

GOVERNMENT OF THE REPUBLIC OF MALAWI

PUBLIC PRIVATE PARTNERSHIP POLICY FRAMEWORK

Approved by Cabinet on 18 May 2011

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ACRONYMS AND ABBREVIATIONS

| | |
|------|---|
| CAs | Contracting Authorities |
| GoM | Government of Malawi |
| MCAs | Ministries and Contracting Authorities |
| MoF | Ministry of Finance |
| MEPD | Ministry of Economic Planning and Development |
| MGDs | Millennium Development Goals |
| OPC | Office of the President and Cabinet |
| PPP | Public Private Partnership |
| PPPC | Public Private Partnership Commission |
| PC | Privatization Commission |
| IPDF | Infrastructure Project Development Fund |
| IDP | International Development Partners |
| IFIs | International Finance Institutions |
| RAs | Regulatory Authorities |
| SOEs | State Owned Enterprises |
| SPV | Special Purpose Vehicle |
| VGS | Viability Gap Scheme |

1.0 Introduction

The Government of Malawi (GoM) is committed to promoting infrastructure investment in Malawi, as one tenet of spurring economic growth, thereby improving the quality of life through reduction of poverty. In this vein the Public Private Partnership (PPP) framework will be used as a new form of procuring and financing infrastructure projects and services in the public sector. The PPP Policy contained herein was approved by Cabinet on 18th May, 2011, and therefore sets out the policy framework for initiating, designing and implementation of PPPs in Malawi.

2.0 The Wider Policy Context for the PPP Framework

2.1 The Government has come up with the Malawi Growth and Development Strategy 2 (MGDs II), which articulates Government's strategy and policy orientation for the medium term. The main objectives of the MGDs are to enhance economic growth through the exploitation of the employment-generation potential of the economy and thereby raising the quality of life of all sections of the population. For this purpose the Government has identified the following key priority within priority areas within the MGDsII and these are:

- 1 Agriculture and Food Security
- 2 Energy, Industrial Development, Mining and Tourism
- 3 Transport Infrastructure and Inland Ports
- 4 Education, Science and Technology
- 5 Public Health, Sanitation, Malaria and HIV and AIDS Management
- 6 Integrated Rural Development
- 7 Greenbelt Irrigation and water Development
- 8 Child Development, Youth Development and Empowerment
- 9 Climate Change, Natural Resources and Environmental Management

The economic strategy being pursued by the Government seeks to reduce poverty through economic growth and to transform Malawi into more of an export based economy, fully integrated in the new global economic environment. The overall competitiveness of the Malawi economy will be bolstered by means of investments, especially those directed towards improving and expanding infrastructure.

2.2 In order to strengthen the investment climate in Malawi, Government is committed to maintaining sound economic policies and continuous improvement of the business environment. In this vein, the Government has reduced and stabilised the interest rate regime and sustained single digit inflation rates since 2004 through pursuing strong economic and fiscal policies. The business environment is being strengthened by, among others, the establishment of the commercial court to speed up resolution of commercial disputes, promoting investor access to land, institutionalizing the public private dialogue on strategic issues and speedy registration of new businesses. The quality of public finances and expenditure is being strengthened through a variety of efforts. A major programme to improve the quality and effectiveness of public expenditure and to enhance the buoyancy and efficiency of the tax system is already under way. Government also now wants to create the appropriate policy, legal and institutional framework for encouraging the private sector to play a larger role in procuring, financing, operating and maintaining infrastructure projects and services in the public sector through well-designed PPPs. The policy framework provides the broad environment, whereby ministries and public contracting agencies, referred to as Ministries and Contracting Authorities (MCAs), are directly responsible for identifying programme areas for potential PPPs in light of government overall social and economic priorities.

3.0 The PPP Concept

3.1 A Public-Private Partnership (PPP) is a legally enforceable contract in which a Contracting Authority partners with a private sector Partner to build, expand, improve, or develop infrastructure or service in which the Contracting Authority and 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 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. Usually the private entity performs infrastructure service delivery functions that would otherwise have been provided through traditional public sector procurement and assumes the associated risks through a long term contract (typically ranging from 10 to 50 years). In return, the private entity receives a benefit/financial remuneration according to predefined performance criteria, which may be derived:

- entirely from service tariffs or user charges,
- entirely from GoM's budgets, and or
- a combination of the above.

4.0 The Scope of PPPs

4.1 PPPs allow each party to concentrate on activities that best suit their set of skills and strategic objective. For the public sector, this not only means planning and identifying infrastructure and public service needs and focusing on developing national, local and sector specific policies but also overseeing enforcement of the PPP agenda. The public sector retains a significant role in the PPP project, either as the main purchaser of the services provided or as the main enabler of the project. It purchases services and specifies the service outputs/outcomes required, as well as the performance criteria which triggers payments to the private sector.

4.2 For the private party the key is to deliver effectively the infrastructure and facilities required by the public sector and consumers at the project level, usually in a PPP arrangement, where the private party provides the design, construction, operation maintenance and financing for the project, and is paid according to performance. Risks are identified and placed with the party best able to bear and manage them at lowest cost.

A particular arrangement or project may constitute a PPP where the following key characteristics are present:

- Shared responsibility for the provision of infrastructure or services with a significant level of risk being taken on by the private party and, for example in infrastructure project, linking design and construction with one or all of the finance, operation and maintenance elements;
- Long term commitment by the public sector to the provision of quality public services to consumers through a contractual arrangement between the public sector and private operator; and
- Better Value for Money (VfM) and optimal allocation of risk, for example, by exploiting private sector competitiveness (managerial, financial and innovation) over the period of the project's life cycle and by promoting the cross-transfer of skills between private and public parties.

- 4.3** There is a clear distinction between a PPP arrangement under which the private party supplies public infrastructure and public services on behalf of the state for a contract period and the sale of specific state assets (that is divestiture) to the market. A PPP project typically requires the establishment of a Special Purpose Vehicle (SPV) by the private Party. The SPV will be a locally incorporated company, hence a legal entity with no other activity other than those in the agreement and connected with the borrowing.
- 4.4** There are several well defined models of PPPs, including Public Finance Initiative (PFI) differing in purpose, scope, legal structure and risk sharing, and increasingly offering different permutations and combinations of them. Specific forms of PPPs are often referred to by special names. However, a single PPP can have the characteristics of several different forms and new types may emerge from time to time. One end of the spectrum would be an outsourcing of some routine operation, while the other could involve the private sector conceiving, designing, building, operating, maintaining and financing a project, thereby assuming a considerable proportion of risk. The choice of the PPP arrangement for a particular project will depend on Government's policy in the related sector and on potential Value for Money to be generated under such an arrangement. Emphasis however will be on developing new infrastructure facilities, or major rehabilitation of an existing facility so that additional and, or higher quality services are provided for the citizens of Malawi. Hence outsourcing without a significant transfer of risk to the private sector over a period is not strictly speaking a PPP. It is important to note that a PPP is a contract for service and outputs, rather than merely a physical asset. This policy framework does not cover government assets listed for divestiture/privatisation and the outsourcing of public services where no significant private investment and risk transfer is involved.

5.0 Eligible Areas

- 5.1** It is Government's intention to encourage innovation in as many areas as possible. However the focus will be on the traditional physical and social infrastructure sectors identified as key priority areas in the national development and economic strategy - such as energy (electricity, oil and natural gas) telecommunications and information technology, transport (air transport, airports, inland waterways, inland ports, railways roads, urban public transport, inter-modal) tourism, public utility (water, irrigation and municipal and liquid waste management

and sanitation sectors), health and education sectors.

6.0 Goals and Benefits

- 6.1** In order to support the objectives of the MGDsII and to enhance the opportunities for realising both strategic and operational benefits, the Government has decided to root PPPs in its broader public expenditure reform programme, as well as in the Public Sector Investment Programme (PSIP). In so doing, the Government seeks to strengthen macro-economic stability, allocate scarce resources in line with priorities and improve the effectiveness and efficiency of public sector expenditures by linking them to strategic objectives. Well-structured PPP projects integrate recurrent and capital budgets and provide meaningful benchmarks for measuring performance, thus making PPP an important tool for better management of public expenditure. In addition, PPP is an instrument which Government can use to reform and re-structure certain strategic sectors of the economy to introduce competition, with the objective of securing increased investments and efficiency, reduced prices and expand the range of services available to a wider cross-section of the society.
- 6.2** Strategically; the use of PPP fosters economic growth by developing new commercial opportunities and increasing competition in the provision of public services, thus encouraging private sector and/or foreign investment to play a more dynamic role in the economic development process, as well as ensuring rigorous governance over the selection of projects for PPPs.
- 6.3** Identification of the goals of PPPs and the prospective benefits from individual projects provide more certainty, in particular, for those (e.g. local communities) that PPP projects are expected to serve. More specifically the benefits are as follows:
- Speedy, efficient and cost-effective delivery of projects;
 - Value for Money for money for taxpayers, inter alia, through optimal risk transfer and risk management;
 - Efficiencies from integrating design and construction of public infrastructure with financing, operation and maintenance/upgrading;
 - Creation of added value through synergies between public authorities and private sector companies, in particular through integration and cross transfer of private and public sector skills, knowledge and expertise;

- Alleviation of capacity constraints and bottleneck in the economy, through higher productivity of labour and capital resources in the delivery of projects;
- Competition and greater construction capacity (including participation with overseas firms);
- Accountability for the provision and delivery of quality services through incentive/ performance based management/ regulatory regime;
- Innovation and diversity in the provision of public services; and
- Effective utilization of state assets where applicable to the benefit of all users of public services.

7.0 Key Principles in the Application of PPPs

7.1 While the benefits and advantages of PPPs can be significant, they are not automatic. Rather, the positive outcomes have to be earned through careful attention to project identification and conceptualization and preparation of well-designed and structured projects, as well as through thorough due diligence and competitive and transparent procurement. There are thus certain key principles which are necessary and these are included in this policy framework, as they are critical in delivering successful outcomes. These have been identified as VfM, risk allocation, public interest and consumer rights, accountability, affordability, transparency, competition, local content & technology transfer, stakeholder consultation and public PPP procurement.

7.2 All PPP arrangements in Malawi shall be guided by the process outlined below.

7.2.1 Value for Money (VfM)

Achieving Value for Money (VfM) criteria on PPP projects is paramount. As such achieving the best VfM outcome should be the key consideration at all stages of the project cycle. PPPs should give greater Value for money than the best realistic public sector project designed to achieve similar service outputs. VfM is a combination of service outcome to be delivered by the private sector, together with the degree of risk transfer and financial commitments for government. Quantitative factors may be tested by comparing the outputs and costs of the PPP proposal against a neutral benchmark called Public Sector

Comparator (PSC), which is adjusted for risk (where the risk can be reliably quantified). Achieving VfM is a key requirement of Government at all stages of a project's development and procurement. VfM is the driver for adopting the PPP approach, rather than capital scarcity or balance sheet treatment.

7.2.2 Risk Allocation

The principle governing the risk transfer is one of optimal allocation. An efficient risk allocation is vital in determining whether VfM can be achieved in PPP projects. Risks will be allocated to whoever is best able to manage them, taking into account public interest consideration. The allocation of risks will therefore determine the chosen method of private sector involvement and allocation of responsibilities.

7.2.3 Public Interest and Consumer Rights

Consideration of public interest requires ensuring that procuring the project as a PPP is not contrary to the public interest. Equally, after a decision has been taken to procure infrastructure and services through the PPP model, it is critical to ensure that the procurement process is so structured as to continue to be in the public interest. PPP projects should seek to safeguard users' interest, particularly vulnerable groups.

7.2.4 Affordability

Affordability will need to be the cornerstone of all PPP projects. PPP options must be affordable, both to Government and the consumer, given that there are other priorities and commitments competing for scarce resources. The rationale for PPPs is improved management of scarce resources, better risk allocation and more efficient and cost-effective delivery of services. It will always need to be borne in mind, however, that while the private sector may be willing to finance and deliver infrastructure and services through PPPs, only users or taxpayers can pay for them. Affordability thus acts as a real constraint, and public bodies will need to give serious consideration to the selection of potential PPP projects, ensuring always that their choices are in line with Government's policy, priorities and objectives. PPP provides real and exciting prospects for new forms of procurement, financing and operation in ways that are likely to result in improved management of scarce resources. Government's PPP programme should not, however, be seen simply as an opportunity for public

bodies to undertake projects that would ordinarily not get approval through normal budgetary approval processes.

7.2.5 Accountability

Contracting Authorities (CAs) are responsible for the delivery of their project outputs, including where the PPPs are used to deliver those outputs. This accountability cannot be transferred to the private sector. At every stage of the PPP process the procedures, laws, regulation and relevant policies must be followed.

7.2.6 Transparency

Transparency and openness are important requirements of all government procurement and is no less so for PPPs. The procurement process laid down for Malawi must be followed. Instructions to bidders must be clear and unambiguous to prevent manipulation or abuse of the process. The bid conditions and evaluation criteria must lead to the attainment of VfM, economy, and efficiency and must be made available to all interested private sector parties. Equal opportunity and access to information must be given to all interested bidders. The process shall be accessible to the public to the extent allowed by law, except where national security would be prejudiced and the need to protect commercial confidentiality. The conduct of the public sector must be such that confidence in the probity of the PPP model is maintained. No unsolicited bids to supply infrastructure or delivery of services shall be entertained by Government, Ministries, Contracting Authorities and any other public institutions. Unsolicited bids are inherently risky as they are known to promote corrupt practices and to result in inefficient and suboptimal delivery of infrastructure and services. Unsolicited bids can however be used to signal private sector interest in delivering public infrastructure and services in a particular sector. Unsolicited bids, once received, should immediately be followed by an assessment of the related potential infrastructure project for purposes of determining suitability for a competitive procurement through the PPP encouragement.

7.2.7 Local Participation, Content & Technology Transfer

PPP projects shall be structured to encourage the maximum use of local content and technology transfer. As much as possible, the PPP arrangement should

facilitate the promotion and linkages with local industries and the private sector in Malawi. PPP projects shall seek to promote Malawian participation in private sector consortia. The Government through the PPP Commission shall come up with strategies, policies, schemes and mechanisms for encouraging local Malawian participation.

7.2.8 Competition

Bids will be invited only when it is clear that there is scope for a private proponent to deliver VfM. All PPP projects should be subjected to a competitive process so as to obtain market contestability and efficiency.

7.2.9 Stakeholder Consultation

Contracting Authorities shall ensure adequate stakeholder consultation, understanding and support in advance of entering into a PPP arrangement and shall endeavour to identify relevant stakeholders and undertake comprehensive consultation so as to ensure awareness of PPP projects under consideration.

7.2.10 Public Procurement and PPP Procurement

PPP procurement activities that are within the scope of public procurement shall be undertaken under the Public Procurement Act. Guidelines shall be issued on procurements of PPPs that do not fall within the scope of public procurement.

7.3 Unsolicited Proposals

The many negative experiences with unsolicited proposals for private infrastructure projects have led several governments to come up with blanket refusals as the only way to safeguard against potential problems with corruption and lack of transparency. Unsolicited bids are inherently non-transparent and are therefore prone to corruption. Unsolicited bids also deny the Government the opportunity to carry out an independent and comprehensive feasibility and viability analyses in order to ascertain the Value for Money and Affordability parameters.

In the absence of a feasibility study and a viability assessment, the private partner has a strong motivation to earn economic rent and may even push for discretionary incentives and subsidies from the Government. The Government

of Malawi concurs with those that have come up with a blanket refusal to accept unsolicited bids. Ministries and Contracting Authorities are therefore not allowed to entertain unsolicited bids. It shall be an offence to accept or entertain any unsolicited bid. All unsolicited bids shall be referred to the PPP Commission who will advise the bidder to wait for a competitive tender process.

8.0 Government Support For PPP Projects

8.1 Government Subsidies

Government shall deploy a range of instruments to support project preparation and financial viability assessment of projects. Consent from the Ministry of Finance will be required in order to use public assets to secure debt-collateral, provision of government guarantee (including contingent liabilities) where necessary. Ministries and Contracting Authorities will require the approval of Cabinet through the Ministry of Finance in order to embark on projects with high social content or those that have a major positive impact on poverty alleviation and requiring Government subsidies to ensure the provision of the services.

8.2 Infrastructure Project Development Fund (IPDF)

The GoM shall establish a PPP Infrastructure Project Development Fund (IPDF) in line with the emerging PPP programmes. The IPDF shall operate according to stated operating procedures and guidelines issued for IPDF. The IPDF shall support the financing of project preparation activities (engineering, economic, financial, public awareness, social and environmental and related studies) and the financing of transaction advisors for undertaking project transaction, structuring, procurement and implementation up to the signing of the PPP contract with the private investor(s). It is GoM's intention to seek the assistance of international development partners (IDP) in the initial financing of this fund.

8.3 Viability Gap Scheme (VGS)

It is also GoM's intention to support projects that fall within its national development agenda and are economically and socially (projects having major impact on poverty alleviation) justified but not financially viable. Cabinet approval is required for such projects. The GoM intends to explore the establishment of a VGS, which shall operate according to stated operating

procedures and guidelines issued for VGS. The VGS aims at providing rule-based incentives for PPP projects that are economically justified but financially not feasible without reasonable support of their investments or operation.

8.4 Management of Government's Obligations

Government shall take steps to institute mechanisms to ensure that its financial obligations under PPPs, having been approved by the Ministry of Finance, are settled in a timely manner including obligations related to the purchase of services by the public sector as well as direct and contingent liabilities on government's finances including guarantees, arising from each PPP project.

9.0 The Legislative, Institutional and Regulatory Environment

The country already has many of the ingredients required for a successful PPP programme: a stable government, a reliable and independent judiciary and reasonably well-performing public institutions. However, with enactment of a PPP legislation, political and regulatory risks have been significantly lowered and therefore strengthening the enabling environment for effective PPP implementation in this country. With this in mind, GoM has merged the legal framework for both PPPs and divestiture so as to provide further concrete evidence of Government's commitment towards private sector participation in infrastructure, through the PPP framework and in state owned enterprises

The new Act will codify the general principles set out in this policy framework including rules for PPP procurement. All CAs and related public bodies will be required to comply with the Act and regulations following from the Act, thereby ensuring consistency in approach across the sectors. This will also enhance the confidence of investors in Malawi's PPP Programme.

9.1 Institutional Arrangements

International experience suggests that identifying and establishing clear and unambiguous institutional functions in relation to PPP early on in the onset of a country's PPP programme can greatly assist in successful PPP implementation. While institutional roles and responsibilities may change over time as Government's experience with PPP develops, a number of public institutions will play key roles in the programme and these are as follows:

9.1.1 The Office of the President and Cabinet (OPC)

OPC will provide broad policy leadership and overall direction of the PPP framework and will directly oversee the Public Private Partnership Commission (PPPC). The OPC will ensure timely enactment of legislative instruments as well as ensuring that project concepts and sectoral reform proposals are brought before Cabinet before implementation. Contracting Authorities will be required to submit a PPP concept and project framework paper to Cabinet for approval before implementation.

9.1.2 The Ministry of Economic Planning and Development (MEPD)

MEPD will ensure that PPP projects fall in line with the national planning process and or the national infrastructure plan, as well as being consistent with the goals of the MGDSII.

9.1.3 The Ministries and Contracting Authorities

This “ownership” role is to be carried out by a particular Ministry or one of its CAs. A Contracting Authority is essentially an asset holding company that legally owns public assets but opts to cede out its right of use of the assets to the private sector through a PPP arrangement. The PPP Act sets out the MCAs as owner of the PPP projects. At all times there should be an identified MCA (sponsoring authority) taking on the ownership role, from inception through to construction and operation. MCAs will play a lead role in the identification, selection and monitoring of PPP projects in their sectors. This does not mean that MCAs will actually undertake all of the work related to the PPP project cycle, but the MCA is to be involved in every phase, retaining the lead interest in the project. The objective of the MCAs is to ensure that a list of bankable infrastructure projects are presented for that sector and that the projects are capable of attracting private sector investments and in so doing reducing the cost of developing and implementing infrastructure projects.

9.1.4 The Ministry of Finance

The Ministry will carry the mandate of the PPP Review and Authorization function and for the most part this is to ensure coordination of the review and screening of PPP projects in the interest of protecting the public interest. The review function, above all, assesses the relevant financial risks

exposure to government which may be associated with the project. The Review and Authorization Unit carries out a review at different stages of the project cycle of all projects submitted by MCAs and which would have been developed with the support of the PPPC. On the basis of this assessment the Ministry of Finance shall approve (or reject) specific aspects of PPP project in order to ensure fiscal sustainability, financial and economic viability and robustness of contracts over the long term. Some of the review functions are not new as these are already being carried out by MoF departments or other MCAs. The purpose of creating the PPP Review and Authorization Unit in the Ministry of Finance is to have a one-stop office that will systematise and coordinate the different inputs needed. With respect to reviews which are not currently being undertaken by any part of the Government, the PPP Review and Authorization Unit would be required to develop these skills within the MoF. The PPPC will work with MoF in ensuring that PPP functions within the ambit of the Public Finance Management Act as well as ensuring that there is coordination in developing the necessary review guidelines. MOF will ensure fiscal sustainability for PPP projects, considering both direct and contingent liabilities on government's finances including guarantees, arising from each PPP project. Specifically, MOF will be responsible for the following:

- ***Fiscal impact:*** assessing the long-term fiscal impact of the PPP project (direct or contingent, explicit or implicit) and determining whether it is acceptable, given other national priorities;
- ***Government support:*** confirming the appropriateness of the project for sovereign guarantees (debt or specific-event) or other kinds of government support.

Will establish processes to incorporate PPP project development into the annual budgeting exercise, and fund direct as well as contingent (unanticipated) calls on the budget. MoF shall therefore ensure that any payments to be made by MCAs under the PPP contract are consistent with the national budget.

9.1.5 The Public Private Partnership Commission:

The Public Private Partnership Commission (PPPC) will be the implementation Agency for PPPs. The rationale for choosing the Commission is based on its extensive experience accumulated over the years in managing privatisation

transactions.

The expertise required for privatization transactions and PPPs is the same. The PPPC will be mandated to provide advice and support to the MCAs on project development and to coordinate the PPP procurement support and related services function. The PPPC will be the driver of PPP policy framework assisting MCAs to ensure that their PPP projects are carefully planned, prepared and appraised, prior to initiating a procurement process. The PPPC will manage the process for recruiting advisors to carry out feasibility studies, as well as the process to recruit transaction advisers. The PPPC will also be responsible for developing guidelines on best practices to assist sector Ministries in the roll-out of their PPP projects. The PPPC will work closely with the Ministry of Finance in the review and assessment of PPP project affordability, value-for-money, feasibility, and contingent liabilities associated with PPP projects. More specifically, the PPPC will provide advice and support in the following areas:

Development of infrastructure sector policies and strategies: where necessary to accommodate private sector financing and operation of public services;

Project Identification: Support with identification of infrastructure projects appropriate for PPPs, Project concept development and exploration of different PPP options and undertaking pre-feasibility analysis;

Feasibility studies: Undertaking technical, economic and financial feasibility studies, legal, environment and social appraisals, assessment of project risks and identification of solutions to mitigate those risks. This would include support in the development of financial and economic models;

Procurement process: Supervising a competitive bidding process to select the best private sector offer;

Negotiation: providing support to the MCA during negotiations with the private sector provider;

Contract management/re-negotiation: assisting in on-going contract oversight, especially over the construction phase and assisting in contract re-negotiations that might occur over the life of the project, including re-financing;

Liaison with PPP Review and Authorization Unit at MOF: Assisting the MCAs in understanding the approval requirements (the Review function), helping them develop necessary documents for review and generally guiding the MCAs through the approval process.

Promotion and Capacity Building: promote PPPs in Malawi and internationally, ensures public awareness amongst all stakeholders, facilitate capacity building across the various institutions and provide guidance on PPP procedures and processes.

Liaising to obtain financial support: Liaise with funding agencies and international development partners with respect to obtaining financial and technical support for PPP projects.

9.1.6. The Utility Regulatory Authorities (RAs):

The regulatory authorities in telecommunications, energy, transport and water usually require, under their Acts, that licenses be issued to private operators wishing to enter their respective industries. The licenses permit such operators to provide specific services in the industry. RAs will need to liaise with the CAs and the PPC to ensure that the terms and conditions as they relate to service standards and tariff (or any other regulatory matter) are consistent with the terms of the contract between the CA and the private party. Private investors/operators will see the agreement as a binding contract and will not expect the regulator to embark on discretionary changes to the tariff and service standards outside of the terms conditions set out in the concession contract. CAs will therefore need to ensure that the RAs approve the tariff formula or tariff discovery methodology and mechanism for changing service standards before commitments are made with the private party.

10.0 The PPP Process

PPPs involve a number of players from different sectors, representing a variety of interests, and thus the relationships need to be formalized and the processes need to be followed in a systematic and transparent way. Detailed guidelines will be issued to cover all phases of the PPP project cycle. It is important to note that PPPs can take a long time to procure if these processes are not carefully followed. To improve credibility and transparency at all phases of project development, the input of both Government and the private Party shall be

assessed in terms of their compliance with the legislation, regulations and the PPP process and its components, including the bidding process, local content, and the formation of a SPV.

10.1 The PPP Life Cycle Process for Government Originated Project

The PPP project cycle covers five distinct phases; project identification and initial viability assessment, project preparation and development, project procurement, contract signing and financial closure.

10.2 MCAs (assisted by PPPC and/or qualified and experienced transaction advisors as appropriate) shall go through the following steps to ensure that PPPs are carried out rigorously:

10.2.1 Phase 1: Project Initiation, Screening and Selection

1st step: Project Identification, Needs and Options Analysis: MCAs with the assistance of the PPPC shall conduct Needs and Options Analysis to determine the best solution to provide the service / build infrastructure i.e. traditional public procurement or PPP route.

2nd step: Initial Viability Analysis and Pre-feasibility: Preparation of a Pre-Feasibility Study including possible location(s), alignment(s) and estimates of broad project costs and an initial indication whether the project is likely to be viable and affordable. The PPPC will provide advisory support services to CAs, while the MoF Review and Authorization Unit will review and provide comments, but not a formal approval at this stage. The PPPC in association with the Review and Authorization shall provide the requirements for the pre-feasibility study and determine if a full feasibility study is required.

10.2.2 Phase 2: PPP Feasibility Analysis and Risk Allocation

3rd step: Feasibility Studies: The Government will assess whether the proposed project is robust and meets GoM criteria for risk, viability, bankability, affordability and value for money. This includes estimates of viability gap and the need for incentives. Clearance and approval shall be sought from MOF (Monitoring and Evaluation Unit) before proceeding to the next step of the process. The CA may be able to tap into the IPDF to carry out the feasibility study and related studies.

10.2.3 Phase 3: PPP Tendering and Procurement

4th step: Procurement Process: Management of the procurement process will largely be the responsibility of the PPPC working in close collaboration with the MCA.

10.2.4 Phase 4: PPP Contract signing and Financial closure

5th step: Contract Management: CAs and Regulatory Authorities (RAs) have responsibility of ensuring contract compliance, contract enforcement and contract adjustment/re-negotiation. The CAs as the landlord and signatory to the concession contract will ensure that the performance standards laid down in the agreement are met by the private party. The RAs will ensure that the tariffs and technical quality/service delivery standards are in compliance with the PPP agreement (discretionary changes will not be permitted). The PPP agreement is a commercial contract and normally requires consent on the part of the two parties in respect of any changes. Where the RA is required to issue a separate licence for the PPP agreement there will be the need to ensure that there is consistency between the two instruments. The PPPC will coordinate the recruitment of owners engineering representative where necessary to ensure that the construction contractor delivers the project according to the standards laid down in the agreement and from time to time will carry out audits of the process.

10.2.5 Phase 5: PPP Post-Award Performance Monitoring

6th Step: Implementation and Appraisal: The CAs supported by the PPPC will carry out an appraisal of the entire PPP project from project identification to Implementation in order to assess the efficiency and effectiveness of project implementation. The purpose of such a review and appraisal is to draw important lessons that can be applied in future projects and to assist in the policymaking effort.

A comprehensive and regular review of the overall process shall be a core responsibility of the structures managing the development and implementation of PPPs. Reviews shall be prepared openly and transparently within an appropriate time-frame. The review shall specify implications for the procurement of infrastructure and the delivery of quality services helping to shape the future of the PPP programme. The implementation of, and adherence

to, the policy framework will focus, in particular, on the consistency of conduct of the PPP process with the policy and the need for any revisions required to maintain its consistency with ongoing developments and expansion of Malawi's PPP programme.

11.0 Conclusion

11.1 Government is committed to increasing private sector participation in infrastructure provision and public sector delivery, and to reducing any budget deficit. But cost savings are not the only consideration in justifying PPP but rather the Government would also like to see improved service delivery from its PPP programme. Over the next few years, appropriate incentives associated with broader reform initiatives will be set in place to encourage sector ministries to consider PPP for their capital projects. Procurement practices for PPP will be structured in line with international best practices, Sector studies will be carried out to review policy and strategy and to identify potential areas for private participation. GoM hopes to develop list of projects to form the initial a pipeline of PPP projects for the approval of Cabinet. Capacity building will continue to be strengthened and more targeted towards implementing Ministries. Public awareness in relation to the PPPs and consensus building with all stakeholders will form essential components of the PPP programme.

REFERENCES

Public Private Partnership Manual, National Treasury PPP Unit, Government of South Africa, 2004

Public Private Partnership: Framework for Public Private Partnership, Irish Republic, 2001

National Public Private Partnership Policy Framework,— Infrastructure Australia,2008

Public Private Partnership Policy, Federal Republic of Nigeria, 2008

PPP ACT

**The Malawi Gazette Supplement, dated 23rd December, 2011 containing
Acts (No 6C)**

MALAWI GOVERNMENT

(Published 23rd December, 2011)

Act

No. 27 of 2011

I assent

NGWAZI PROF. BINGU WA MUTHARIKA
PRESIDENT
22ND DECEMBER, 2011

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

ENACTED by the Parliament of Malawi as follows-

PART I-PRELIMINARY

- | | | |
|------------------------------|----|---|
| Short title and commencement | 1. | This Act may be cited as the Public-Private Partnership Act, 2011, and shall come into operation on such date as the Minister shall appoint by notice published in the <i>Gazette</i> . |
| interpretation | 2. | In this Act, unless the context otherwise requires- "Commission" means the Public-Private Partnership Commission established under section 4; "bank" has the meaning ascribed thereto in the Banking Act; "Chairman" means the Chairman of the Commission as specified under section 5; "Chief Executive Officer" means the head of the Secretariat of the Commission appointed under section 15; "commercialization" means the re-organization of specified Government departments into commercialized enterprises which shall operate as profit making commercial ventures; |
- Cap. 44:01

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

Cap. 46:03

"concessionaire" means a Partner assigned through a long-term concession contract with a Contracting Authority, the right to invest and maintain an infrastructure project or provide a service to the public, and be compensated through charging of user fees directly to the public;

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

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

"Contracting Authority" means any Ministry, Government Department, Local Authority or state-owned enterprise;

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

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

"Divestiture Proceeds Account" means the account established under section 55;

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

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

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

Act No. 26 of
2010

"immediate family member", in relation to any person, means that person's spouse, child, parent, brother, sister, grandchild or grandparent;

"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 public;

"investor" means an individual, a company, an established

fund, a mutual fund, a financial institution or any other institution, entity or commercial venture whether local or foreign, and in any format of enterprise recognized as a legal entity under the laws of Malawi, intending to invest in a state-owned enterprise or in an infrastructure facility under a public-private partnership arrangement, but does not include the Government, a Local Authority or a state-owned enterprise whether foreign or local;

Cap. 22:01

"Local Authority" means a City, Town, District, or Municipal Council, established under the Local Government Act;

"market value" means the market value of a state-owned enterprise at the completion of the sale;

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

"operation" includes management and maintenance;

"Partner" in relation to a public-private partnership arrangement, means a party to the arrangement other than a Contracting Authority;

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

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

"public-private partnership arrangement" refers to the arrangement provided for in Part V;

"public-private partnership" means a contract in which a Contracting Authority partners with a Partner to build, expand, improve, or develop infrastructure or service in which the Contracting Authority and 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 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;

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

arrangement including for raising finance for public-private partnership projects as anticipated in section 21; **"specified Government department"** means a department specified by the Minister under section 48;

"state-owned enterprise" means a corporation, board, commission, 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 or a Local Authority;

"stocks" and **"shares"** in relation to a state owned enterprise includes loans, stocks, debentures and debenture stock and options on any stocks, shares, loan, debentures or debenture stock and rights; and

"stock broker" means a person who carries on the business of buying and selling stocks or shares for and on behalf of other persons.

PART II-OBJECTIVES OF PUBLIC-PRIVATE PARTNERSHIPS AND DIVESTITURE OF STATE-OWNED ENTERPRISES

- 3.-(1) This Act shall facilitate the development and implementation of public-private partnership arrangements for purposes of efficient delivery of infrastructure and services in order to achieve sustainable economic growth and social development including-
- (a) to improve the delivery of public infrastructure and therefore access to services in Malawi;
 - (b) to assist in achieving better value for procurement of infrastructure and public expenditure by the Government through efficient and optimal risk identification and transfer to the private sector;
 - (c) to leverage on private sector financing, management, technical know-how and technological innovation for delivery of efficient and affordable infrastructure and services;
 - (d) to encourage participation by resource owners in public private partnerships and provide assurance for private interests in those partnerships;
 - (f) to encourage competitive and efficient markets for the

Objectives

- provision of infrastructure and services in Malawi;
- (g) to minimize the fiscal burden of providing in frastructure development and service delivery through the public treasury and thereby allowing resources to be freed for social services; and
 - (h) to promote private sector contribution towards the attainment of positive social indicators associated with optimal access to infrastructure and services.
- (2) The objectives of this Act in relation to divestiture of state-owned enterprise shall be-
- (a) to foster increased efficiency in the economy;
 - (b) to increase competition and reduce monopoly in the economy;
 - (c) to promote participation by the Malawian public in state-owned enterprises; and
 - (e) to raise revenue for the Government through divestiture of state-owned enterprises.

PART III-THE PUBLIC-PRIVATE PARTNERSHIP COMMISSION

Establishment
of the
Commission

- 4.** There is hereby established a body to be known as the Public-Private Partnership Commission (in this Act otherwise referred to as the "Commission") which shall be a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name, 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.

Composition
of the
Commission

- 5.-(1)** The Commission shall consist of a Chairman and-
- (a) four other members appointed by the President by notice published in the *Gazette*, and
 - (b) the following members *ex officio*-
 - (i) the Secretary to the Treasury;
 - (ii) the Solicitor General and Secretary for Justice;
 - (iii) the Principal Secretary responsible for planning and development; and
 - (iv) the Principal Secretary responsible for industry and trade.
- (2) In appointing members under subsection (1), the President shall have regard to the need for continuity of service on the Commission, so that at least half of the members appointed thereunder shall be re-appointed for the next term of office.
- (3) Members of the Commission appointed under subsection (1)

shall be persons who-

- (a) are citizens resident in Malawi; and
- (b) possess qualifications, expertise and experience in any of the fields of economics, accountancy, law, engineering, project finance, public administration, public-private partnerships, mergers and acquisitions, and business management.

Tenure of
Office and
vacancies

6. A member of the Commission shall hold office for a period of three years and shall be eligible for re-appointment, but the office of that member shall become vacant-

- (a) if the member resigns by giving one month notice, in writing to the President;
- (b) upon the member's death;
- (c) if the member is absent, without the consent in writing of the Chairman, or without valid excuse, from three consecutive meetings of the Commission of which the member has had notice;
- (d) if the member is convicted of a criminal offence without the option of a fine;
- (e) if the member becomes an undischarged bankrupt; or
- (f) if the member participates, directly or indirectly, in a public-private partnership arrangement or acquires shares or other interests in a state-owned enterprise in contravention of this Act.

Allowance of
members

7. Members of the Commission shall be paid such allowances as the Minister shall determine.

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

Authority and
functions
of the
Commission

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

- (a) facilitate the procurement of private sector investors in public-private partnership arrangements and other form of undertaking relating to public investments projects in Malawi;
- (b) implement divestitures in direct or indirect Government ownership of, or interest in, any state-owned enterprise; and
- (c) provide technical support to Contracting Authorities in the identification, initiation and development of public-

- private partnership arrangements.
- (3) The functions of the Commission in relation to public-private partnerships shall be-
- (a) to perform pre-feasibility and viability assessment in conjunction with a Contracting Authority, of a project submitted to it and give its recommendations to the Cabinet through the Minister, as to whether the project-
 - (i) is affordable to the Government, the Contracting Authority and ultimate users;
 - (ii) delivers Value for money; and
 - (iii) presents optimum transfer of technical, operational and financial risks to the private party;
 - (b) in conjunction with a Contracting Authority, conduct full legal technical and financial feasibility studies on public-private partnership projects;
 - (c) planning, managing the procurement tender process from receipt of expressions of interest to selection of a preferred Partner and negotiations of the contract with the Partner;
 - (d) appropriate bidding documentation including the draft public-private partnership agreement, confidentiality undertakings, requests for proposal, and ensure that the requests for proposal conforms with the project model approved during the feasibility study stage;
 - (e) to advise the Minister on administrative procedures in relation to public-private partnership projects;
 - (f) to develop best practice guidelines in relation to all aspects of public-private partnerships;
 - (g) to propose to the Minister policy considerations in relation to accelerating bankable public-private partnership projects;
 - (h) to build public-private partnership awareness in the country;
 - (i) generally facilitate the implementation of public-private partnerships in Malawi from project identification to procurement of a Partner;
 - (j) to implement the public-private partnership programme in accordance with the policy guidelines approved by the Cabinet;
 - (k) to advise the Minister responsible for finance of what, in the opinion of the Commission, are the optimal means of financing the cost of public investment

-
- projects in order to achieve value for money;
- (l) to implement public-private partnership arrangements in accordance with this Act and any regulations made hereunder;
 - (m) to provide advice to any Contracting Authority on all aspects of financing, refinancing and insurance of public investment projects to be duly undertaken by means of public-private partnership arrangements; and
 - (n) to monitor progress of the implementation of public-private-partnership arrangements in Malawi and report the same to the Cabinet through the Minister, on a regular basis, in any case no less frequently than on a quarterly basis.
- (4) The functions of the Commission in relation to divestiture of state-owned enterprises shall be-
- (a) to prepare an annual working plan, annual budget, and a Corporate Strategic Plan;
 - (b) to oversee all aspects of private sector participation in state-owned enterprises and infrastructure;
 - (c) to monitor the impact and progress of the divestiture programme and to prepare the long-term divestiture sequence plan in relation to enterprises designated for divestiture and submit such plan to the Cabinet through the Minister for approval;
 - (d) to report the sale of each state-owned enterprise to the Cabinet, through the Minister, specifying the method of sale used and the reasons why such method was considered appropriate, the proceeds realized and other particulars;
 - (e) to carry out or cause to be carried out an assessment of the market value of the state-owned enterprise that is to be divested;
 - (f) subject to any existing rights, to ensure that the divestiture of each state-owned enterprise is carried out according to the following principles, that is to say, that-
 - (i) each transaction is fully transparent to the public at large;
 - (ii) participation is competitive by making it open to all investors;
 - (iii) the process is fair and efficient;
 - (iv) the transaction is such as to reduce concentration of ownership and marketing;

- (g) to set pre-qualification criteria for the selection of potential buyers of, or investors in, a state-owned enterprise to be divested, and evaluate offers from them, in accordance with such criteria, with regard to-
 - (i) the ability and commitment of buyers to develop the enterprise;
 - (ii) the track record of buyers and their expertise in the type of enterprise on offer, and
 - (iii) the price;
 - (h) to ensure that monopolies are not created nor maintained in the process of divestiture in relation to consumer markets; but so, however, that concentrated production does not in itself constitute a monopoly for the purposes of this Act;
 - (i) to prepare or cause to be prepared the relevant documentation necessary to effect the divestiture of any state-owned enterprise;
 - (j) to seek potential investors in state-owned enterprises;
 - (k) to maintain records, safeguard information and establish such administrative procedures as shall ensure confidentiality of information;
 - (l) to maintain close liaison with all relevant institutions in the process of divestiture;
 - (m) to publicise activities of the divestiture programme; and
 - (n) to do all such things as are necessary or incidental or conducive to the better carrying out of the functions of the Commission specified in this Act.
- (5) The Commission 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.
- (6) In carrying out its functions, the Commission shall comply with all guidelines and instructions that the Minister may, from time to time, issue to the Commission.
- (7) In the discharge of its functions, the Commission shall at all times exercise due care, skill, prudence and diligence, and act in the utmost good faith.
- (8) Any recommendation or report by the Commission to the Cabinet under this Act shall be submitted through the Minister.

Provision
have of advice

- 9.-** (1) In providing advice under this Act, the Commission shall have regard to-

-
- (a) such policy directions as the Minister may issue for the purposes of this paragraph to Contracting Authorities from time to time in relation to the financing of public investment projects; and
 - (b) such policy guidance as the Minister may issue for the purposes of this paragraph to Contracting Authorities from time to time in relation to the process, procedures and regulations generally of public-private partnership arrangements.
- (2) The Minister shall cause a copy of every policy direction and policy guidance issued under subsection (1) to be sent to the Commission.
- (3) The provision of advice by the Commission under this Act may include, where appropriate, advice 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 this Act in respect of public investment projects, including-
- (a) the type of projects;
 - (b) the size of the project;
 - (c) the stage of development of the project; and
 - (d) any other relevant factors that shall determine projects of which the Commission's advice and involvement shall be sought, a Contracting Authority shall-
 - (a) seek the advice of the Commission as soon as is practicable before undertaking a public investment project; and
 - (b) on the basis of a pre-feasibility assessment, evaluate the feasibility of a public-private partnership approach in implementing the project.
- 10.**-(1) Subject to the other provisions of this Act, the Commission may regulate its own procedure.
- (2) The Commission shall meet for the transaction of business at least once every three months at such places and at such times as the Chairman may determine.
- (3) A special meeting of the Commission may be called by the Chairman upon written notice of not less than seven days received from any member of the Commission 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.

- (4) Half of the members of the Commission shall form the quorum of any meeting of the Commission.
- (5) There shall preside at any meeting of the Commission-
 - (a) the Chairman;
 - (b) in the absence of the Chairman such member as the Chairman 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.
- (6) The decision of the Commission 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 a casting vote in addition to that person's deliberative vote.
- (7) No member of the Commission shall attend to the business of the member's office by representation, and where a member is unable to attend any meeting of the Commission, the member may request that the member's apologies for failure to attend be recorded.

Committees
of the
Commission

- 11.**(1) The Commission may, for the purpose of performing its functions under this Act, establish committees and delegate to any such committee such of its functions as it considers necessary, and the Commission may appoint as members of a committee established under this subsection persons who are or are not members of the Commission and such persons shall hold office for such period as the Commission may determine.
- (2) Subject to any special or general directions of the Commission, any committee established under this section may regulate its own procedure.

Minutes of
meetings

- 12.** The Commission shall cause minutes to be kept of the proceedings of every meeting of the Commission and of every meeting of a committee of the Commission.

Disclosure
of interest

- 13.** If any member is present at a meeting of the Commission or of any committee of the Commission at which any matter which is the subject of consideration is a matter in which that person or that person's immediate family member, or that person's professional or business partner is directly or

indirectly interested in a private or professional capacity, the person shall, as soon as is practicable after the commencement of the meeting, disclose such interest and, unless the Commission or the committee otherwise directs, that person shall not take part in any consideration or discussion of, or vote on, any question touching on such matter.

- 14.-(1) The Commission may in its discretion at any time and for any period invite any person, and the Minister may in like manner nominate any officer in the public service, to attend any meeting of the Commission or of any of its committees and take part in the deliberations of the meeting, but such person or officer shall not be entitled to vote at the meeting.
- (2) Section 13 shall apply, *mutatis mutandis*; to a person or an officer attending a meeting of the Commission pursuant to subsection (1).

Co-opted
persons

PART IV-SECRETARIAT

15. The Secretariat of the Commission shall consist of the Chief Executive Officer and other employees of the Commission appointed under this Part.

Secretariat
of the
Commission

- 16.-(1) The Commission shall appoint, on such terms and conditions as it may determine with the approval of the Minister, a Chief Executive Officer.
- (2) The Chief Executive Officer shall perform such duties as the Commission shall assign to that office and ensure the effective administration and implementation of the provision of this Act.
- (3) Without derogation from the generality of the responsibilities and duties of the Chief Executive Officer conferred under subsection (2), the duties of the Chief Executive Officer shall include the following-
- (a) to formulate and submit to the Commission proposals and recommendations including programme strategies, selection criteria and annual targets for-
- (i) public-private partnership arrangements;
- (ii) financing of public-private partnership projects; and
- (iii) divestiture and reform of state-owned enterprises;
- (b) to prepare and update a database of state-owned enterprises that are subject to divestiture;
- (c) to establish operational guidelines and transparent

Chief Executive
Officer of the
Commission

- procedures and carry out studies for implementation of-
- (i) public-private partnership arrangements;
 - (ii) financing of public-private partnership projects; and
 - (iii) the divestiture and reform of state-owned enterprises;
- (d) to ensure that the functions of the Commission are being performed effectively;
- (e) to prepare for approval by the Commission, the strategic objectives and targets to be met by the Commission; and
- (f) any other function and duties as the Commission may assign to him from time to time for the purposes of the implementation of the Act.

- (4) The Chief Executive Officer or, in the Chief Executive Officer's absence, such other officer of the Commission as the Chief Executive Officer may designate, shall attend meetings of the Commission and may address such meetings, but shall not vote on any matter:

Provided that the person presiding at any meeting of the Commission may, for good cause, require the Chief Executive Officer or such other officer to withdraw from such meeting.

- (5) Section 13 shall apply, *mutatis mutandis*, to the Chief Executive Officer and to such other officer referred to in this section.

other
employees

- 17.** The Commission may delegate to the Chief Executive Officer the employment, on such terms and conditions as the Commission may determine, such other employees, subordinate to the Chief Executive Officer, as the Commission considers necessary for the performance of the Chief Executive Officer's functions and to assist the Chief Executive Officer in the discharge of the Chief Executive Officer's duties and responsibilities.

Disclosure of
interest by
employees,
etc

- 18.-(1)** An employee of the Commission or a consultant to the Commission who, or whose spouse, is directly or indirectly interested in a private or professional or official capacity in any matter relating to the divestiture programme or public-private partnership arrangement shall be required to disclose such interest.

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

19. Every-

- (a) member of the Commission;
- (b) member of a committee of the Commission;
- (c) employee of the Commission;
- (d) consultant in the service of the Commission, shall take such oath of secrecy as may be approved by the Commission or as may otherwise be prescribed under this Act.

Oath of
secrecy

- 20.**-(1) No person shall, without the consent in writing given by or on behalf of the Commission, publish or disclose to any person, otherwise than in the course of the person's duties, the contents of any document, communication or information which relates to, and which has come to the person's knowledge in the course of the person's duties under this Act.
- (2) Any person who knowingly contravenes the provision of subsection (1) commits an offence.

Prohibition of
publication or
disclosure of
information by
unauthorized
persons**PART V-PUBLIC-PRIVATE PARTNERSHIP ARRANGEMENTS**

- 21.**-(1) The public-private partnership arrangement may be implemented through a Special Purpose Vehicle incorporated under the Companies Act specifically for this purpose or it may be through a Joint Venture agreement between the Contracting Authority and the private Partner: Provided that the Joint Venture provisions may be incorporated into the public-private partnership agreement.
- (2) The Shareholders of the Special Purpose Vehicle shall be the Minister responsible for Finance and the private Partner and the two must enter into a Shareholders agreement the terms of which must be as prescribed by the Minister.

Special
purpose
vehicle or
joint venture

- 22.**-(1) Notwithstanding any other enactment but subject to this Act, a Contracting Authority, if authorized by the Minister, may enter into an agreement with a Partner for the performance of one or more of the functions of that Contracting Authority.
- (2) Every Agreement shall-
- (a) identify the responsibilities of the Contracting Authority and the Partner;
 - (b) specify the relevant financial terms;
 - (c) ensure the management of performance of the Partner;

Public-Private
Partnership
agreement

- (d) provide for the return of assets, if any and where applicable, to the Contracting Authority, at the termination or expiry of the agreement, in such manner as may be provided for in the Agreement;
 - (e) provide for the optimal sharing of risks between the Contracting Authority and the Partner;
 - (f) provide for the payment to the Partner by way of compensation from revenue or charges or fees collected by the Partner from users or customers of a service provided by it;
 - (g) provide for its duration; and
 - (h) contain such other information as may be prescribed.
- (3) Every agreement shall be governed by and construed in accordance with the Laws of Malawi.
- (4) Every agreement shall provide for disputes between the Partner and the Contracting Authority to be settled by exhausting alternative dispute resolutions mechanisms such as mediation, failing which matters will go for arbitration, according to the rules defined in the Agreement.

Functions of a
Contracting
Authority

- 23.-(1)** Without prejudice to the functions of a Contracting Authority under any written law, the Commission or a Contracting Authority with the support of the Commission, may, either itself or in conjunction with any other person or another Contracting Authority-
- (a) identify, appraise, develop and monitor a project to be implemented under this Act;
 - (b) undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under a public-private partnership agreement;
 - (c) submit the feasibility study to the Minister responsible for Finance through the Commission for its approval;
 - (d) enter into a public-private partnership arrangement with a Partner, subject to the approval of the Minister responsible for finance and the Minister, for the performance of functions of the Contracting 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; and
 - (ii) the provision of services relating to an

-
- infrastructure facility and the provision of finance, if required, for such service;
- (e) subject to subsection (4), arrange or provide for a payment to a Partner;
 - (f) transfer an interest, or part of an interest, of the Contracting 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 Contracting Authority is a ministry, subject to the consent of the Minister, to a nominee of the Partner by transfer, assignment, conveyance, grant of lease or licence or otherwise; and
 - (g) 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 subsections (3) and (4), the Contracting Authority may, whether or not for consideration, transfer, convey or assign its interest in any real or person property, including leasehold owned or held by such Contracting Authority to a company formed under section 21 for the purpose of enabling such a company to carry out its financing functions in connection with public investment projects.
 - (3) A Contracting Authority shall not convey, assign or transfer any property under subsection (2) to any such company unless the consent of the Minister and the appropriate Minister has been obtained.
 - (4) A Contracting Authority may, with the approval of the Minister, attach such terms and conditions as it considers appropriate to any transfer, conveyance or assignment pursuant to subsection (1).
 - (5) 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 Contracting Authority.
 - (6)-(a) Where a payment is arranged or provided for pursuant to section 21, the Minister responsible for finance may, at any time until entry into the public-private partnership arrangement by the Contracting Authority, give directions to the appropriate Minister in relation to the aggregate value of the moneys committed to such

arrangements, as the Minister considers necessary; and
 (b) the appropriate Minister shall, in performing his functions, have regard to any directions given by the Minister responsible for finance under this section.

- (7) Functions conferred on a Contracting Authority by this section shall be in addition to, and not in substitution for, any other functions of the Contracting Authority.
- (8) The public-private partnership arrangements undertaken pursuant to the provisions of this Act shall be carried out based on the principles of fairness, transparency and accountability.
- (9) The Contracting Authority shall ensure that risks and associated benefits of the public-private partnership arrangements are allocated to parties that are best placed to manage them.

Additional
powers

- 24.**-(1) A public-private partnership arrangement shall, whilst it is in force, operate to confer on the Partner concerned, the functions of the Contracting 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 Contracting Authority concerned; and
- (b) shall, notwithstanding such arrangement, continue to be vested in the Contracting 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 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 Contracting Authority, includes functions of any other Contracting Authority to be performed by it pursuant to an agreement or arrangement duly made by it with that other Authority.

Types of
infrastructure
Facilities and
service

- 25.**-(1) A Contracting Authority, where authorized by the Cabinet, may enter into a public-private partnership arrangements for the delivery of infrastructure and services within the scope of Government's key priority areas aimed at achieving sustainable economic growth and social development.

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- (2) Without delogating from the generality of subsection (1), the key priority areas include-
- (a) agriculture and food security;
 - (b) energy, industrial development, mining and tourism;
 - (c) transport infrastructure and inland ports;
 - (d) education, science and technology;
 - (e) public health, sanitation, malaria and HIV/AIDS management;
 - (f) integrated rural development;
 - (g) greenbelt irrigation and water development;
 - (h) child development, youth development and empowerment;
 - (i) climate change, natural resources and environmental management; and
 - (j) any other type of infrastructure and services as the Minister may, from time to time, designate by notice published in the *Gazette*.
- (3) In the implementation of public-private partnership arrangements listed in subsection (1), the Commission may use any or a combination of the following modes of private sector involvement-
- (a) Build Own Operate Transfer;
 - (b) Build Operate Transfer;
 - (c) Build Own Operate;
 - (d) Design Finance Refurbish Operate Transfer;
 - (e) Design Finance Build Operate Transfer;
 - (f) Concession or Leases; and
 - (g) any other mode as the Commission shall determine.

PART VI-PROCEDURES FOR AWARDING CONTRACTS

- 26.-(1) Every Contracting Authority shall, through the Commission or by itself if authorized by the Commission undertake or cause to be undertaken a feasibility study where it considers that a project may be implemented under an agreement to assess whether the proposed project is feasible as a public-private partnership project.
- (2) The feasibility study shall-
- (a) demonstrate comparative advantage in terms of strategic and operational benefits for implementation under a public-private partnership agreement;
 - (b) describe in specific terms-
 - (i) the nature of the Contracting Authority's functions,

Feasibility study for public-private partnership

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

- (ii) the extent to which those functions can lawfully and effectively be performed by a Partner in terms of an agreement; and
- (iii) the most appropriate form by which the Contracting Authority may implement the project under an agreement;
- (c) demonstrate that the agreement shall-
 - (i) be affordable to the Contracting Authority;
 - (ii) deliver value for money; and
 - (iii) transfer appropriate technical, operational or financial risk to the Partner; and
- (d) explain the capacity of the Contracting Authority to effectively enforce the agreement, including the ability to monitor and regulate project implementation and the performance of the Partner in terms of the agreement.

Pre-selection
of bidders

- 27.**-(1) The Commission shall consider carrying out a pre-qualification exercise to select potential bidders or may delegate its powers under this subsection to the Contracting Authority where the Commission considers that the Contracting Authority has the necessary expertise to undertake the pre-qualification exercise.
- (2) The invitation to bidders to submit bids shall be done through the request for proposal document which shall be prepared by the Commission and shall include a public invitation for bidders to submit bids.
- (3) In the exercise of its powers under this section the Commission shall strive for the highest standard of equity by ensuring that all bidders are afforded equal opportunity and are treated fairly.

Evaluation
criteria

- 28.**-(1) The request for proposals shall clearly set out the evaluation criteria which shall form the basis for selection of a preferred bidder.
- (2) Bids shall be evaluated by the Commission.

Contract
Award for
Public private
partnership

- 29.**-(1) The public-private partnership contract may be concluded solely on the basis of a decision by the Commission having secured clearance from the Minister responsible for finance and the consent obtained from the Minister to the final draft

contract.

- (2) Where the Commission has delegated its function to the Contracting Authority, the Contracting Authority shall submit to the Commission for approval the final draft of the public-private partnership contract, including all the annexes thereto, evaluation reports prior to reaching a decision on the selection of a Partner.
- (3) Within thirty days from the date of receipt of the final draft contract referred to in subsection (1) the Commission shall reach the decision on the granting of consent to the text of the draft contract.
- (4) The Commission shall issue the decision referred to in subsection (2) on the basis of the assessment of compliance of the draft contract with the tender documents and the provisions of this Act and the Regulations made thereunder.
- (5) Any amendments to a concluded public-private partnership contract, whereby the rights and obligations of the parties to the contract are being modified, shall be made according to a procedure that is in line with the provisions of this Act.

30.-(1) The Contracting Authority shall submit to the Commission the concluded public-private partnership contract with all annexes, including changes to the contract and annexes thereto in the period that the Minister shall set.

- (2) The concluded public-private partnership contract with all annexes thereto which are its integral part, and all changes to the contract and annexes thereto, shall be entered in the Register which is kept by the Commission.

Register of
public-private
partnership
contracts

31.-(1) Any unsolicited bid or expression of interest for a public-private partnership by a prospective private Partner to a Contracting Authority shall be referred to the Commission and shall not be responded to by the Contracting Authority.

- (2) Once the Commission receives the unsolicited bid or expression of interest, it shall consult with the relevant Contracting Authority for a preliminary assessment whether the public-private partnership of the type proposed is acceptable or not.
- (3) If the assessment and consultation in subsection (2) determines that the public-private partnership type is acceptable, the Commission shall seek the approval of the Cabinet to conduct a feasibility study, and the unsolicited bidder shall be informed that bidders including the

Unsolicited
bids

unsolicited bidder shall be invited to bid for the public-private partnership in accordance with the procedure laid down in this Act.

- (4) If however the assessment and consultation in subsection (2) above determines that the public-private partnership being proposed is unacceptable the Commission shall advise the unsolicited bidder accordingly.

PART VII-DIVESTITURE AND COMMERCIALIZATION

Divestiture of
State-owned
enterprises

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

Special rights
of the
Government

- 33.** In any agreement for the sale of a state-owned enterprise, the parties may agree that the Minister responsible for Finance may retain, or at any time after the date of the agreement acquire, a share in the divested enterprise, which share shall confer special rights to enable the Government in the national interest to intervene in the operations of the enterprise where such intervention is necessitated by the specific actions or undertakings of the enterprise.

Allotment
Of shares

- 34.** The shares of a state-owned enterprise shall be allotted by the Commission.

Obligations of
shareholders

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

Obligations of
State-owned
enterprises

- 36.-(1)** A state-owned enterprise scheduled for divestiture, and in which there is no private ownership, shall-
- (a) carry out any recommendations, made by the Commission, for preparing the enterprise for divestiture;
 - (b) keep up to-date all business records and books of accounts;
 - (c) make available to the Commission its manpower development, investment or financing plan if any has been developed;
 - (d) prepare the accounts and a financial statement of the enterprise for every financial year and cause them to be

-
- audited not later than four months after each financial year;
 - (e) maintain a register of its fixed assets, which register shall be reconciled with the financial statement;
 - (f) not perform any action that would result in the assets of the company being dissipated;
 - (g) not undertake any new capital investment programmes, unless a project appraisal report approved by the Commission, is prepared showing that-
 - (i) routine plant, equipment and vehicle renewal is required;
 - (ii) rehabilitation expenditure is essential to keep the operations of the state-owned enterprise running or to improve the marketability of the enterprise;
 - (iii) the new capital investment has a pay back period of less than two years;
 - (iv) the new capital investment will contribute to the promotion of export or import substitution; and
 - (v) the state-owned enterprise demonstrates that the new capital investment will not result in deterioration of its operations;
 - (h) as far as possible, establish and document all contractual, legal and other obligations;
 - (i) not give any person information which might give undue advantage to that person or to any potential investor; and
 - (j) if so requested by the Commission, disclose all of any information whatever about the enterprise.
- (2) Any person who knowingly contravenes the provisions of subsection (1) commits an offence.

37.-(1) The Commission may employ the following modes of divestiture-

- (a) public offering of shares;
- (b) private sale of shares through negotiated or competitive bids;
- (c) offer for sale of additional shares in a state-owned enterprise to reduce Government share holding;
- (d) sale of the assets and business of the state-owned enterprise;
- (e) re-organization of the state-owned enterprise before the sale of the whole or any part of the enterprise;
- (f) buy outs of a state-owned enterprise by management or

Modes of
divestiture

- employees in that enterprise; and
- (g) any other- method the Commission may consider appropriate.
- (2) Save as may otherwise be provided in regulations made under this Act, the Commission shall ensure that each state-owned enterprise is sold at its market value.
- Valuation of state-owned enterprises
- 38.** The valuation of state-owned enterprises shall be performed by independent valuers who shall issue a certificate of valuation or an opinion of the value.
- Eligible shares to members
- 39.** The shares in a state-owned enterprise shall be liable to be sold to any person whether or not such person is a citizen of Malawi. That notwithstanding, the Commission will make every effort to encourage Malawian participation in state-owned enterprise through various schemes approved by the Minister.
- Sales of shares to Members of Cabinet, etc.
- 40.** No member of the Cabinet or of the Commission or of a committee of the Commission and no employee of the Commission or consultant to the Commission or the spouse, child, mother, father, brother, sister or a professional or business partner or immediate family member thereof shall purchase shares or assets in a state-owned enterprise, unless the sale is by public offer of shares.
- Established funds
- 41.** An established fund may purchase shares in a state-owned enterprise on behalf of the contributors.
- Purchase of shares by citizens of Malawi
- 42.** Where the purchasers are citizens of Malawi, shares may be offered at a discount which shall be in accordance with prescribed guidelines, and it shall be a condition of every sale of shares at a discount that the shares so purchased shall not be disposed of within two years of the date of purchase.
- Shares not to be sold on credit
- 43.** The shares of a state-owned enterprise shall not be sold on credit, unless otherwise prescribed by regulations made under this Act.
- Negotiations of sale
- 44.**-(1) The Commission shall appoint a competent negotiating team for each sale to act on behalf of the Commission.
- (2) A person appointed on the negotiating team shall-
- (a) have proper professional qualifications and experience and shall not be a person held in bad business standing;
- (b) take an oath of secrecy as approved by the Commission or as may be prescribed; and

- (c) disclose any personal or professional interest the person may have, whether direct or indirect, before accepting the appointment.
45. The Commission may convert a state-owned enterprise scheduled for divestiture, which is not a company, into a private or public company in accordance with the provisions of the Companies Act. Conversion of private companies to public companies
Cap. 46:03
46. The Commission may liquidate a state-owned enterprise in accordance with the provisions of the Companies Act. Liquidation
Cap. 46:03
- 47.-(1) The final sales agreement to transfer shares in a state-owned enterprise to the successful bidder shall be signed by-
- (a) the Minister responsible for finance or the Commission, where the shares sold were directly owned by the Government; or
- (b) the respective shareholder, where the shares sold were not directly owned by the Government. Completion of sales

Cap. 46:03
- (2) The transfer of shares shall be in accordance with the provisions of the Companies Act.
- (3) The final sale or transfer of assets-owned by a state-owned enterprise to the successful bidder shall be signed by the Commission on behalf of the state-owned enterprise.
- 48.-(1) The Minister, in consultation with the Minister responsible for the Government department to be commercialized, c may specify, by notice in the Gazette, any Government department for purposes of commercialization under this Act. Commercialization of specified Government departments
- (2) A specified Government department shall be incorporated under the Companies Act.
- (3) A Government department specified under this section may, subject to the approval of the Minister responsible for Finance-
- (a) fix its own rates, prices and charges for goods and services provided;
- (b) capitalize assets; and
- (c) borrow debenture stocks.

PART VIII-PUBLICATION, INFORMATION AND REPORTS

- 49.-(1) The Commission shall publish by notice in the Gazette and in at least two newspapers in general circulation in Publication and records of certain information

Malawi, or in any media, the names of the state-owned enterprises approved to be divested.

- (2) The Commission shall keep and maintain proper records of-
 - (a) the names of the state-owned enterprises approved to be divested as published under subsection (1);
 - (b) public-private partnership arrangement transactions that have been undertaken;
 - (c) the registered consultants dealing with the divestiture process;
 - (d) the bidders and bid prices;
 - (e) the successful bidders and the reason for selecting such bidders;
 - (f) the cost of transactions and any other special conditions of the public-private partnership arrangement;
 - (g) the price of shares and any other special conditions of the sale of shares; and
 - (h) any other matters as the Commission may deem appropriate.
- (3) Any person having or claiming to have an interest in a state-owned enterprise to be divested shall make a claim in writing to the Commission within a period of sixty days after the notice referred to in subsection (I) is published, and if the person fails to do so, the person shall be deemed to have relinquished all interests in the state-owned enterprise.
- (4) The Commission may not be sued in relation to actions or debts incurred by state-owned enterprises.
- (5) The Government shall be responsible for the debts and actions of state-owned enterprises.

Unauthorized
Persons not
To publish or
disclose
information

- 50.-**(1) Save as otherwise provided by law, a person shall not disclose confidential information obtained by that person while performing, or as a result of having performed, duties under this Act as-
- (a) a member of the Commission;
 - (b) an employee of the Commission; or
 - (c) a consultant or an adviser to the Commission, or an employee of such person whilst performing duties relating to such advice or consultation, or obtained while in performance of a service contract, unless such person is duly authorized by the Commission to do so.
- (2) A person who contravenes subsection (1) commits an offence and shall be liable, on conviction, to a fine of five

hundred thousand Kwacha (K500,000) and to imprisonment for two years.

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

Annual report:

51.-(1) As soon as practicable, but not later than six months after the expiry of each financial year, the Commission shall submit to the Minister, a report concerning its activities with respect to public-private partnership arrangements or divestiture of state-owned enterprises during that financial year.

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

- (a) an audited balance sheet;
- (b) an audited statement of income and expenditure; and
- (c) such other information as the Commission may consider appropriate or as the Minister may direct.

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

52. The Commission may annually publish a report of public-private partnership arrangements to the public.

Public-private partnership arrangements report

53. The Commission shall, every six months, at the end of June and at the end of December, produce a report 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.

Progress reports

PART IX-FINANCIAL PROVISIONS

54.-(1) Such amount of the proceeds of every sale of state-owned enterprises as the Minister shall determine with the advice of the Commission shall be paid into a fund to be known as the Divestiture Proceeds Account to be established by the Minister responsible for Finance and to be held at the Reserve Bank of Malawi or at such other bank or place as that Minister, on the advice of the Commission, may direct.

Use of proceeds

- (2) With the prior approval of the Minister responsible for Finance, the funds held on the Divestiture Proceeds Account

may be-used for-

- (a) funding the Commission;
- (b) funding the cost of divestiture under this Act;
- (c) funding the cost of public-private partnership development;
- (d) funding the restructuring of a public enterprise to be divested or commercialized;
- (e) supporting payments for retrenchment, redundancy or other form of lay-off resulting from divestiture processes under this Act;
- (f) funding of any project within the Government development plans.

Funds of the Commission

55.-(1) The funds of the Commission shall consist of such moneys as may-

- (a) be appropriated by Parliament for the purposes of the Commission;
 - (b) be paid to the Commission by way of grants or donations or otherwise received by the Commission;
 - (c) be retained by the Commission out of the proceeds of sales of state-owned enterprises as may be approved by the Minister responsible for Finance;
 - (d) be received by the Commission under subsection (2);
 - (e) constitute proceeds of the sales of the annual progress reports of the Commission; and
 - (f) otherwise vest in or accrue to the Commission.
- (2) The Commission may charge and collect fees in respect of programmes, publications, seminars, documents, consultancy services and other services provided by the Commission.
- (3) The Commission may invest in such manner as it thinks fit such of its funds as it does not immediately require for the performance of its functions.

Funds for public-private partnership development

56.-(1) The Commission may-

- (a) accept money by way of grants or donations from any source in or outside Malawi:
Provided that such source and their principals, immediate family members, related entities, representatives or affiliated parties of any type, have not participated directly or indirectly in any public-private partnership arrangement or divestiture of state-owned enterprise in Malawi.
- (b) subject to the approval of the Minister and the Minister

responsible for Finance, raise, by way of loans from any source in or outside Malawi, such money as it may require for the discharge of its functions:

Provided that such source shall comply with the restraints in paragraph (a) above; and

- (c) charge and collect fees in respect of programmes, facilitating public-private partnership arrangements, publications, seminars, documents, consultancy services and other services provided by the Commission.
- (2) The Commission may invest in such manner as it thinks fit such of its funds as it does not immediately require for the performance of its functions.

57.-(1) Subject to subsection (2) and to such guidelines as the Minister may issue, the Commission may from time to time raise money for purposes of public-private partnership arrangements.

Raising resources for public-private partnership arrangements

- (2) The combined net aggregate of the principal of all moneys raised and outstanding by the Commission and any companies formed under section 8 shall not exceed such total sum as the Minister may, from time to time, set and publish by notice in the Gazette.

58. Subject to the provisions of the Public Finance Management Act, the Minister responsible for finance may make available moneys from the Consolidated Fund to the Commission or a company formed under section 8 on such terms and conditions as the Minister may determine.

Minister may make available moneys from the Consolidated Fund Cap. 37:02

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

Commission Financial Yearor Contracting Authority to keep record of cost of transaction

60. The financial year of the Commission shall be the period of twelve months ending on 30th June in each year or on such other date as the Minister may specify by Order published in the Gazette.

Financial Year

61.-(1) The Commission shall cause to be kept proper books of

Accounts

accounts and other records relating to its accounts.

- (2) The accounts of the Commission shall be audited annually by independent auditors appointed by the Commission and approved by the Minister.

Annual
Financial
Report

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

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

- (a) an audited balance sheet;
(b) an audited statement of income and expenditure; and
(c) such other information as the Commission may consider appropriate or as the Minister may direct.

- (3) The Minister shall, during the meeting of the National Assembly next following receipt by the Minister of the report referred to in subsection (1), lay the report before the National Assembly, but otherwise the Commission may publish the report for sale to the public.

PART X-MISCELLANEOUS PROVISION

Prohibition
against
exerting
undue
influence
on officers

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

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

Statement of
disputes

- 64.**-(1) Any dispute between-
- (a) an investor and the Commission arising from the divestiture process;

- (b) an investor, a Partner, a Contracting Authority and the Commission arising from or relating to a public-private partnership arrangement, shall be settled through negotiation, mediation, or, by arbitration in accordance with the Arbitration Act.

Cap. 6.03

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
 - (c) solicits for use by any person not authorized under this Act any confidential information, relating to the divestiture of a state-owned enterprise, commits an offence.
- (2) A person convicted of an offence under subsection (1) shall not thereafter be eligible to participate in any public sector investment programme in Malawi.

Administrative
penalties

- 66.**-(1) If the Commission is satisfied on reasonable grounds that a person has contravened this Act or regulations made under it, the Commission may impose administrative penalties on the person by doing one or more of the following-
- (a) giving the person a written warning;
 - (b) directing the person to do a specified act, or refrain from doing a specified act, for one or more of the following purposes-
 - (i) to remedy the effects of the contravention;
 - (ii) to compensate persons who have suffered loss because of the contravention;
 - (iii) to ensure that the person does not commit further contraventions;
 - (c) requiring the person to pay a monetary penalty as may be prescribed by the Minister.
- (2) Without limiting subsection (1) (b), a direction may require the establishment of compliance programmes, corrective advertising or, in the case of a direction to a corporation, changes in the management of the institution.
- (3) A person on whom an administrative penalty has been imposed and who fails or refuses to comply with the administrative penalty commits an offence and, on conviction, shall be liable to a fine of one million Kwacha (K1,000,000) and to four years imprisonment.
- (4) Where the administrative penalty imposed by the

Commission is a monetary penalty and the person on whom the monetary penalty has been imposed does not pay for a period of more than thirty days from the date of first demand in writing by the Commission, the amount in respect of the monetary penalty shall be recoverable by the Commission as a civil debt.

General
Penalties

- 67.**-(1) A person convicted of an offence under this Act, for which no penalty has been specified, shall be liable to a fine not exceeding one million Kwacha (K 1,000,000) and to imprisonment for four years.
- (2) Where a body corporate is convicted of an offence under this Act, the court may, if the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five years times the amount of the maximum pecuniary penalty that could be imposed by the court on an individual convicted of the same offence.

Regulations

- 68.** The Minister may, on the advice of the Commission, make regulations for carrying out or giving effect to the provisions of this Act, and without prejudice to the generality of the foregoing, such regulations may prescribe-
- (a) the structure or general description of the structure of the partnership;
 - (b) capitalization requirements;
 - (c) debt level limitations;
 - (d) operating conditions;
 - (e) conditions as to the standard of maintenance and performance standards during the operation of the public-private partnership;
 - (f) conditions as to the transfer of ownership of any assets or liabilities to the State or a municipality, including inspection and valuation processes;
 - (g) conditions as to the transfer of risk to the Partner;
 - (h) conditions as to fixed or variable subsidy levels;
 - (i) conditions as to the need for performance bonds or guarantees from any party, its parent company or any other person;
 - (j) the level or kind of local involvement that is expected or preferred; and whether any concessions might be made in return for local involvement;
 - (k) conditions as to the step-in rights of the Government or any lender, which may include service level

-
- requirements;
- (l) dispute resolution processes;
 - (m) circumstances in which the public-private partnership may be determined by the Government and the consequences of that termination;
 - (n) conditions that must be met before any part of the public-private partnership may become operative or before charges may be imposed for use of any infrastructure or services provided by the public-private partnership;
 - (o) tender procedures;
 - (p) public floatation procedures;
 - (q) pre-qualification and registration of bidders procedures
 - (r) public announcement requirements;
 - (s) negotiation guidelines;
 - (t) final sale or transaction monitoring guidelines;
 - (u) pre- and post-transaction audit requirements;
 - (v) approach to, and procedures for, dealing with unsolicited proposals and direct negotiations for selection of the private sector;
 - (w) risk sharing framework between a Contracting Authority and a Partner in a public-private partnership arrangement;
 - (x) any forms and anything required to be prescribed under, or for the purposes of this Act; and
 - (y) such other matters as are necessary or conducive for the better carrying out of this Act.
- 69.**-(1) The respective responsible sector regulators shall, in consultation with the Commission, subject public-private partnership arrangements to consistent regulation to ensure that the public-private partnership arrangements are being managed in such a way that they are achieving the purpose for which they were established and are giving acceptable returns.
- (2) The appropriate Minister shall ensure that sector regulators are effective and impartial in order to promote public-private partnerships.
- 70.** The Minister may, on the advice of the Commission 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

Oversight of public-private partnership arrangements by regulators

Guidelines, policy directives or objectives

to be followed for the proper and effective implementation of the provisions of this Act, and such objectives or guidelines shall be valid for all purposes unless inconsistent with this Act and only on the extent of the inconsistency.

PART XI-TRANSITIONAL PROVISIONS, REPEAL AND SAVINGS

Savings of existing agreements and arrangements

- 71.** Subject to section 74, 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 a 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.

Existing Public-private Partnership arrangements

- 72.** Any public-private partnership arrangement of any Contracting authority effected at any time before the commencement of this Act shall comply with the provisions of this Act within twelve months from the commencement of this Act.

Vesting of assets of the Privatization Commission

- 73.-(1)** Any property procured or acquired by the Privatization Commission shall vest in the Commission.
- (2) On or after the appointed date, there shall be transferred to, and vested in, or subsisted against, the Commission by virtue of this Act and without further assurance-
- (a) the affairs of the Privatization Commission; and
- (b) subject to this Act, all property, rights and obligations which immediately before the appointed date were the property, rights and obligations of the Privatization Commission.
- (3) Except as provided in this Act, every deed, bond and agreement (other than an agreement for personal service) to which the Privatization Commission was a party immediately before the appointed date, whether in writing or not, and whether or not of such nature that rights, liabilities and obligations thereunder could be assigned, shall, unless its subject matter or terms make it impossible that it should have effect as modified in the manner provided by this subsection, have effect from the date of the assignment thereof, as if-
- (a) the Commission had been a party thereto;

- (b) for any reference to the Privatization Commission there were substituted, as regards anything falling to be done on or after the appointed date, a reference to the Commission; and
- (c) for any reference to any officer of the Privatization Commission not being a party thereto and beneficially interested therein there were substituted, as regards anything falling to be done on or after the appointed date, or reference to such officer of the Commission as the Commission shall designate.
- (4) Subject to the provisions of subsection (2), documents, other than those referred to therein, which refer specifically or generally to the Privatization Commission shall be construed in accordance with subsection (2) as far as applicable.
- (5) For the purposes of this Part-
"Privatization Commission" means the Privatization Commission established under the Public Enterprises (Privatization) Act.
- 74.-(1) Where under this Act, any property, rights, liabilities and obligations of the Privatization Commission are deemed to have been transferred to the Commission in respect of which transfer a written law provides for registration, the Commission shall make an application in writing to the appropriate authority for registration of such transfer.
- (2) The registration authority referred to in subsection (1) shall make such entries in the appropriate register as shall give effect to such transfer and, where applicable, issue to the transferee concerned a certificate of title in respect of the property or make necessary amendments to the register, as the case may be, and shall make endorsement on the deeds relating to the title, right or obligation concerned, and no registration fees, stamp duty or other duties shall be payable in respect thereof.
- 75.-(1) Without prejudice to the other provisions of this Act, where any right, liability or obligation vests in the Commission by virtue of this Act, the Commission and all other persons shall, as from the appointed date, have the same rights, powers and remedies (and in particular the same rights as to the instituting or defending of legal proceedings or the making or

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Registration
of property
to be
transferred
by the
Privatization
CommissionLegal
Proceedings

resisting of applications to any authority) for ascertaining, perfecting that right, liability or obligation as they would have had if it had at all times been a right, liability or obligation of the Commission.

- (2) Any legal proceedings or application of any authority pending immediately before the appointed date by or against the Privatization Commission may be instituted by or against the Commission.
- (3) After the appointed date, proceedings in respect of any right, liability or obligation which was vested in, held, enjoyed, incurred or suffered by the Privatization Commission may be instituted by or against the Commission.

Transfer of employees

- 76.-**(1) Any person who immediately prior to the commencement of this Act is employed by the Privatization Commission shall be deemed to have been transferred to the employment of the Commission under the person's former terms and conditions of service, and for purposes of determining the person's rights thereunder, the service shall be regarded as being continuous from the time the person was appointed by the Privatization Commission.
- (2) No employee of the Privatization Commission transferred to the Commission by virtue of this section shall be entitled to claim any payments merely by virtue of such transfer.

Repeal and savings

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- 77.-**(1) Subject to subsection (2), the Public Enterprises (Privatization) Act is hereby repealed.
- (2) Anything done in accordance, with the Public Enterprises (Privatization) Act repealed by subsection (1), prior to the commencement of this Act and which may be done in accordance with the provisions of this Act, shall be deemed to have been done in accordance with this Act.

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- (3) Any subsidiary legislation made or deemed to have been made under Public Enterprises (Privatization) Act repealed by subsection (1) in force immediately before the commencement of this Act-
 - (a) Shall remain in force, unless in conflict with this Act, and shall be deemed to be subsidiary legislation made under this Act; and
 - (b) may be replaced, amended or repealed by subsidiary legislation made under this Act.
- (4) All contracts awarded by the Privatization Commission in accordance with the Public Enterprises (Privatization) Act

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repealed by subsection (1), prior to the commencement of this Act, shall be deemed to be contracts awarded by the Commission in accordance with this Act.

Passed in parliament this sixteenth day of November, two thousand and eleven.

M.M. KATOPOLA
Clerk of Parliament

