

**REPORT OF THE FINANCE COMMITTEE ON THE PUBLIC
PRIVATE PARTNERSHIP BILL, 2020**

1.0 INTRODUCTION

The **Public Private Partnership Bill, 2020** was *presented and read the first* time in the House on Tuesday 13th October 2020 by the Honourable Minister for Parliamentary Affairs, Mr. Osei Kyei-Mensah-Bonsu on behalf of the Minister responsible for Finance.

The Bill was subsequently *referred* to the Finance Committee for consideration and report in accordance with Article 103 of the 1992 Constitution and Order 169 of the Standing Orders of the House.

The Committee met and considered the Bill with a Deputy Minister for Finance, Hon. Kwaku Kwarteng and a team of officials from the Ministry of Finance and the Attorney General's Department.

The Committee is grateful to the Hon. Deputy Minister for Finance and the officials from the Ministry of Finance and the Attorney General's Department for attending upon the Committee.

2.0 REFERENCES

The Committee referred to and was guided by the following documents *inter alia* during its deliberations on the Bill:

- The 1992 Constitution of the Republic of Ghana
- The Standing Orders of the Parliament of Ghana
- Interpretation Act, 2009 (Act 792)
- Public Financial Management Act, 2016 (Act 921)
- Tolls Act, 1973 (NRCD 153)
- Road Fund Act, 1997 (Act 536)
- Ghana Highway Authority Act, 1997 (Act 540)
- Earmarked Funds Capping and Realignment Act, 2017 (Act 947)
- Fees and Charges (Miscellaneous Provisions) Act, 2018 (Act 983)

3.0 BACKGROUND INFORMATION

The provision of public infrastructure and public services is one of the prime mandates of Governments all over the world. Public infrastructure like roads, electricity, transportation, water and sanitation, seaports and airports are fundamental prerequisites for economic growth and development.

Additionally, education and health facilities as well as public housing and buildings, social, cultural and commercial facilities and infrastructure are essential in modern societies. Undoubtedly, there is a close relationship between infrastructure and economic output.

However, fiscal constraints experienced by governments have resulted in the development of new and innovative approaches to the provision and

financing of public infrastructure and public services. The traditional role of the Government as the primary provider of public infrastructure and public services is gradually being supplemented with private sector expertise and financing.

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

4.0 OBJECT OF THE BILL

The purpose of the Bill is to provide for the development, implementation and regulation of public private partnership arrangements between contracting authorities and private parties for the provision of infrastructure and services and to establish institutional arrangements for the regulation of public private partnerships.

5.0 CONTENTS OF THE BILL

The Bill contains a total of ninety (90) clauses and four (4) Schedules.

6.0 OBSERVATIONS

6.1 National Policy on Public Private Partnerships

The Committee observed that the Government of Ghana adopted a National Policy on Public Private Partnerships on 3rd June, 2011. Subsequently, the Policy has been revised by Government to provide the

needed framework for the prompt and effective structuring and implementation of Public Private Partnerships (PPPs) in Ghana.

6.2 Quality and Affordability of Infrastructure and Services

The Committee noted that the present Bill reflects the desire of Government to improve the quality, affordability and timely provision of infrastructure and services in Ghana.

Though PPP arrangements are not a panacea for all public infrastructure needs of the country, they are nonetheless a complement to the continued Government commitment and efforts at continuously improving infrastructure and public services and opening up key service markets to competition.

6.3 Value for Money

The Committee was informed that PPP arrangements will be considered by Government only where the arrangements would provide greater value for money than other fully-private or fully-public service delivery options.

6.4 Investor Confidence

The Committee noted that the establishment of objective, open and fair processes in the selection and/or approval of PPP proposals will engender investor confidence and help rake in the much needed private capital in the provision of public infrastructure and services.

7.0 AMENDMENTS PROPOSED

The Committee respectfully proposes the following amendments to the Bill:

7.1 Clause 2 – Application

(a) In paragraph (d) of subclause (1) lines 2 and 3, delete the words “military, police, defence” and insert “security services”.

(b) In paragraph (f) of subclause (2) line 2, delete the words “military, police, defence” and insert “security services”.

7.2 Clause 3 – Compliance

(a) In paragraph (a), delete “the decision” and insert “decisions”.

(b)) In paragraph (b), delete “the”.

7.3. Clause 4 - Safeguards

In subclause (1) line 3, delete “interests” and insert “interest”.

7.4. Clause 12 – Parliament

In line 2, delete “require” and insert “requires”.

7.5. Clause 15 - Office of the Regional Coordinating Council

(a) In line 1, delete “Units” and insert “Unit”.

(b) In line 2, delete “Councils” and insert “Council”.

7.6. Clause 18 – Audit Service

(a) In paragraph (a) of subclause (1) line 2, delete “(921)” and insert “(Act 921)”.

(b) In subparagraph (ii) of paragraph (b) of subclause (1), delete “the”.

(c) Delete subclause (2) and insert the following:

“The special purpose entity shall submit to the Office and the Auditor-General copies of the

- (a) annual audited accounts; and
- (b) financial statements

to be published on the website of the Ministry as part of disclosure arrangements in respect of the public private partnership.”.

7.7. Clause 21 – Composition of the Public Private Partnership Committee

Delete the clause and insert the following:

“Composition of the Public Private Partnership Committee

21. (1) The Public Private Partnership Committee consists of
- (a) the Minister as the Chairperson;
 - (b) the Attorney-General and Minister responsible for Justice;
 - (c) the Minister responsible for Trade and Industry;
 - (d) the Chief Director of the Ministry;
 - (e) the Director-General of the National Development Planning Commission;
 - (f) the Chief Executive Officer of the Ghana Investment Promotion Centre;
 - (g) the Chief Executive Officer of the Public Procurement Authority;

- (h) the Executive Director of the Environmental Protection Agency;
- (i) the Executive Secretary of the Lands Commission;
- (j) one representative of the Chartered Institute of Bankers nominated by the Chartered Institute of Bankers;
- (k) one representative of the Ghana Institution of Engineers nominated by the Ghana Institution of Engineers;
- (l) two persons nominated by the President at least one of whom is a woman and the other person with experience in investment banking and project finance; and
- (m) the Director of Public Investment and Assets Division as secretary to the Committee.

(2) The members of the Committee shall be appointed by the President.

(3) In respect of a local government authority, the Executive Committee of a local government authority shall be considered to be the Committee.

(4) The Committee may establish sub-committees as the Committee may consider necessary for the effective performance of the functions of the Committee.”.

7.8. Clause 22 - Meetings of the Public Private Partnership Committee

(a) In subclause (3) line 1, insert “not less than” before “four”.

(b) Insert a new subclause after subclause (4) as follows:

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

7.9. Clause 24 – Allowances for Public Private Partnership Committee

Delete the entire clause and insert the following:

“Allowances

24. Members of the Committee and sub-committees, members of the Fiscal Commitment Technical Committee and the Complaints Panel shall be paid allowances approved by the Minister.”.

7.10. Clause 25 – Ministerial responsibility

In subclause (1) line 2 delete “object” and insert “objects”.

7.11. Clause 29 – Composition of the Fiscal Commitment Technical Committee

Delete clause 29 and insert the following:

“Composition of the Fiscal Commitment Technical Committee

29. The Fiscal Commitment Technical Committee consists of
- (a) the Chief Director of the Ministry as chairperson;
 - (b) the Director responsible for the Public Debt Management Office of the Ministry;
 - (c) the Director responsible for the Budget Office of the Ministry;
 - (d) the Director responsible for Economic Strategy and Research of the Ministry;

- (e) the Director responsible for Public Investment and Assets; and
- (f) the Head of the Office who shall be secretary to the Committee.”.

7.12. Clause 31 – Contracting authorities

Delete paragraph (a) of subclause (1) and insert the following:

“(a) Medium Term National Development Plan;”.

7.13. Clause 32 – Public Investment Unit

In subclause (3) line 3, delete “consider” and insert “considers”.

7.14. Clause 33 – Functions of a Public Investment Unit

In paragraph (a) of subclause (2) line 1, delete “and guidelines”.

7.15. Clause 37 – Full feasibility study

- (a) In the headnote delete “full”.
- (b) In subclause (1) line 4, delete “full”.
- (c) In paragraph (e) of subclause (1), delete “envisaged future”.
- (d) Delete subclause (4) and insert the following:
 - “(4) In undertaking a pre-feasibility study and feasibility study, the contracting authority and the transaction advisor shall, pursuant to the Public Financial Management (Public Investment Management) Regulations, 2020 (L.I. 2411), ensure that only established parameters and conversion factors developed, administered and published on the website of the Ministry are applied.”.

7.16. Clause 39 – Request for Qualification

In subclause (4) line 2, delete "wholly or".

7.17. Clause 40 – Qualification of private party

(a) Delete paragraph (e) of subclause (1), and insert the following:

"(e) have relevant industry experience;"

(b) In paragraph (g) of subclause (1) line 3, delete "by pollution".

7.18. Clause 42 – Prequalification bidders conference

(a) In subclause (2) line 3, delete "bidder" and insert "bidders".

(b) In subclause (2) line 4, insert "the prequalification" before "bids".

7.19. Clause 43 – Evaluation and decision on prequalification

(a) In paragraph (a) of subclause (5) line 1, delete "promptly" before "give".

(b) In paragraph (a) of subclause (5) line 3, delete "the" before "bidder".

7.20. Clause 44 – Request for proposals

In paragraph (l) of subclause (2), delete "effective" and insert "valid".

7.21. Clause 47 – Submission and opening of bids

(a) In paragraph (a) of subclause (1) line 1, delete "day" and insert "date and time".

- (a) In paragraph (b) of subclause (1) line 2, delete "representative" and insert
"representatives".

7.22. Clause 48 – Evaluation of bids

Delete subclause (8) and insert the following:

"(8) The Head of the contracting authority shall, after the evaluation and approval by the Public Private Partnership Committee, give notice of the results of the evaluation in writing to each bidder that submitted a proposal."

7.23. Clause 49 – Negotiations

- (a) In subclause (1), delete the second "(iv)" and insert "(v)".
- (b) Delete subclause (3) and insert the following:
- "(3) Where the negotiations carried out with the successful bidder are unsuccessful, the negotiation team shall enter into negotiations with the second ranked successful bidder without varying the technical and financial terms of the project agreement referred to in subsection (2) of section 49".

NB: further amendments were proposed by the Ministry of Finance after the meeting.

- (c) In subclause (4) lines 1 and 3, delete "negotiating" and insert "negotiation".

(d) In paragraph (b) of subclause (5) line 2, delete “negotiating” and insert “negotiation”.

(e) In subclause (7) line 3, delete “negotiating” and insert “negotiation”.

7.24. Clause 53 – Approval of partnership projects by local government authority

Delete subclause (3) and insert the following:

“(3) Where the value of the partnership project exceeds the threshold for the local government authority, the District Assembly shall, through the Regional Coordinating Council and the Ministry of Local Government and Rural Development, seek approval in accordance with the First Schedule.”.

7.25. Clause 55 – Requirements for unsolicited proposals

(a) In paragraph (b) of subclause (3) line 2, delete “and” and insert “or”.

(b) Delete subclause (8) and insert the following:

“(8) The intellectual property right with respect to the initial business case, Feasibility Study Report or any other diagnostic document submitted by the proponent in furtherance of the proposal shall be protected in accordance with the intellectual property right laws of Ghana unless the holder of the right agrees in writing to waive the right of that holder.”

(c) Insert a new subclause after subclause (8) as follows:

“(i) Despite subsection (8), a contracting authority that discloses an intellectual property right for the purposes of the partnership is deemed to have waived such right unless the private party designates

and the parties agree in writing that the intellectual property right is not waived.”

(c) Delete subclause (10) and insert the following:

“(10) Any correspondence between the contracting authority and the private party does not put the contracting authority under any obligation to a private party or proponent of an unsolicited proposal.”

(d) Delete paragraph (a) of subclause (11) and insert the following:

“notify the Office of the decision in writing accompanied by the initial business case prepared by the private party or proponent;”

NB: the amendment was proposed by the Ministry after the meeting.

(e) In paragraph (a) of subclause (12) line 2, delete “specific project”.

(f) In subclause (14) line 1, insert “in” after “to”.

(g) In subclause (18) line 2, insert “capital” before “cost”.

(h) Delete subclause (20) and insert the following:

“(20) Where a contracting authority declares the original proponent as the preferred bidder, that preferred bidder shall

(a) receive a defined return; and

(b) apply an open book method.” .

7.26. Clause 56 – Public private partnership arrangements

In line 3, delete “Third” and insert “Second”.

7.27. Clause 58 – Scope of partnership agreement

In paragraph (b) of subclause (10) line 3, delete “entity” and insert “party”.

7.28. Clause 60 – Contract management

In subclause (3) line 4, delete “and” and insert “or”.

7.29. Clause 62 – Governing law of public private partnership agreement

Delete subclause (2) and insert the following:

“(2) The parties shall determine the place of arbitration in respect of a partnership agreement.”.

7.30. Clause 64 – Acquisition of rights related to project site

In subclause (1) line 4, delete “contracting authority” after “relevant” and insert “public entity”.

NB: this amendment was proposed by the Ministry after the meeting.

7.31. Clause 65 – Easements

In line 2, delete “contracting authority” after “other” and insert “public entity”.

NB: this amendment was proposed by the Ministry after the Finance Committee meeting.

7.32. Clause 67 – Complaints Panel for bidding process

Delete subclauses (1) and (2) and insert the following:

“67. (1) There is established by this Act a Complaints Panel for the bidding process consisting of seven persons.

(2) The members of the Complaints Panel consist of the following:

- (a) one Judge nominated by the Chief Justice as chairperson;
- (b) one representative of the Ghana Bar Association nominated by the Ghana Bar Association;
- (c) one representative of the Association of Ghana Industries nominated by the Association of Ghana Industries;
- (d) one representative of the Ghana Institution of Surveyors nominated by the Ghana Institution of Surveyors;
- (e) one representative of the Chartered Institute of Procurement and Supply nominated by the Chartered Institute of Procurement and Supply;

(f) one Chief State Attorney nominated by the Attorney-General and Minister responsible for Justice; and

(g) one person nominated by the Minister responsible for Finance who shall be Secretary to the Complaints Panel.”.

7.33. Clause 69 – Suspension of bidding process by Complaints Panel

In subclause (3) line 3, delete “office of the Complaints Panel” and insert “Office”.

7.34. Clause 73 – Special purpose entity

(a) Delete paragraph (a) of subclause (2) and insert the following:

“(a) may include a public entity as a shareholder in the company subject to the Regulations; and

(b) In subclause (3) line 1, delete “The” and insert “Subject to the Companies Act, 2019 (Act 992), the ”.

(c) Delete subclause (4).

7.35. Clause 78 - Sources of moneys for the Project Development Facility

(a) In subclause (1) line 1, delete “the” before “moneys”.

(b) In paragraph (c) of subclause (1) line1, insert "capital" before "cost".

(c) Delete subclause (3).

7.36. Clause 79 – Management and use of moneys of Project Development Facility

In subclause (3) line 2, delete "Act and the Regulations" and insert "Act, the Regulations and Guidelines".

7.37. Clause 81 – Sources of moneys for the Viability Gap Facility

(a) In subclause (1) line 1, delete "the" before "moneys".

(b) In subclause (2) lines 3 and 4, delete the words "and shall be approved by Parliament and covered in the Appropriation Act".

7.38. Clause 82 - Management and use of moneys of Viability Gap Facility

(a) Delete paragraph (b) of subclause (5) and insert the following:

"(b) not exceed thirty percent of the capital cost of the project."

(b) Delete subclause (6) and insert the following:

"(6) Despite subsection (5), the Viability Gap Facility support may exceed thirty percent of the capital cost of the project, as may be determined by the Minister, but shall not exceed fifty percent of the capital cost of the project."

7.39. Clause 85 – Offences and penalties

(a) In paragraph (b) of subclause (2) line1, delete “willfully” and insert “wilfully”.

(b) In line 2 of the closing phrase of subclause (2) insert “and” after “thousand”.

7.40. Clause 86 – Regulations

Delete the clause and insert the following:

“Regulations

86. (1) The Minister may, by legislative instrument, make Regulations for the effective and efficient implementation of this Act.

(2) Without limiting subsection (1), the Regulations may provide for

- (a) the public private partnership process;
- (b) the procedures for the application of the margin of preference for domestic business;
- (c) the procedures for procurement through the Ghana Infrastructure Investment Fund;
- (d) the procedures for unsolicited proposals or private sector led proposals;
- (e) complaints procedure;
- (f) the management of the Project Development Facility and Viability Gap

Facility;

- (g) special purpose entity;
- (h) contract management and amendment; and
- (i) early termination payments.”

7.41. Clause 88 – Interpretation

(a) Insert a definition for “capital cost of the project” after the definition for “bidding documents” as follows:

“capital cost of the project” includes

- (a) a one-time expenditure that will be incurred for creating the public private partnership project assets or for substantial modernisation or renovation of any of the existing project assets such as the cost incurred on civil and construction works, purchase of plant, machinery and equipment, installation, commissioning and supervision expenses for the plant, machinery and equipment; and
- (b) recurring expenses during the project construction period that are capitalised such as interest during construction, project insurance expenses, project management and consultancy fees, debt syndication fees and contingencies;
- (c) but does not include

(i) the cost of land and the expenses for the project incurred by the contracting authority in respect of the resettlement and rehabilitation of affected parties; and

(ii) operating expense to be incurred during the operating period;"

(b) Delete the definition of "concession fees" and insert the following:

"concession fees" mean the entry fee and performance fee as specified in the Project Agreement to be paid by a private party to the contracting authority or the Viability Gap Facility;"

(c) Delete paragraph (h) of the definition for "contracting authority" and insert the following:

"(h) an entity owned by any of the entities under paragraphs (a) to (g) which intends to enter into a partnership arrangement with a private party;"

(d) Delete the definition for "contract management" and insert the following:

"contract management" means the process of managing and administering the public private partnership project from the time the project was agreed at contract signature to the end of the contract term;"

(e) Delete the definition for "feasibility report" and insert the following:

"Feasibility Study Report" means the report which is the outcome of a feasibility study;

(f) Delete the definition for "infrastructure project."

(g) Delete the definition for "local content" and insert the following:

"local content" includes

(a) utilisation of local expertise, goods and services;

(b) the financing and development of local capacities through education and skills transfer;

(c) expertise development; and

(d) local equity participation in special purpose entity;"

(h) In the definition for "market sounding", delete "accessing" and insert "assessing".

(i) Insert a definition for "open book" after the definition for "Office" as follows:

"open book" means a method of procuring an unsolicited project where the contracting authority signs the contract with the original

proponent who receives a defined return and must conduct a transparent bidding process for each component of the project in order to get the best price;”.

(j) Delete the definition for “private sector - led proposal” and insert the following:

“private sector –led proposal” means an unsolicited proposal as defined in section 54;”

(k) Delete the definition for “project preparation” and insert the following:

“Project preparation” includes development of concept notes, pre-feasibility studies, feasibility studies and other forms of appraisals of partnership projects;”

(l) Delete the definition for “project company” and insert the following:

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

(m) Delete the definition for “project development facility” and insert the following:

“project development facility” means the facility established in section 77 for the purpose of providing moneys to support the projects and services specified in subsection (2) of section 79;”

(n) Delete the definition for “public function”.

(o) Delete the definition for “public private partnership” and insert the following:

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

(p) Delete the definition of “regulatory authority”.

(q) Insert a definition for “security services” after the definition for “Seal of Quality” as follows:

“security services” includes

- (a) Armed Forces;
- (b) Police;
- (c) Immigration Service;
- (d) Ghana National Fire Service;
- (e) Prisons Service; and
- (f) other intelligence agencies;

(r) Delete the definition of “special purpose entity” and insert the following:

“special purpose entity” means a company incorporated in Ghana by the successful bidder for the sole purpose of executing the public private partnership contract awarded;”

(s) Delete the definition for “total project cost”.

(t) Insert a definition for “Viability Gap Facility” before the definition for “value for money” as follows:

“Viability Gap Facility” means a facility for providing grants or other financial support to projects that are economically viable but not financially viable;”

7.42. First Schedule

Delete the First Schedule and insert the following:

FIRST SCHEDULE
Accountability of contracting authorities
(sections 52 (2) and 53(3))

Criteria	Approval Authority	Notes
Partnership Projects which require the Republic of Ghana to comply with Article 174 or 181 of the Constitution.	Parliament	This shall be applicable irrespective of the financial threshold or capital outlay of the project.
Partnership Projects with an estimated capital cost of project exceeding the Ghana	Cabinet	The amount established at feasibility study stage shall be used to

Cedi equivalent of Two Hundred Million United States Dollars (Dollars (USD200m).		determine the threshold.
Partnership Projects with an estimated capital cost of not more than the Ghana Cedi equivalent of Two Hundred Million United States Dollars (Dollars (USD200m).	Public Private Partnership Committee	The amount established at feasibility study stage shall be used to determine the threshold.
<p>Partnership Projects undertaken by Metropolitan, Municipal and District Assemblies with estimated capital cost of less than</p> <p>(a) the Ghana Cedi equivalent of One Million United States Dollars (USD 1m) in the case of a District Assembly;</p> <p>(b) the Ghana Cedi equivalent of Two Million United States Dollars (USD 2m) in the case</p>	General Assembly of the Metropolitan, Municipal and District Assemblies for Local Government Authority projects	The amount established at pre- feasibility or feasibility study stage shall be used to determine the threshold.

<p>of a Municipal Assembly;</p> <p>(c) the Ghana Cedi equivalent of Five Million United States Dollars (USD 5m) in the case of a Metropolitan Assembly.</p>		
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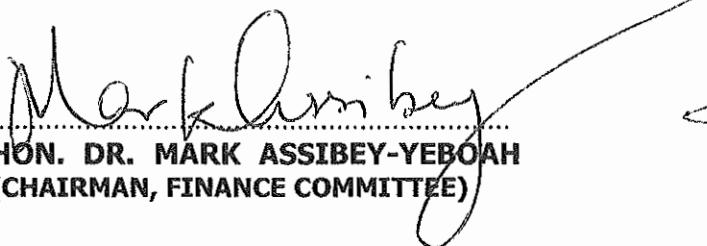
7.43. Third Schedule

- (a) In paragraph 2 line 1, *delete* "public" and insert "contracting".
- (b) In paragraph 7 line 1, delete "public" and insert "contracting".
- (c) In paragraph 12 line 1, delete "public" and insert "contracting".
- (d) In paragraph 21, delete "engineer" and insert "engineers".

8.0 RECOMMENDATION AND CONCLUSION

The Committee recommends to the House to adopt this Report and pass the **Insurance Bill, 2020** into law, subject to the amendments proposed.

Respectfully Submitted.


 HON. DR. MARK ASSIBEY-YEBOAH
 (CHAIRMAN, FINANCE COMMITTEE)


 MS. EVELYN BREFO-BOATENG
 (CLERK, FINANCE COMMITTEE)

9TH OCTOBER 2020