SUMMARY OF THE PUBLIC PRIVATE PARTNERSHIPS ACT, 2013 (REVISED 2015)

I. Introduction

The Act provides for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects of the government through concessions and other contractual arrangements. In forestry, the Kenya Forest Service (contracting authority) can engage private entities in the management of all or part of a public forest which is a plantation forest through concession agreements (Section 43 & 44 of the Forest Conservation and Management Act, 2016). The Public Private Partnerships Act, 2013 was adopted in line with Vision 2030, which aims to transform Kenya into a middle-income country, mainly through the realization of key projects, which, in practice, cannot be fully supported by the government. The law also aligns with the Constitution in the ratification by parliament, of project agreements that involve natural resources (Article 71 of the Constitution).

II. Institutions established under the Act

The Act establishes 3 institutions, namely:

- **The PPP committee**, which is responsible for ensuring project consistency with national priorities and formulation of guidelines among other functions;
- **The PPP Unit**, established within the National Treasury, which serves as the secretariat and technical arm of the Committee. It serves a resource centre for PPPs and is mandated to assess PPPs and give recommendations to the Committee; and
- **The PPP Nodes** which are established by each contracting authority to identify, screen and prioritize projects, and undertake the tendering process of the project among other functions.

III. Steps to be followed for each PPP project

- Project identification and feasibility studies
- Pre-qualification
- Call for tenders
- Evaluation of bids
• Information dissemination of the project through newspapers and electronic media

A. Project Identification and Feasibility Studies (Part VI)

The Act requires the conceptualization and identification of a potential project by the contracting authority with support of the PPP unit and the node. The PPP committee is expected to approve a report of the consideration to enter a PPP and a project proposal by the contracting authority. Once approved, the contracting authority is expected to constitute a project appraisal team to oversee the preparation phase of the project.

The Act requires contracting authorities to conduct a feasibility study of the project which includes the social, economic and environmental impacts. The report of the feasibility study is submitted to the unit for review and submission to the Debt Management Office, which assesses and approves the financial risk and contingent liabilities of the project. The unit then submits a report to the PPP Committee for approval.

B. Pre-qualification (Section 37)

A contracting authority, upon approval of the PPP Committee, is expected to invite requests for qualifications by private entities through newspapers and electronic media. The contracting authority is required to specify the eligibility criteria of a bidder. A pre-qualification committee is constituted by the contracting authority to pre-qualify bidders.

C. Call for tenders (Section 43)

The contracting authority is expected to prepare an invitation to bid and tender documents, in consultation with the unit. The law provides that tender documents shall include information on environmental preservation requirements to be met by the bidder. A bidder is expected to complete and submit a technical and financial bid and enclose each bid in a separate sealed envelope.

D. Evaluation of bids

The contracting authority is required to constitute a proposal evaluation team to evaluate bids (Section 47) and submit the evaluation report to the PPP Committee for approval (Section 49). The committee then prepares a report on its recommendations as to the viability of the project.
The Cabinet Secretaries in the State department responsible for the implementation of the project are then expected to prepare a joint cabinet memorandum based on the recommendations of the Committee and to submit the memorandum to the Cabinet for approval. Where the Cabinet approves undertaking of a project or Parliament ratifies the project agreement, the contracting authority is expected to finalize the project agreement for execution by the parties to the project.

E. Information dissemination of the project

The Act provides for the dissemination of information through newspapers and electronic media, on the nature of the project, the scope of the project, the successful bidder, project cost, project value and duration of the project (Section 60).

F. Establishment of a project company (Section 59)

The successful bidder is required under the Act to establish a project company to undertake a project under the PPP. The company may include a public body as a minority shareholder. Project companies may also request the secondment of public sector employees from the public contracting authority (Section 66). Employees on secondment shall be subject only to the direction and control of the company.

Criteria for Public Private Partnerships (Section 61, 3): value for money, affordability of the project, and appropriate transfer of risks to the private party.

G. Establishment of the Public Private Partnership Project Facilitation Fund (Section 68)

The fund is established under Section 68 to support contracting authorities in the preparation phase of a project, the tendering process and project appraisal; support activities of the unit and finance desirable projects that require government funding among other activities. Monies of the fund are sourced from grants and donations, levies imposed on projects, success fees paid by a project company to the unit, appropriations in aid and funds from the National Treasury.