be subject to an audit.

(2) The Minister or the Committee may instruct an audit of a public private partnership project at the public entity by a person or an institution designated by the Minister and the scope of such audit must be as follows -

- (a) the process compliance during procurement stage;

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- (b) the procedures observed in releasing payments from the public sector from time to time, provision of guarantees from the public sector or managing contingent liabilities;
- (c) adherence to the public private partnership agreement in terms of fulfilment of conditions precedent, performance assessments, imposition of penalties for non-performance and administration of termination payments;
- (d) exercise of its rights by the public entity under the public private partnership agreement;
- (e) fulfilment of obligations by the private entity under the public private partnership agreement; and
- (f) adherence to the provisions of this Act, in making any change or modification in the public private partnership agreement.

(3) The audit of the public private partnership project at the public entity must be based on the information available to the public entity.

(4) For the purpose of an audit, the public entity must make available the following documentation and information -

- (a) data and documents, relating to the bids, bid evaluation and the proceedings of the public entity;
- (b) public private partnership agreement;
- (c) correspondence between public entity and the private entity;
- (d) reports submitted by the transaction advisors, independent experts and independent auditors; and
- (e) all communication and documentation relating to post award negotiations or contract modifications.

(5) The public entity must maintain such documents required for the purpose of section 37.

(6) The Minister or the Committee, may instruct the private entity to furnish an audit report for the public private partnership project in the event of non-performance under the public private partnership agreement; and

- (a) the Minister or the Committee must specify the nature and scope of the required audit;
- (b) after receiving such instruction the private entity must submit an audit report within six months from the date of instruction; and
- (c) the audit must be undertaken by a suitably qualified and accredited person or institution.

Information dissemination

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37. (1) The public entity must make available information regarding the public private partnership project to the general public to ensure adequate transparency, and for this purpose, it must -

- (a) document all the information in relation to the public private partnership agreement, construction, project operation and maintenance and termination;
- (b) document and maintain on an on-going basis all information relating to performance of the private entity with respect to the provisions of the public private partnership agreement;
- (c) document the reasons for declaring information as commercially sensitive and not subject to disclosure; and
- (d) comply with any additional requirements for information disclosure in accordance with applicable legislation.

(2) The public entity must cause to be included in the public private partnership agreement effective norms for disclosure and sharing of information by the private entity which is not detrimental to the interests of the private entity.

[The verb “is” should be “are” (“norms... which are”).]

(3) The public entity may voluntarily disclose, as soon as reasonably practicable, the following documents regarding the public private partnership project -

- (a) feasibility assessment;
- (b) procurement plan;
- (c) all procurement documents and minutes of pre-submission meetings;
- (d) reports of the management team, related to progress of the public private partnership project;
- (e) documents relating to external quality inspectors, if appointed;
- (f) audited annual report of the public private partnership project party;
- (g) variations and amendments to the public private partnership agreement;
- (h) the executed public private partnership agreement, along with any annexure and schedules; and
- (i) other project agreements that have been signed by the preferred bidder and a public entity in relation to the public private partnership project, as applicable, such as the state support agreement, substitution agreement, any agreement related to operations, maintenance and development agreement, technical operations agreement, if applicable, and land lease agreement, if any.

(4) The public entity must make the disclosures referred to in subsections (1) and (3) on its website.

(5) The public entity must specify in the public private partnership agreement a list of documents that the private entity must periodically submit to the public entity for disclosure to the public.

PART 10 GENERAL PROVISIONS

Calculation of days

38. If this Act prescribes a particular number of days for performing an action, days do not include Saturdays, Sundays or public holidays, and the period in question must be calculated as exclusive of the first day and inclusive of the last day.

Exemptions

39. (1) A public entity may apply to the Minister to be exempted from a provision from this Act.

(2) The Minister, after consultation with the Committee, may -

- (a) grant an exemption, with conditions or without conditions; or
- (b) decide not to grant an exemption.

(3) The Minister may grant an exemption in terms of this section only if this is assessed to be in the public interest and is consistent with the objects of this Act.

(4) The Minister must in the *Gazette* give notice of an exemption granted in terms of subsection (2), as well as conditions, if any, subject to which an exemption has been granted.

Regulations and guidelines

40. (1) The Minister, after consultation with the Committee, may by notice in the *Gazette*, make regulations relating to -

- (a) any matter which is by this Act required or permitted to be prescribed;
- (b) the form and content of a feasibility assessment;
- (c) the form and content of a public private partnership agreement;
- (d) the manner in which the process for procurement for a public private partnership project must be undertaken;
- (e) the keeping of records for the purposes of this Act;
- (f) the form and manner of applications for exemptions in terms of section 39; and
- (g) generally, all other matters which the Minister considers necessary or expedient to prescribe in order to achieve the objects of this Act.

(2) The Minister may by notice in the *Gazette*, issue guidelines to the Committee, the Unit and public entities, relating to the implementation of this Act.

Short title and commencement

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41. (1) This Act is called the Public Private Partnership Act, 2017 and comes into operation on a date determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.

(3) A reference to the commencement of this Act means a reference to a date determined under subsection (1).