



## **Consolidated PPP Legal Framework Report**

**e-Consultant Selection: #1228111 Lesotho PPP Policy  
and Legal Framework**

**Submitted to: International Finance Corporation**

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## Disclaimer

The findings, interpretations, and conclusions expressed in this document are entirely those of the authors and should not be attributed in any manner to the International Finance Corporation. The International Finance Corporation does not guarantee the accuracy of the data included in this document nor does it accept responsibility for any consequence of its use.

## Glossary of Abbreviations

EIA	Environmental Impact Assessment
FOREX	Foreign Exchange
GOL	Government of Lesotho
IFC	International Finance Corporation
LCB	Lesotho Central Bank
LEWA	Lesotho Electricity and Water Authority
LMPS	Lesotho Mounted Police Service
MOF	Ministry of Finance
MOH	Ministry of Health
MOU	Memorandum of Understanding
MPWT	Ministry of Public Works and Transport
PPA	Power Purchase Agreement
PPP	Public-Private Partnerships
PS	Public Sector
PSIC	Public Sector Investment Committee
RSA	Republic of South Africa
SADC	South African Development Community
TOR	Terms of Reference
USD	United States Dollar
WASCO	Water and Sewage Company, Lesotho

## Introduction

The Draft Consolidated PPP Legal Framework Report presents the findings of the Planet Partnerships consultancy team for the *Lesotho PPP Policy and Legal Framework* assignment, funded by the IFC.

This report includes the following:

- The Findings and Conclusions from the Due Diligence and Review Process
- Inception Mission Feedback
- Workshop 1 Feedback
- Workshop 2 Feedback
- The Final PPP Policy
- The Final PPP Act
- The Final PPP Regulations
- Annexes containing Key Presentation PowerPoints and Ministerial Survey

These documents and recommendations will provide the foundation for the implementation of a harmonized and effective PPP policy and legal framework for the Kingdom of Lesotho.

## Due Diligence Findings

The initial due diligence, reviews, and analyses were undertaken by the Planet Partnerships Team to provide a foundational evaluation of the current overarching framework governing the use of PPPs in Lesotho and to propose revisions to said framework.

The Team analyzed the issues identified in the course of the preceding review, including a synopsis of the key factors that will impact the efficiency and effectiveness of the legal, policy and regulatory environment in which PPPs will be planned, evaluated, and implemented. Interlinked with this review is analysis of four critical documents:

- *Draft PPP Policy*
- *Draft PPP Regulations*
- *Note on the Potential Design of a PPP Unit*
- *Note on the Potential Treatment of Unsolicited Proposals.*

The review of these documents was complemented by an analysis of current public finance laws and processes.

The Team then focused on the issues identified in the course of the preceding review, including a synopsis of the reasons for why the points raised for discussion detrimentally impact the efficiency and effectiveness of the legal, policy and regulatory environment in which PPPs will be planned, evaluated, and implemented.

As a final component of this due diligence stage of the assignment, the Team provided recommendations on mitigation measures that are most appropriate for addressing the identified deficiencies in the framework. In this regard, the Recommendations for Mitigation of Issues are broken down into three categories:

- *Institutional Recommendations*
- *Legal and Regulatory Recommendations*
- *Policy Recommendations*

The fundamental objective of these recommendations is to combat the ambiguity of the role and responsibilities of relevant public sector bodies, as well as ensuring the establishment of a more streamlined evaluation and approval process for potential PPP projects that is clear and logical, and eliminates unnecessary administrative encumbrances on all parties. While numerous recommendations have been developed, there are five key reforms identified as core themes:

1. Harmonizing clauses of the Draft PPP Policy with the Draft PPP Regulations to ensure coherence and cohesion in the framework governing PPPs in Lesotho.
2. Reassessing the role of the PPP Unit by providing it with more regulatory power through its authority to conduct a preliminary review of the last three stages of the approval process to avoid an unnecessary feedback loop with the Steering Committee.
3. Defining the roles and responsibilities of all relevant public sector bodies to avoid ambiguity or confusion regarding the approval process and with which body authority lies at each stage.
4. Establishing incentive mechanisms for unsolicited proposals to encourage the submission of PPP projects initiated by the private sector.

5. Ensuring the process for the evaluation and approval of PPP projects is streamlined and will not be impeded by overly restrictive bureaucratic procedures.

Implementing the mitigation measures suggested will allow adherence of Lesotho's PPP scheme to international best practices and standards in analogous regional countries.

## Review of Existing Framework Documents

Critical to the development of an efficient and effective national policy and regulatory framework for PPPs in Lesotho is undertaking a comprehensive due diligence on international best practice and common practice in the SADC region combined with an analysis of current draft policy documents.

This review provides the opportunity to both identify deficiencies in the current policy and institutional framework and critique specific issues that may not necessarily be problematic, but that nonetheless do not adequately conform to best practice especially compared to some countries within the SADC region. Such of these key issues may detrimentally impact upon the transparency, credibility and efficiency of the national framework, and proactive action is important to ensure the design of the most effective system possible.

Below, under each sub-heading is a deconstruction of international best practice gleaned from our experience, reports, reviews, case studies and associated documents of Multilateral Development Banks, national governments and other key bodies. These are summarized, with particular focus on addressing the practice of countries in the SADC region. Following this overview of best and common practice is the examination of the content of the relevant documents for each sub-Section. We also pay particular attention to countries with similar characteristics to that of Lesotho such as market size, legal system, development of the private sector, and experience with PPP.

## Analysis of Existing Draft PPP Policy

### 1. International Best Practice and Common Practice in the SADC Region

The development and implementation of a comprehensive policy platform that provides a basis around which regulatory and legislative frameworks may be constructed is a fundamentally important prerequisite for the successful use of PPPs.

The policy, regulatory and legislative elements of the framework governing public sector engagement with the private sector in large-scale infrastructure developments must be coherent, coordinated and cohesive in principles and content to ensure transparency and ease of understanding for prospective commercial partners and the general public.

An important starting point is the manner in which a PPP is defined. This definition will have ramifications for the initial evaluations of solicited

South Africa's *Public Finance Management Act No.1 of 1999* (Part 6, Section 16.1) provides a definition of PPPs that can be summarized as:

*A commercial transaction between an institution and private party where the private party performs an institutional function on the institution's behalf and/or acquires the use of State property for its own commercial purposes and assumes substantial financial, technical and operational risks in connection with the function or property, and receives a benefit for doing so either by way of consideration, charges or fees paid through service provision, or a combination of both.*

proposals that may not meet the requirements of a restrictive definition, and also has implications for the acceptability of unsolicited proposals. Typically, PPPs are defined as a long-term contractual arrangement between a public and private party for the development and/or management of a public asset or service where significant risk and management responsibility is born by the private sector agent through the life of the contract, and remuneration is tied to performance indicators and/or the demand for that asset or service.

PPP policies must not only address specifics of the Government's developmental objectives by laying out guiding principles in accordance with national strategies and plans, but there must also be a clear enunciation of the rationale for adopting this development tool. Doing so improves transparency and provides stakeholders, the general public and the private sector with clarity on governmental strategy and vision. There are numerous available examples of the way that the statement of national objectives and policy rationale are articulated by countries in the SADC.

Equally important as the statement of policy rationale is the delineation of the scope and eligibility of potential PPP projects. This involves identifying the type of projects to be adopted or those which may be prohibited, size limits in terms of volume, the financing structures that may be adopted, and the sectors for which they will be permitted. This deconstruction of scope must also provide a succinct demarcation between the privatization and divestitures of state assets and PPPs.

In addition, a logical breakdown of the PPP evaluation, approval and management process is required. This breakdown will necessarily require discussion of the relevant institutions and public authorities involved throughout these processes. There are numerous differing approaches to how the procurement management and approval process may be structured. There is, however, a single key principle that is common to successful PPP policies that provides a useful guide. This is the criticality of establishing a streamlined process that clarifies approvals authority and eliminates, where possible, cumbersome bureaucratic processes that unnecessarily hinder the swift evaluation and approval of proposals through appropriate channels.

## 2. Current Status of the Lesotho Draft PPP Policy

The *Public-Private Partnership Policy* of the Lesotho Government provides a comprehensive approach to detailing the country's rationale for and approach to the utilization of PPPs. The Policy contains clauses addressing each of the key issues that must be necessarily discussed to be in

In Zambia the Government's formulation of its PPP rationale is set out in the 2009 *Public-Private Partnership Policy*, which recognizes that "...various sectors of the economy require resources which are rather limited. Thus, PPPs would provide Government an alternative means for providing new infrastructure as well as rehabilitation and maintenance of existing infrastructure through involvement of private sector that will provide requisite finance and expertise for such investment."

The *National Public-Private Partnership Policy* (2009) of Tanzania succinctly provides that the "[r]ealisation of the National Development Vision 2025, requires achieving and sustaining a high rate of shared growth based on building a strong and competitive economy. The private sector has a key role in the achievement of this goal; and PPPs provide a powerful instrument among others in attaining this goal." The Policy goes on to list the general objective of promoting private sector participation in the provision of resources in terms of investment capital, managerial skills and technology, before moving on to list seven specific objectives to guide the national strategy toward utilization of PPPs.

Tanzania's PPP Policy also provides a clear policy rationale that relates back to other national policies, stating that these partnerships are "essential in order to achieve the Millennium Development Goals, National Development Vision 2025 and the National Strategy for Growth and Reduction of Poverty (NSGRP) goals."



accordance with international best practice and reflect common practice among SADC countries.

Below is a summary of the key elements/clauses in the Lesotho PPP Framework:

Section	Summary
<b>0. Preamble</b>	Provides an overview of the background context for the importance of adopting PPPs as a policy, finance, and investment mechanism of the State to develop infrastructure and other critical sectors in Lesotho, as well as reaffirms the Government's commitment to PPPs.
<b>1. Custodians of PPP Policy and Applicability</b>	Sets out and clarifies the relevant institutions to which the PPP Policy applies and identifies roles and responsibilities for oversight of the programs, as well as the laws and regulations that must be read alongside the Policy.
<b>2. PPP Policy Vision and Rationale</b>	States that the policy rationale is to “accelerate the provision of infrastructure assets, and services by utilizing the know-how and resources of private sector and providing for investment opportunities to private sector.” Goes on to provide a specific list of points on which the rationale is based.
<b>3. Definition of PPP</b>	Provides a clear definition that encompasses the responsibilities of the Proponent, risk-sharing, and the issue of financial remuneration.
<b>4. Scope of PPP Policy</b>	Requires that PPPs must be closely aligned with the development goals and strategies of the Government. It also provides examples of the various types of PPP arrangements that may be adopted, although there is no specific limitation imposed on the exact models that are available. Finally, an enumerated list of six infrastructure and services sectors are provided which are governed by the PPP Policy and the seventh point empowers the government to broaden this list based on discretion
<b>5. Guiding Principles</b>	A set of six overarching guiding principles and three sub-principles are provided as those which are to guide the development of the Lesotho PPP scheme in its early stages. The primary themes are harmony with development priorities and objectives, financial viability, serving the public interest and private sector empowerment, as well as promoting transparency and government accountability.
<b>6. The Institutional Framework</b>	Basic roles and functions to be performed by various institutions are detailed to promote and ensure proper implementation of PPPs. These are the Public Agency/Procuring Unit, PPP Steering Committee, PPP Unit, Ministry of Finance, and Cabinet.
<b>7. PPP Processes</b>	Sets out the objective of establishing a coherent and an unambiguous PPP process aimed at improving credibility and transparency throughout project development. Also provides an overview of each of the four steps and associated roles of the relevant institutions and bodies in the project cycle process: Concept Note and Project Proposal, Detailed Feasibility Study and

	PPP Structuring, Procurement Transaction, and Contract Management.
<b>8.Probity Management</b>	Provides for the Government of Lesotho's commitment to promoting the development and implementation of PPPs through a fair process that enhances transparency and credibility of the national PPP scheme.

Under the 'Analysis of Legal, Institutional, Regulatory and Policy' Section, the issues identified with the *Draft PPP Policy* are discussed in detail, and steps to combat identified deficiencies provided under the 'Recommendations for Mitigation of Issues' Section.

## Analysis of Existing Draft PPP Regulations

### 1. Overview of International Best Practice and Common Practice in the SADC Region

The critical importance of establishing an institutional and regulatory framework that clearly empowers public bodies with the required authority to execute PPPs in a defined jurisdiction has been demonstrated in all countries with successfully functioning schemes. This includes the allocation and delineation of roles, responsibilities and powers to Procuring Authorities, PPP Units, Implementing Ministries, Contracting Authorities, and other regulators. Equally necessary is entrusting these bodies and institutions with clear mandates, sufficient resources and clear lines of accountability.

There are a number of core principles that guide the establishment of institutional frameworks to govern the utilization of PPPs by public authorities, including:

- Clearly defined authority for specified agencies and bodies to engage in certain fields of activity and provide public services;
- Delineate the roles, responsibilities and jurisdictions of each relevant agency in the PPP procurement and management process;
- Distinguish between the bodies responsible for the regulation, approval and implementation process for PPPs;
- Determine the capacities of individuals or offices with the authority to enter into commitments on behalf of Contracting Authorities and other bodies, and;
- Establish a PPP Unit housed within the Ministry of Finance or equivalent parent Ministry to promote PPPs, provide critical technical advice to national agencies and institutions, as well as act as a focal point for

Examples of how the PPP scope is defined in SADC countries include:

- The Government of Mauritius provided a clear *Public-Private Partnership Policy Statement* in 2003 that enumerates specific key areas of development for PPP use as: transport; public utilities (energy and water); solid and liquid waste management; health; education and vocational training, and; ICT.
- In Tanzania's 2009 *National Public-Private Partnership Policy* there is also a list of the sectors to which PPPs may apply, however, unlike Mauritius, it is defined as a non-exhaustive list.

Malawi sets out its objective with the use of PPPs in its 2011 *Public-Private Partnership Policy Framework* as enhancing "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." The Policy goes on to explicitly list nine key priority areas within the Millennium Development Goals (referred to as Priorities within Priorities), stating that they form the basis of the economic strategy that "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 dissemination of key information to the public and private sector.

It is equally important that the regulatory framework established to govern the evaluation, approval, tendering, and implementation management of PPPs provides clear and transparent processes and procedures throughout each of these phases. The primary purpose of PPP legislation and regulations should be the provision of an enabling legal framework that provides certainty to both the private sector and general public by addressing institutional roles and responsibilities and procedural processes for the implementation of PPPs.

The nature of this system is necessarily determined by the legal system of the country in question, whether civil or common law with customary law intermixed. The former being more rigidly prescribed through administrative law and the latter less prescriptive as to the rights and processes applicable to PPP contracts. Common law countries like Lesotho thus tend to avoid rigid systems in favor of PPP laws that establish general guiding principles, processes, and institutional responsibilities that are supported by detailed regulations. Avoiding overly prescriptive PPP laws and regulations serves the important purpose of empowering the Contracting Authority to be flexible in its approach towards negotiating an agreement that is tailored to the project and Proponent.

Four general principles guide the contours of best practice for the development of PPP regulations:

1. The roles and powers of awarding authorities, procuring agents and regulatory bodies are approved;
2. The rights of the private and public sector and innocent third parties must be adequately safeguarded;
3. The long-term and financially and environmentally sustainable provision of public services is ensured through selective development practices, and;
4. Guidelines and procedures for the tendering process and procurement must be clearly and transparently defined.

## 2. Current Status of the Lesotho Draft PPP Regulations

A thorough review of the *Draft PPP Regulations* provided our team with a detailed understanding of the principles and objectives of the document. A brief synopsis of each regulation has been provided below:

Section	Summary
1. <b>Definitions</b>	A comprehensive list of definitions of key terms, bodies, concepts and steps in the PPP evaluation process are provided.
2. <b>Exclusive Competency of the Chief Accounting Officer</b>	States that the Chief Accounting Officer of a Procuring Unit and the Minister are the parties responsible as co-signatories to formally conclude a PPP Agreement. A Chief Accounting Officer is an officer of a Procuring Unit who is charged with responsibility for financial control over the unit in question, and is tasked with applying for all project approvals.
3. <b>Roles and Responsibilities</b>	Provides an overview of the scope of authority of the Ministry of Finance, Cabinet, Project Officer, and the Public Sector Investment Committee.

4. <b>Establishment of Bodies</b>	Represents the statutory authority for the establishment of the PPP Steering Committee and the PPP Unit, which also includes descriptions of their constitution and administrative activities through the PPP Project Cycle.
5. <b>Project Identification: Concept Note</b>	Sets out the process and requirements for the preparation and evaluation of the Concept Note by the Procuring Unit and the PSIC with recommendations provided by the PPP Unit. Approval of the Concept Note by the PSIC is defined as PA: I, which is required before the Project Proposal may be prepared.
6. <b>Project Proposal</b>	Details the process and requirements for the preparation of the Project Proposal by the Procuring Unit with approval from the PSIC defined as PA: II, which is required before the Procuring Unit may proceed to the Feasibility Study.
7. <b>Feasibility Study and PPP Structuring</b>	Provides for the roles, responsibilities and prerogatives of the Procuring Unit and PPP Unit in appointing a Transaction Advisor to assist in carrying out the Feasibility Study and PPP Structuring. Then outlines the requirements of the study, and the requirements of preliminary technical review by the PPP Unit before comprehensive review by the Steering Committee. The Procuring Unit may only proceed to the Procuring Phase after PA: III approval is obtained from the Steering Committee following its comprehensive review.
8. <b>Procurement</b>	Sets out the procurement process to be following by the Procuring Unit with PPP Unit technical assistance following PA III approval from the Steering Committee. Prior to the issuance of any procurement documentation that includes a draft PPP Agreement to a Preferred Bidder, the documentation must be submitted to the PPP Unit that will then in turn be submitted to the Steering Committee for review and approval, which is defined as PA: IV. Once approval is obtained, the Procuring Unit is then entitled to proceed with PPP Agreement.
9. <b>PPP Agreement and Negotiations</b>	Provides that following PA: IV approval the Procuring Unit will negotiate the PPP Agreement in consultation with the PPP Unit, which will then be submitted to the PPP Unit for preliminary review. After the initial review the draft PPP Agreement the Steering Committee will provide final review and approval, with final approval then provided by the Cabinet which is the body with final approval authority. Approval from the Cabinet is defined at PA: V.
10. <b>Management of PPP Agreements</b>	Details that ultimate responsibility for the management of a PPP Agreement rests with the Chief Accounting Officer of the Procuring Unit party to the Agreement, and sets out the requirements attached to this responsibility.
11. <b>Amendment and Variation of PPP Agreements</b>	Sets out that all proposed amendments to a PPP Agreement must be submitted to the PPP Unit for preliminary review and then submitted to the Steering Committee for final review and approval, after obtaining the Committee's approval the amendments must be submitted to Cabinet for final approval.

<b>12. Agreement Binding on GOL</b>	Provides that if proper procedures followed and authorization obtained then the PPP Agreement will be binding.
<b>13. Exemptions</b>	Sets out that a Procuring Unit may approach the PPP Unit to apply for an exemption to a specific PPP Agreement, or from complying with any or all of the <i>Draft PPP Regulations</i> . Following PPP Unit review this will be submitted to the Steering Committee, which, if approved, will then be submitted to the Cabinet for Final Approval.
<b>14. Reporting and Audit</b>	Provides that a Procuring Unit must provide details of PPP Agreements to which it is a party in its quarterly and annual reports.
<b>15. Transitional Arrangements</b>	Represents a time-clause that all PPP project not yet signed prior to enactment of the <i>Draft PPP Regulations</i> are subject to the Regulations, whereas those signed at an earlier point in time will not also fall under the scope of the Regulations.

Under the ‘Analysis of Legal, Institutional, Regulatory and Policy’ Section, the issues identified with the *Draft PPP Regulations* are discussed in detail, and steps to combat identified deficiencies provided under the ‘Recommendations for Mitigation of Issues’ Section.

### Analysis of Note on the Potential Design of a PPP Unit

#### 1. Overview of International Best Practice and Common Practice in the SADC Region

The complexity of PPPs and the unique characteristics of projects of this nature necessitate the establishment of a specialized body that engages individuals with critically important skills and knowledge to provide technical assistance, review and assistance to national authorities. Moreover, PPP Units used in pioneering PPP leaders such as Canada, Malaysia, Australia, Mexico, Chile, Singapore, South Africa, etc., serve to foster coordination, planning, the utilization of PPP standards and best practices. In some cases, PPP Units serve to oversee and govern the PPP process and promote adherence to PPP regulations and sovereign financial risk management as well as serve as a technical resource to implementing agencies and Line Ministries.

The PPP Unit acts to fill gaps in skills and knowledge, provide coordination throughout the PPP evaluation, approval and management process, and address institutional shortcomings by enabling other government authorities to effectively create, manage and evaluate proposals.

The fundamental objective of the PPP Unit should be to support the Government in ensuring value-for-money in PPP investments across the procurement and implementation phases (often referred to as the “PPP Life Cycle”) while also guaranteeing that procedural requirements are closely adhered to throughout the project cycle. This requires that Unit staff hold financial, legal, economic, technical,

The exact contours of PPP unit structures varies between jurisdictions, however best practice and common practice in SADC shows that PPP Units are most successful when housed within the federal Ministry of Finance or Treasury, as opposed to acting as standalone bodies.

- Zambia and Malawi are each examples of successful PPP Units housed within Ministries of Finance or their equivalents. This structure is particularly important for countries with PPP schemes that are in the nascent stage given the close level of engagement that is required with other government agencies.

monitoring and evaluation, and management expertise.

A critical determination to be made in the establishment of PPP Units is where on the spectrum the Unit falls between performing non-regulatory functions such as merely providing advice, and regulatory functions involving limited decision-making and preliminary review authority. International best practice demonstrates that PPP Unit tends to be more effective when empowered to provide meaningful input throughout the evaluation and approval process when screening proposals. The key “measuring stick” is the number of successful PPP transactions that are implemented and/or the portfolio of viable PPP transactions developed. Countries with strong PPP Units tend to have more successful PPP transactions (and less failed and expensive projects) than those with mere “advisory” PPP units or cells.

While a PPP Unit represents a valuable resource to assist responsible authorities execute their roles and responsibilities and should not be merely a passive reactor to requests, it should also not be the ultimate authority for approval or rejection of a proposed project’s feasibility. Rather, this decision typically rests with competent authorities that are empowered to do so through statutory enactments. Nonetheless, the appropriateness of empowering the PPP unit with ultimate authority to approve or reject a potential project has been granted in other jurisdictions and this step represents a necessary topic of discussion during Workshop One.

As such, a PPP Unit’s role primarily encompasses a range of advisory and limited decision-making responsibilities, including:

- Encouraging authorities to consider PPP arrangements as a method of procuring infrastructure;
- Advising and assisting authorities on all aspects of public private partnership arrangements;
- Handling knowledge management, including the maintenance of databases and statistics as well as the dissemination of critical information to public and private sector stakeholders, which includes the general public;
- Assessing specific financial and legislative matters requested of it by other government agencies relevant to the Unit’s roles and responsibilities;
- Developing guidelines and methodologies;
- Structuring, promoting, and bidding of projects, or providing support and assessment during structuring to lead government entities; and
- Analyzing and evaluating initiatives proposed by the private sector.
- Managing sovereign public financial management, and ensuring that sovereign financial liabilities and guarantees are limited and controlled.

The PPP Unit also requires the power to engage long and short-term support staff and a team of professional advisors as without adequate resources, both human and financial, it will lack the capacity required to have the necessary level of impact that is required to effectively execute its mandate. There is an obvious need to tie the staffing structure to the functions, roles and available financing resources, however. As such, while a wide-range of technical skills and areas of knowledge are required of PPP Units, in nascent schemes with limited numbers of PPP projects it is more appropriate to establish a small, core team of specialists. This has been done in many countries around the world starting with the first PPP Units established with donor support in Philippines (1987), Pakistan (1989), Sri Lanka (1990), Poland (1995), South Africa (1999) as well as countries that established PPP Unit without donor support but hired professional advisors such as Singapore (1987), Malaysia (1988), Chile (1990) and Mexico (1988).

## 2. Review and Analysis of the Note on Potential Design of a PPP Unit in Lesotho

The review and analysis provided by Deloitte in the form of a *Note on Potential Design of a PPP Unit* is comprehensive with well-founded conclusions. At this stage of the due diligence the most important elements for the purpose of the Planet Partnerships analysis are the conclusions drawn in two Section of the study: ‘Role and Mandate’ and ‘Organizational Design of the PPP Unit’. Below is a detailed review of these two Sections:

Sections	Comments
<p style="text-align: center;"><b>Role and Mandate</b></p>	<p><i>Regulatory Function</i></p> <ul style="list-style-type: none"> <li>• The PPP Unit must assume a regulatory function with limited decision-making powers, which is in harmony with the Deloitte study. However, the flaw in the Deloitte study is that while it recommends the PPP Unit assuming a regulatory role that includes a decision-making function, there is no mention in the preliminary reviews the Unit conducts only allows for it to make recommendations to the Steering Committee, rather than liaise directly with a Procuring Unit to address any concerns the Unit may have before passing along its recommendations to the Committee.</li> <li>• Empowering the PPP Unit to deal directly with a Procuring Unit and require any concerns or queries of the PPP Unit are addressed before making recommendations to the Steering Committee for review would streamline the approval process by removing an unnecessary feedback loop.</li> <li>• Empowering the PPP Unit with this limited decision-making authority would not, however, be equivalent to providing it with the power to reject or approve a project. The power for review and authorization prior to approval by the Cabinet would remain with the Steering Committee.</li> </ul>
<p style="text-align: center;"><b>Organizational Design of the PPP Unit</b></p>	<ul style="list-style-type: none"> <li>• In this regard, we have concluded that the recommendations on the short- and long-term organizational structure of the Unit are coherent with international best practice given the critical specialty fields of knowledge are encompassed by the four positions (PPP Unit Head, Project Finance Manager, Engineering Manager, and Legal Manager).</li> </ul>

Deficiencies in the proposed design of the PPP Unit are discussed in the ‘Institutional Issues’ sub-Section falling under the ‘Analysis of Legal, Institutional, Regulatory and Policy’ Section. Corrective actions are deconstructed within the ‘Recommendations for Mitigation of Issues’ Section.

### Analysis of Note on the Potential Treatment of Unsolicited Proposals

#### 1. Summary of International Best Practice and Common Practice in the SADC Region

### *Overview of the Purpose of Accepting Unsolicited Proposals*

The participation of private sector agents in large infrastructure developments is typically secured through the adoption of traditional contractual and competitive procurement processes. Processes may also be initiated by the private sector, however, and this process can be a rich source of unique and innovative ideas that benefit objectives of the public sector where human or financial capital and resources are otherwise lacking.

In light of reputational challenges associated with public skepticism over the utilization of unsolicited proposals, there is a need to ensure concerted efforts to improve transparency and adherence to the principles of good governance throughout this alternative procurement process. Primarily, this will be achieved by establishing a clear and concise framework for unsolicited proposals, which typically involves two foundational steps:

1. Establishing a regulatory and policy platform that addresses fundamental definitional and logistical issues, including eligibility requirements, timeframes for the procurement process, protection of intellectual property rights, and administrative procedures to ensure healthy competition.
2. Develop the institutional capacity of the public sector through the establishment of specialized bodies, procedures and mechanisms that support the basis of policy and regulatory platforms designed to govern the unsolicited proposal process.

There are countries that have adopted a blanket refusal policy on the ability of Contracting Authorities to accept unsolicited proposals due to concerns over governmental corruption, collusion and/or political favoritism. Section 7.3 of the *Public Private Partnership Policy Framework* of Malawi provides no Ministries or Contracting Authorities may entertain such proposals, and they must instead be referred to the PPP Commission that will advise the bidder to await a competitive tender process.

The fundamental objective of these steps is the creation of an environment where unsolicited proposals, as with traditional solicited proposals, follow a competitive procurement process that is subject to public scrutiny, absent conflicts of interests, and which leads to the award of cost-effective projects providing excellent value-for-money.

The proliferation of countries utilizing the unsolicited proposal mechanism has resulted in the steady accumulation of international best practice, as well as examples of common practice within the SADC Region.

### *Deconstruction of International and Regional Best Practice*

An example of the difference is found when comparing the practice of South Africa contained in the *National Treasury Practice Note No 11 of 2008/2009 – Unsolicited Proposals*, Tanzania as found in *Supplement No. 17 3rd June, 2011 to the Public Private Partnership Act (No. 18 of 2010)*, and Zambia *Public-Private Partnership Act (2009), Section 42(1)*. South Africa's criteria for consideration highlight an innovative design or approach, which suits its advanced capability with PPPs. On the other hand, Tanzania and Zambia each focus on VfM and a public benefit as key criteria.

As a starting point, the regulatory and policy framework implemented by countries must provide a concise definition of how an unsolicited proposal is classified. This typically encompasses requirements that such proposals are consistent with national plans but are not already part of existing government priorities that may be procured, within reasonable limits, through traditional processes.

There is an increasing definitional emphasis that unsolicited proposals offer a product or services that is either unique or innovative not otherwise readily available to the public sector. However, it is important to distinguish between the maturity of



PPP frameworks in various countries, as those experienced with implementing these partnership arrangements prioritize innovation and expansion of the role played by private sector actors. On the other hand, countries with low capacities and familiarity with PPPs tend to focus on initiating projects in priority sectors with the highest value-for-money result.

The creation of clear administrative processes for procurement management is also critical. Methodical, step-by-step procedures with defined processes for approving or rejecting unsolicited proposals serves the dual function of eliminating the potential for political favoritism, as well as improving transparency and public oversight of the rationale behind proposal approval. The following three points provide a summary of the key steps typically involved in the procurement management for unsolicited proposals:

In Zambia, the *Public-Private Partnership Act (2009)*, Section 42(6) requires that the contracting authority advertise the unsolicited proposal for the purpose of receiving competitive proposals for the same project.

1. After submission of the unsolicited proposal with an overview of the proposed services the relevant agency or ministry provides a preliminary response evaluating compliance with definitional terms and assessing adherence to the criteria for consideration.
2. If this preliminary analysis is approved the applicant entity will receive notification of such and generally be asked to provide an overview of the company evidencing an ability to complete the proposed works. At this point the administering agency should have information on feasibility studies, estimated costs, financing plans, expenditure plans, environmental and social impact studies.
3. The detailed proposal will then be reviewed and a decision on whether to move the project toward competitive tendering either approved or rejected.

Following the successful conclusion of the approval process for unsolicited proposals the competitive tendering phase commences. This is the most critical phase of unsolicited proposal process as it is the adoption of transparent procedures that mitigate and combat public concerns over corruption, conflicts of interest and political patronage.

Key in the treatment of unsolicited PPP proposals is finding a balance between a mechanism that encourages innovative and high quality proposal from the private sector that demonstrates the government's commitment to promoting entrepreneurial solutions to public infrastructure and a system that protects the public interest from bad and expensive projects that are not evaluated competitively or transparently. The latter if not managed well can tie government's hands, discourage the private sector, and result in projects that may ultimately fail, or need to be cancelled, or litigated. Striking a balance is key. In the global experience with PPP since 1985, some of the best projects (in terms of economic impact, stimulus, improved service expansion, win-win approaches, etc) have been a result of unsolicited projects. That said, there are a number of countries where the award of one major unsolicited proposal resulted in failure and the resultant backlash stunted the growth of successful PPPs for several years.

#### *Incentive Mechanisms for Unsolicited Proposals*

International best practice and regional common practice provides four alternative approaches towards incentivizing the submission of unsolicited proposals despite the competitive process: Bonus System, Swiss Challenge, Automatic Shortlisting, and Best and Final Offer. These are elaborated upon below:

Approach	Incentives
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<i>Bonus System</i>	In the evaluation of bids in an open tender the original applicant (the unsolicited offeror) receives bonus points in the published bid evaluation criteria for their proposal (10% in Chile and South Korea);
<i>Swiss Challenge</i>	Original applicant has the option of matching the winning bid in a competitive tender process;
<i>Automatic Shortlisting</i>	Only applicable to multi-staged tender processes with the original applicant progressing directly to the final stage;
<i>Best and Final Offer</i>	This is a variation of the Swiss Challenge adopted by various countries (South Africa and Argentina, for example), however the key difference is that best and final offers are requested only from bidders progressing from the first round in a multi-stage assessment process and information about other bid prices is not disclosed.

The final key thematic issue is of reimbursing project development costs to the original bidder if it is not the eventual successful applicant, as well as protecting intellectual property rights of the initial bidder. Compelling arguments exist on both sides of the question of whether or not the original bidder should be reimbursed for the initial cost of developing their proposal. These positions center on whether doing so increases the likelihood of frivolous proposals from bidders merely seeking to profit from the tender process and thereby exaggerate costs. The opposing view is that reimbursement is essential to prevent only deep-pocketed companies putting forward unsolicited proposals and that protecting intellectual property is essential to private sector development. It is more common that unsolicited proposals will be used in novel sectors that relate to game changer projects eg latest or bleeding edge technology. However, PPPs being a development tool are regular in the more mundane sectors eg roads, power, water etc. This focuses the work of PPPs on delivery of public services, rather than being used for solutions that do not have broad impact.

Approaches to this challenge are numerous and varied. It is interesting to note, however, that most countries that originally adopted a system to reimburse the private sector for the costs of unsolicited proposals eventually eliminated those programs. Typically, the replacement takes the shape of one of the systems described above with greater emphasis on promoting viable PPP projects that are more conceptually advanced in exchange for some reasonable rights for the opportunity.

## 2. Current Status of the Lesotho Unsolicited Proposals Framework

The *Lesotho Unsolicited Proposals Framework* provides a comprehensive approach to the country's approach to dealing with the evaluation, approval and competitive tendering of unsolicited proposals that is in accordance with the *Draft PPP Policy* and largely international best practice.

Below is an overview of the key clauses in the Framework:

Section	Summary
1. <b>Definitions</b>	A comprehensive list of definitions is provided.

<b>2. Purpose</b>	An explanation of the purpose of the Framework is described succinctly.
<b>3. Submission of Unsolicited Proposals</b>	The point of contact for the submission of unsolicited proposals is listed.
<b>4. Criteria for Consideration of an Unsolicited Proposal</b>	Provides that only those proposals meeting the listed criteria may be considered if it is in line with the Government's Strategic Plan or Procuring Unit's priorities; involves an innovative design; an innovative approach to project development and management; presents a cost-effective method of service delivery, and/or; contributes to the transfer of skills to locally owned companies. Essential information of the Proponent relevant to ascertaining its ability to provide the proposed services is also required.
<b>5. Simultaneous Proposals</b>	Provides that if two unsolicited and simultaneous proposals are 'materially the same technically and in price, a first come first served approach must be adopted'.
<b>6. Unacceptable Unsolicited Proposals</b>	Provides that proposals must be rejected if the listed points are satisfied and all documentation provided by the Proponent returned with a clear statement that intellectual property or proprietary data may not be used by the Procuring Unit.
<b>7. Evaluation of Compliant Unsolicited Proposals</b>	Provides an overview of the process for unsolicited proposals that are and are not PPPs that is provided in accordance with the <i>PPP Regulations</i> . This Section includes an overview of the procedure for concluding a Memorandum of Understanding and calculation of reimbursable costs, if any, to the proponent by the successful bidder, if so required.
<b>8. Procurement</b>	The procurement process addresses the competitive tendering element of unsolicited proposal evaluations, setting out what must be included in the bid documents through a Request for Qualification and Request for Proposals should there be adequate responses to the RFQ.
<b>9. Use of External Consultants</b>	The engagement of external consultants for the purpose of technical advice in any of the above listed processes and procedures is authorized, with the issues of confidentiality and cost liability also addressed.
<b>10. Use of Unsolicited Proposal</b>	The Procuring Unit is forbidden from making use of an unsolicited proposal without the Proponent's authorization upon contract award or unless otherwise agreed, as well as from disclosing information in the Memorandum of Understanding.
<b>11. Reporting</b>	The Chief Accounting Officer is made responsible for reporting all concluding unsolicited proposal agreements in the Procuring Unit's annual report.
<b>12. Records</b>	Procuring Units are made responsible for submitting copies of each concluded unsolicited proposal for record keeping.
<b>13. Unsolicited Proposals</b>	A time clause is provided that addresses how unsolicited

<b>Submitted Prior to the Publishing of Framework</b>	proposals submitted but not concluded prior to the Framework are to be considered.
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Challenges that the Planet Partnerships team has identified as associated with the process through which unsolicited proposals are reviewed, evaluated and approved are discussed in further detail in subsequent Sections.

## Review of Public Finance Laws and Processes

An important part of this initial due diligence it is important to undertake a review of existing public finance laws and processes to understand the current procedures that must be followed by public sector authorities

### Identification and Analysis of Existing Public Finance Laws and Processes

#### 1. Review of Procurement Processes under the Local Government Act and Amendment

After detailed review of both the Local Government Act 1997 and the Local Government (Amendment) Act 2004, there have been no identified bodies, process, or financial procedures that hold relevance to the current study other than under Part V – Finance Fund.

Of relevance under this Part is the following:

- Regulation 47(1) of Part V requires that each Council establish a Council Fund. Sub-Section (2) of Regulation 47 then details that payable to the fund are all sums realized sales, leases or other transactions of the Council, and all revenue derived by the Council from any property vested in the Council or the administration of any utilities.
- Regulation 49(a) states that there shall be paid out of the Fund all sums incurred by the Council in the exercise of its powers and the discharge of its functions and duties under the Local Government Act, *or any other enactment or regulation, rule or by-law made thereunder.*

We take these Regulations to mean that any PPP arrangements that lead to revenue to local Councils will be payable into a Council Fund, and from this fund any sums incurred by the Private Partner performing a Procuring Unit Function may be payable.

## Analysis of Legal, Institutional, Regulatory, and Policy Issues

### Identification and Analysis of Legal, Regulatory Institutional and Policy Issues

Both the assessment of international best practice and common practice within SADC, alongside the assessment of key documents under the Review of Existing Framework Documents above, forms the basis of our analysis of legal, institutional, regulatory and policy issues.

Avenues through which the issues addressed in this Section may be mitigated are provided in the Section following this analysis.

The purpose of this analysis is an overview of the proposed framework governing the use of PPPs in Lesotho, and then identification of how and why the departures from best and common practice under this framework present challenges to the emergence of an effective regulatory and operational environment for public and private sector cooperation.

Not every recommendation provided below is discussed in this Section as they are more minor in nature. Nonetheless, each mitigation measure provided in that Section directly relate to the stated objective of this analysis.

#### A. Institutional Issues

Given the nascent stage of the PPP scheme in Lesotho, there are at current holes in the institutional framework. The absence of appropriate agencies is rectified by the *Draft PPP Policy* which is the statutory instrument providing for the establishment of the PPP Unit and PPP Steering Committee that are to perform critical functions in the evaluation and approval process for pipeline projects alongside Procuring Units, the Public Sector Investment Committee, the Ministry of Finance and Cabinet.

The Procuring Unit acts as the owner of a given PPP acting in the lead role advancing the project throughout the review and approval process with technical advice and preliminary review provided by the PPP Unit. The PSIC provides approval of the Concept Note and Project Proposal developed by the Procuring Unit should the project align with the investment priorities and strategic objectives of the Government of Lesotho and the requirements of the Project Appraisal Guidelines. The PPP Unit is to be an advisory body that also acts as the initial clearance body regarding project identification, evaluation and implementation. The Steering Committee is the gateway authorization body for the latter three stages of the approval process as it reviews the Feasibility Study, Procurement Report and PPP Agreement provided to it by the Unit. Cabinet bears ultimate responsibility for the approval of PPPs following the Steering Committee's review under PA:V.

A summary of the key issues is provided below:

<b>1. Institutional Roles and Responsibilities – Summary of Issues</b>
<i>1. Establishment of these bodies is a critically important step for the introduction of a comprehensive regulatory framework to provide oversight, review and approval of identified projects.</i>
<i>2. Equally as important, however, is the clear delineation of the institutional roles and functions to be performed by each of these public bodies, both existing and proposed. Failure to do so</i>

*increases the likelihood of bureaucratic inefficiency as the work of government departments overlaps and the procedures and processes designed to facilitate the approval of appropriate projects actually result in an undue bureaucratic encumbrance that may result in the stagnation of potential developments.*

*3. While there is largely agreement between the draft Policy and Regulations as to the roles and responsibilities of the various entities involved, contradictions remain. For example, the PPP Unit's scope of responsibility is unclear as it provides a preliminary review of projects under stages PA:III to PA:V (per the Draft PPP Regulations) while also performing an advisory role to the Procuring Unit throughout the entire review process.*

*4. Furthermore, in the Regulations 'Establishment of Bodies' Section, the Steering Committee approves projects and acts as the evaluation committee following the PPP Unit's preliminary review under PA:III and PA:IV. However, under Regulation 9, 'PPP Agreement Negotiations, authorization is also required by the Steering Committee for PA:V before the Cabinet is required to review and provide final approval.*

*5. Under the PPP Institutional Framework in Lesotho Section of the Draft PPP Policy, the Procuring Unit is responsible for establishing a contract management process. Under Regulation 10 of the Draft PPP Regulations, the Chief Operating Officer of the Procuring Unit is responsible for establishing a Project Management Team for management of PPP agreements comprised of the Project Officer, representative of the Private Partner and representative of the PPP Unit. It may be inefficient in a country the size of Lesotho to expect that each Procuring Unit will have an appropriately qualified individual to act as Project Officer, and requiring a representative of a the PPP Unit to participate will be unduly burdensome given the limited number of staff. One recommendation is for the GOL to consider creating, over time, a Contract Monitoring Unit, that can assist in managing compliance for all PPP Projects to achieve greater economies of scale.*

## **2. PPP Evaluation and Approval Process – Summary of Issues**

*1. In this regard, the primary challenge underlying the Draft PPP Policy is the unclear process for the evaluation and approval of PPP projects. The summary of the procedure and roles of relevant institutional bodies is not sufficiently clear as it is provided in a text-heavy format rather than a logical step-by-step approach with reference to specific input by each public body.*

*2. While the process is more clearly enunciated in the Draft PPP Regulations, refer to Annex II of the Draft PPP Policy included in this document for a visual representation, inconsistencies between the two persist. Addressing this lack of cohesion is of critical importance.*

*3. The numerous layers of reviews, both preliminary and final by the PPP Unit and Steering Committee respectively, prior to ultimate approval by Cabinet will make it difficult for projects to reach financial close in a timely manner. It is critical that unnecessary steps in this review process are eliminated to ensure the implementation of a streamlined system that provides for the effective and efficient assessment of potential projects.*

*4. The primary issue requiring concerted attention in relation to this approval process is the extent of the regulatory role to be performed by the proposed PPP Unit. While the Unit is empowered to conduct a preliminary review of projects before providing recommendations to the Steering Committee, it does not have the authority to require amendment or further information from the Procuring Unit directly rather than recommending the Committee does so, despite providing technical advice and guidance to the Procuring Unit throughout each step of the review and approval process.*

*Not providing the PPP Unit with this authority results in an overly complicated process whereby*

*there is a feedback loop between the Unit and the Steering Committee, rather than establishing a collaborative working relationship between the Procuring and PPP Units.*

*5. Finally, requiring final approval by Cabinet of all projects under PA:V sends a message to the business community that political intervention into the PPP review process is inevitable. The transparency of the scheme is hindered by the potential for the Cabinet to reject any proposed development despite recommendations otherwise by the other public bodies involved. This fundamentally undermines the objective of establishing the policy, regulatory and institutional framework governing PPPs in Lesotho.*

## **B. Legal and Regulatory Issues**

While the current legal and regulatory environment in Lesotho does allow for the evaluation and assessment of PPPs, procedures and processes are not clearly defined between various statutory instruments, nor are the roles and responsibilities of public agencies clearly established. Additionally, the treatment of unsolicited proposals provides another initiative that must be further critiqued in order to establish a properly functioning regime for the treatment of these private sector propositions.

The *Draft PPP Regulations* comprehensively address the critical issues associated with the regulation of review and approval processes, certain manifest deficiencies persist in the legislative or regulatory environment which could affect that objective.

A summary of the issues is provided below:

<b>1. Definitions and Clarifications – Summary of Issues</b>
<p><i>1. The definition of PPPs is a foundational starting point for a coherent regulatory framework. Ensuring coherence with the Draft PPP Policy is of fundamental importance for without cohesion between these definitions ambiguity will exist as to the exact scope of allowable projects that qualify for consideration under the PPP scheme.</i></p> <p><i>The definition under the Draft PPP Regulations is not consistent with the definition in the Policy, and there are some notable omissions that result in a vague scope regarding the types of allowable contracts in terms of obligations accepted by both the State and Private Party.</i></p>
<p><i>2. The definition of Procuring Unit refers to a Ministry, statutory body or local authority 'entitled to conclude a PPP Agreement', however this is imprecise phrasing given that ultimate authority to conclude an agreement rests with Cabinet. This is particularly true given that it must be co-signatory to any agreement with the Chief Executive Officer of a Procuring Unit. Additionally, the Chief Executive Officer is not defined as holding the power to conclude an agreement, but is 'tasked with applying for all project approvals'.</i></p>
<p><i>3. In Regulations 7, 8 and 9 the PPP Steering Committee is referred to as having responsibility for 'final review and approval' of the relevant documents. However, the Cabinet is also stated as holding ultimate responsibility for the 'final approval' of a PPP Agreement. This apparent contrast of jurisdictions creates confusion as to where actual authority for 'final' approval resides.</i></p>



## 2. Approval Process – Summary of Issues

*1. The process for reviewing and approving potential projects provided in the Draft PPP Regulations is clearer than that which is set out in the Policy. However, aspects of this approval procedure are cause for concern given the numerous steps involved and the involvement of multiple bodies for preliminary and final approval.*

*2. As mentioned under the Institutional Issues Section above, of specific concern is the unnecessary administrative hurdle created by empowering the PPP Unit to conduct a preliminary review without also providing it with the authority to liaise directly with the Procuring Unit regarding any necessary clarifications it may have, rather than merely providing recommendations to the Steering Committee.*

*3. There are also additional a lack of clarity with other aspects of the process, specifically:*

- It is not clear at which stage the PPP Pipeline is to be developed by the PPP Unit.*
- There is also ambiguity as to whether the PSIC will include PPP specialist staff to assist with its determinations of the first two approvals.*
- No information is provided as to the conditions of financial close and whether there is any further review and approval required in respect of direct and related agreement.*

*4. Finally, allowance has been made for exemptions from the requirements of the Regulations for certain projects. This is a problematic inclusion given that no grounds for applying for the exemption are provided and it appears to leave open the possibility of political patronage for projects the Government would like to push through despite not meeting the requirements for approval under the defined process.*

## 3. Unsolicited Proposals – Summary of Issues

*1. The Note on the Treatment of Unsolicited Proposals framework comprehensively addresses the process for the fair and transparent evaluation of proposals for PPP developments initiated by the private sector.*

*2. However, the Criteria for Consideration make clear that two foundational requirements are the proposition involving an innovative design and innovative approach to project development and management. While this is a commendable objective, emphasizing the necessity of innovation in unsolicited proposals is primarily a characteristic of countries experienced in the utilization of PPPs. On the other hand, countries that have established PPP schemes relatively recently and have low capacities for such projects instead emphasize obtaining the highest VfM result across priority sectors.*

*3. Another issue is the noticeable absence of an incentive arrangement for the submission of unsolicited proposals through one of the various models adopted by countries internationally and in the SADC region. Providing an advantage to the original Proponent of an unsolicited proposal encourages the submission of proposals that might not only cost firms financially, but also ensures that their initial investment of time and human capital in the development of the proposal is rewarded during the evaluation process.*

## C. Policy Issues

The *Draft PPP Policy* provides a foundational overview of the requirements, institutional and regulatory, for Lesotho to establish a modernized PPP scheme that improves upon the pre-existing system for the implementation of projects of this nature. However, as with the *Draft PPP Regulations*, the content of the policy does not remove all ambiguity as to the exact scope of

public agencies' jurisdiction and there exist a number of inefficiencies in the PPP evaluation and approval process.

Some of the issues identified in this analysis have been remedied in the Planet Partnerships review of the Policy, which is attached below. Other concerns will substantially impact upon the content of the policy and thus have not been incorporated into the *Draft PPP Policy* given that it is the prerogative of the Government of Lesotho to determine whether or not such alterations are desirable.

A summary of the issues is provided below:

<b>1. Definitions and Clarifications – Summary of Issues</b>
<i>1. The Preamble is not a sufficiently concise statement of purpose and objective with an appropriate contextual description of the motivations behind the implementation of this new PPP scheme.</i>
<i>2. As discussed in the above sub-Section, the definition of PPP provided in the Policy is overly broad as it appears to cover all sectors, and it is not consistent with the definition provided in the Draft PPP Regulations.</i>
<i>3. The Scope of PPP Policy clause noticeably excludes mentioning any potential projects related to sustainable development outside of forestry and waste-water, which appears to undermine the stated commitment of the Government to environmental protection in the Preamble to the Policy.</i>
<i>4. There is no reference to tracking government liabilities.</i>
<i>5. Given that there are now draft regulations it is not clear that the document needs to be as lengthy and detailed as is currently. The Policy should provide an overview of roles, responsibilities, procedures and processes while the Regulations give the detailed content.</i>

<b>2. PPP Evaluation and Approval Process – Summary of Issues</b>
<i>1. The approval process under Stage II: Procurement and Transaction conflicts with the Draft PPP Regulations as the former provides the appropriate procurement process is to be determined by the PPP Unit, whereas the latter specifies it is the Steering Committee that will guide the Procuring Unit at this stage.</i>
<i>2. As addressed under the Institutional Issues sub-Section, the requirement of final approval by Cabinet of all PPP projects increases the likelihood of arbitrary political interference into the approval process. The best strategy to mitigate this issue is provided under Institutional Recommendations.</i>
<i>3. The PPP approval process set out in clause 6 of the Policy is logical and sequential. However, changes must still be made to improve clarity over where the involvement of specific public bodies is required, and there are a number of possible substantial changes which will directly impact on the extent of the financial and human resources expended by the Government during the evaluation phase.</i>
<i>Of particular importance in this regard will be determining whether a full feasibility study is necessary, how it will be determined if a project should be added to the PPP Unit's pipeline, and clearly defining which body holds the ultimate authority to approve and sign PPP</i>

## Agreements.

### Recommendations for Mitigation of Issues

In this Section, the Planet Partnerships team has provided recommendations targeted at mitigating the issues identified in the preceding analysis that are concise, in harmony with international best practice and regional common practice, and which will have the greatest impact in improving the clarity and efficiency of Lesotho's PPP scheme.

#### A. Institutional Recommendations

Based off the documents provided and preliminary interviews with stakeholders in Lesotho, our team has determined that the future institutional framework in Lesotho, as far as the promotion and implementation of PPPs are concerned, appears to be well-defined and appropriately structured to serve as a cornerstone for the development of a sustainable PPP program. That said, we provide below some key recommendations to add clarity and logic to the framework, as well as some strategies to make the process more streamlined and encouraging to potential private sector partners.

We provide the following recommendations to address the identified issues:

#### 1. Institutional Roles and Responsibilities – Summary of Recommendations

*1. The Regulations seems to require that there are a number of agencies that will need quite a lot of capacity on PPPs, including PSIC, PPP Unit and the PPP Steering Committee. Our contention is that this may not be realistic nor an efficient way to approach toward structuring the approval process.*

- *As discussed further under the next sub-Section, we recommend that the PPP Unit is given greater regulatory authority as a gate-keeper and preliminary decision-maker that will both maximize the expertise of its staff with PPPs, as well as streamline the approval process.*

*2. The roles of Steering Committee and PPP Unit are not precisely defined:*

- *The PPP Unit seems to approve a PPP Pipeline and do a preliminary review of the projects, but also plays an advisory role to the Procuring Unit.*
- *The Steering Committee approves projects and also acts as the evaluation committee. In the Regulations, however, the Steering Committee reviews the bid evaluation of the Procuring Unit; this scope or responsibilities needs to be harmonized and unnecessary steps in the review process eliminated.*
- *It may become difficult for each entity to carry out its functions when there are some inherent potential conflicts of interest in their mandates.*

*3. As with the change recommended for clause 6 of the Draft PPP Policy – Procurement and Transaction phase – reference to the Steering Committee having responsibility for final review and approval in Regulations 7 and 8 before submitting the PPP Agreement to Cabinet in Regulation 9 for final approval creates confusion over where ultimate approval authority rests. This should be reworded in a way that makes clear the hierarchy of institutions and bodies.*

- *We recommend replacing the phrase “final review and approval” by the Steering Committee with “review and authorization” in order to ensure clarity that Cabinet holds ultimate authority for approval.*

*4. Rather than tasking Procuring Units and representatives of the PPP Unit with responsibility*

*for management of PPP Agreements, we recommend the establishment of a centralized Contract Management Unit. It is envisaged that this Unit would be housed within the Ministry of Finance. This approach would serve to consolidate expertise, manage limited resources, and provide a support service to Procuring Units on contract compliance matters. This could be done once a critical mass of PPP contracts are executed or as part of an evolving PPP apparatus.*

## **2. PPP Evaluation and Approval Process – Summary of Recommendations**

*1. In Regulations 7, 8, 9 and 11 the PPP Unit is empowered to conduct a Preliminary Review of all documents. However, the Regulations do not also provide it with authority to directly raise any issues with the Procuring Unit rather than providing recommendations to the Steering Committee for its review and approval.*

- *It will significantly streamline the process if the PPP Unit is also authorized to work directly with the Steering Committee where it is possible to rectify technical issues with the Feasibility Study, Procurement Report, PPP Agreement and Amendments and Variations to the PPP Agreement.*
- *The current process means the PPP Unit is required to submit its recommendations to the Steering Committee following preliminary review and the Committee may then direct the Procuring Unit to address any issues and re-submit to the PPP Unit again for preliminary review.*
  - *As international best practice suggests that the more a PPP Unit is empowered to dictate the process when screening proposals the more effective it will be, the Unit should have the authority to liaise directly with the Procuring Unit to address its concerns and any answer any queries.*
  - *The PPP Unit would not have the power to reject the feasibility of a project and this authority properly rests with the Steering Committee. However, removing an unnecessary cycle of reviews would significantly streamline the process as the Committee would only receive proposals from the PPP Unit that it recommends for approval or outright rejection, rather than to seek further clarification or submit queries back to the Procuring Unit.*
- *A useful tool to guide the PPP Unit when conducting its preliminary review that assists in establishing a standardized evaluation process is the design and development of 'PPP Guidance Document'.*
  - *This document would resemble the Project Appraisal Guidelines issued by the PSIC to guide the Committee's evaluation of the Concept Note and Project Proposals (PA:I and PA:II), but would instead guide the PPP Unit's review for PA:III, PA:IV and PA:V.*
  - *The core elements would be model contracts, procurement evaluation criteria and project approval criteria to be met before the proposal can be passed to the Steering Committee. This would ensure the Steering Committee receives clear recommendations from the PPP Unit based on a standardized evaluation format*
  - *Additionally, establishing these Guidelines would act in conjunction with empowering the PPP Unit to deal directly with the Procuring Unit by requiring further action on any given proposal before it passed on recommendations to the Steering Committee.*

*2. It would be in harmony with the purpose and objective of the policy, legal and regulatory framework that establishes a scheme for the review and evaluation of potential PPP projects based on technical and financial merit rather than political accession to remove the requirement for Cabinet to approve all proposed PPP developments under PA:V. Instead, there should be*

*established different categories of PPPs such as by financial size or perhaps sector and only projects requiring financial support by the Government of Lesotho over a certain threshold or in defined sectors require explicit approval. Projects not falling in those categories should be passed to Cabinet for review and no objection. Possible thresholds are an appropriate topic for discussion during Workshop One.*

- *This lessens the likelihood of political interference, improves transparency of the evaluation process, and facilitates a less arbitrary system that is based on financial and technical merit.*

## **B. Legal and Regulatory Recommendations**

While the *Draft PPP Regulations* provide comprehensive coverage of the key issues required by international best practice, there is a need for refinement of the procedures for review and approval, as well some issues where conflict exists with the *Draft PPP Policy*.

Below are our preliminary recommendations:

### **1. Definitions and Clarifications – Summary of Recommendations**

*1. The definition of PPP is not consistent with definitions in other PPP law and there is no emphasis on long term or on outputs. There is also a concept of state property being used for commercial purposes which also includes incorporeal property. There needs to be a harmonization of the PPP definition that is accordance with international best practice and the Draft PPP Policy.*

*2. The definition provided for Procuring Unit refers to “a ministry or other statutory body, or a local authority as defined in the PFMA which shall be entitled to conclude a PPP Agreement”. However, as the Cabinet is the body with which ultimate authority rests to approve the conclusion of a PPP Agreement, the definition of Procuring Unit should be changed to read “entitled to enter into a PPP Agreement”.*

- *This interpretation is supported by Regulation 2 that provides the authority to sign an Agreement rests with the Chief Accounting Officer of a Procuring Unit as co-signatory alongside the Minister, so the ability to conclude a PPP Agreement does not rest solely with a Procuring Unit.*
- *Clarity over these definitions is important to ensure a transparent process where it is clear to both public sector authorities and private actors which body holds the authority to conclude a PPP Agreement.*

*3. As with the change recommended for clause 6 of the Draft PPP Policy – Procurement and Transaction phase – reference to the Steering Committee having responsibility for final review and approval in Regulations 7 and 8 before submitting the PPP Agreement to Cabinet in Regulation 9 for final approval creates confusion as to where ultimate approval authority rests. This should be reworded in a way that makes clear the hierarchy of institutions and bodies.*

- *Stating that the Committee has responsibility for ‘final review’ under the regulations conflicts with the same clause of the Draft PPP Policy in which the Cabinet is defined as holding “final decision-making power over all matters involving PPP Projects”, including “final approval of a PPP Agreement”.*
- *We recommend replacing the phrase “final review and approval” by the Steering Committee with “review and authorization” in order to ensure clarity that Cabinet holds ultimate authority for approval.*

*4. The Government of Lesotho should consider creating a Project Development Facility (PDF)*

*to support the development of a PPP Project Pipeline through funding PPP transaction advisors. The PDF would use donor funds to support the preparation of eligible PPP projects according to standardized models. The grants funds would stimulate PPP “deal flow” and coordinate PPP approaches and resources. PDF’s have been used successfully in small and larger countries and coordinate and leverage donor resources more effectively than “case by case” approaches to PPP project development.*

## **2. PPP Evaluation and Approval Process – Summary of Recommendations**

**1.** *The approval process in the Regulations is clearer than the Draft PPP Policy; it should be reflected in the Policy.*

- *It is still not clear how and when the PPP pipeline is developed. The process is quite heavy as it requires 3 stages prior to starting procurement which is in line with the PSIC document.*
- *There should be a succinct overview of the approval process from PA:I to PA:V prior to individual Sections that detail the requirements for approval and responsibilities of the relevant bodies. This would provide further clarity as to the specific procedural steps involved.*
- *We recommend this overview is accompanied by a simple PPP Life Cycle flowchart.*

**2.** *The PSIC carries out the first two approvals, however it needs to be established whether the PSIC will have PPP specialists in the team that will be able to carry out this work. If so, these specialists will need to be trained in the details of the Project Appraisal Guidelines issued by the PSIC and understand how these guidelines conform to international best practice behind the entire PPP Life Cycle.*

**3.** *There seems to be two processes for reviewing the bid evaluation. The Steering Committee reviews and then allows the Procurement Unit to proceed to negotiations. The negotiated package then needs to be reviewed by the PPP Unit, Steering Committee and the Cabinet. This is creating bureaucratic obstacles to successful proposal approval and implementation.*

- *There is no statement regarding financial close as to whether there a further review and approval process and also in respect of direct and related agreement. If this approval falls under Regulation 11 Amendments and further cabinet approval is required, this is going to be very difficult.*
- *On this note, while the Ministry of Finance is identified in the Draft PPP Regulations and Policy as the body responsible for financial risk management, best practice is for there to be specific processes developed to guide the evaluation of each proposed project to manage sovereign financial risk.*

**4.** *Under Regulation 13 Exemptions, there is a right to apply for exemption from the regulations for a project – but the grounds for this are not set out. This is not consistent with international practice; however there is an example of similar practice in Regulation 16 of the Public Finance Management Act and Regulation 309 of the Municipal Finance Management Act of the South Africa PPP legislation where exemptions are allowed.*

- *Nonetheless, allowing political determinations of PPP contracts without defined guidelines risks jeopardizing public perception of the transparency and credibility of the PPP evaluation and approval process.*

**5.** *The requirement in Regulation 8.2 that the Procuring Unit submit all procurement documentation to the PPP Unit for review before submitting to the Steering Committee for PA:IV is unnecessary and adds an administrative burden given that the Regulation 8.3 also requires the submission of a Procurement Report to the PPP Unit.*

- *Eliminating the reference to the PPP Unit's review in Regulation 8.2 will streamline the process and eliminate the apparent requirement for back-to-back reviews by the PPP Unit, which is supported by the fact that both of the PPP Unit's reviews in Regulations 8.2 and 8.3 come prior to appointment of the Preferred Bidder.*

### 3. Unsolicited Proposals – Summary of Recommendations

*1. The Lesotho Unsolicited Proposal Framework is largely consistent with international best practice and mirrors much of the practice of comparable countries in the SADC region. However, the following are our preliminary recommendations:*

- *In light of the current experience and capacity of Lesotho with PPPs, the Criteria for Consideration of Unsolicited Proposals should adopt an approach similar to Zambia and Tanzania that places greater emphasis on value-for-money and projects that benefit the public, rather than an innovative design and approaches, as in the South African regulations. That said, attracting both types of proposals will be important for Lesotho's development and the reference to attracting innovative ideas should not be removed, but it should be given equal weight as the VfM criteria.*
  - *The list of criteria should also be expanded to include considerations as to the scientific, technical or socio-economic merits of the proposal;*
  - *It should be made clear whether the criteria are successive through the use of 'and', or if they are alternatives then the term 'or' should be used as the linkage.*

*2. The submission of unsolicited proposals should be incentivized through the use of one of the four mechanisms described above during the competitive tendering phase that provides an advantage to the original Proponent.*

- *It is recommended that the approach of South Africa provides a good model to emulate with an adapted Swiss Challenge where there is a two-stage evaluation during the competitive tender. This would mean that the two most advantageous bids are selected in the first round and if the original Proponent is not one of the two selected bids, it will automatically be provided the opportunity to participate in the second round putting forward its best and final offer.*
- *This incentive mechanism should be stated in both the final PPP Policy and PPP Regulations.*

#### C. Policy Recommendations

While the *Draft PPP Policy* adheres to international best practice broadly and follows the general structure with equivalent content of the PPP policies of other countries, including within SADC, , there is room for further refinement to eliminate potential for an unnecessarily complicated administrative process, further clarify certain issues, and streamline the PPP process. This is not only suggested for governance and transparency reasons, but also to ensure that the PPP Policy in Lesotho is business friendly and encouraging to both domestic and foreign investors.

Below are our preliminary recommendations:

#### • Definitions and Clarifications – Summary of Recommendations

*1. The Preamble is not concise and we suggest that this would read better if drafted into a concise executive summary, drawing out the key issues and elements of the policy, highlighting the entity or person championing it and so forth.*

*2. The list of legislation and regulations in Section 1 – Custodians of PPP Policy and Applicability must be updated to reflect the Draft PPP Regulations, the Unsolicited Proposals Framework and the Project Appraisal Guidelines.*

*3. The definition of PPP is very broad as it appears to cover most sectors, it might be easier to say what is excluded. It is also not consistent with the definition of PPP in the PPP Regulations – this should be harmonized as each definition has some shortcomings.*

- The PPP definition provided refers to a contractual arrangement that extends for ‘a significant period of time’, which is a vague term. Per international best practice we recommend the term significant is replaced with ‘15-20 years’, or ‘long-term’.*
- Rather than only referring to risk-sharing between both parties, the definition should also make mention of the Private Partner bearing ‘management responsibility through the life of the contract’.*

*4. Under clause 4, ‘Scope of PPP Policy’, the list of PPPs in infrastructure and services noticeably excludes mentioning anything related to environmental protection outside of forestry and waste-water.*

- It would be in harmony with the Preamble and other elements of the PPP Policy for climate change resilient infrastructure to be included under the second dot point, as well as making Natural Resources a point of its own. Explicitly mentioning environmentally conscious development in this way would support the stated commitment of the Government.*

#### **• PPP Evaluation and Approval Process – Summary of Recommendations**

*1. The approval process under Stage II: Procurement and Transaction needs to be clearer and more concise as it states that ‘the most suitable procurement process should be followed as recommended by the PPP Unit’. Regulation 8.1 of the Draft PPP Regulations requires the Procuring Unit follow the procurement process determined by the PPP Steering Committee, which directly contradicts the Draft PPP Policy that it is the PPP Unit which determines the appropriate process to follow.*

- The critical recommendation in this regard is the formulation of a standardized procurement process.*
- Rather than any one agency being empowered to determine the procurement process to be followed, there should instead be model contracts that require adherence to clear evaluation criteria. This is addressed in Comment 5 in the text of the Draft PPP Policy.*

*2. What happens from commercial to financial close seems to have been omitted from inclusion in the Policy.*

*3. The Policy provides a detailed description of the role and responsibilities of the PPP Steering Committee under clause 6, where the Committee is detailed as having is described as having “an advisory, gateway or review and oversight function”. However, this description is inconsistent with the Draft PPP Regulations which provides that the Committee is “tasked with the final review of all proposed PPP projects”.*

- Stating that the Committee has responsibility for ‘final review’ under the regulations creates confusion with the clause of the Policy in which the Cabinet is defined as holding “final decision-making power over all matters involving PPP Projects”, including “final approval of a PPP Agreement”.*
- Removing the term “final” from the description of the responsibilities of the PPP Steering Committee would provide clarity about the body that holds ultimate authority in the PPP approval process.*
- While final review and final approval have different meaning, it is the use of the term ‘final’*



*for each that is the source of potential ambiguity as to the body holding authority in the process.*

**4.** *Under clause 6 of the Policy, the PPP process is defined in a logical and sequential manner. Nonetheless, changes need to be made to the first three of the stages in order to provide greater clarity:*

- *Concept Note and Project Proposal – mention should be made that this stage largely falls under the purview of the Procuring Authority with technical assistance by the PPP Unit, which also provides preliminary project review and clearance. As the PPP Unit is responsible for Pipeline Projects, it is recommended that reference is made at this early stage that this is where Pipeline Project Profiles will begin to be developed.*
  - *The evaluation of whether a project should be added to the PPP Unit’s Pipeline must be undertaken in a standardized way such that all projects are evaluated accurately so those that are unsuitable are not advanced, or that suitable projects are instead structured using public or donor funding.*
- *Detailed Feasibility Study and PPP Structuring – specify that this Section is overseen by the Ministry of Finance, which is the sole authority in charge of coordination, evaluation and management of the fiscal implications of PPPs.*
  - *It would be useful to conduct a scoping study prior to a feasibility study in order to optimize financial and human resources by avoiding comprehensive studies on manifestly unacceptable projects.*
  - *It would also be worthwhile to limit this stage of the approval process to a pre-feasibility study given the expense attached to extensive assessments of project viability, a recommendation supported by the fact the Private Partner will be required to conduct a full feasibility study themselves.*
- *Procurement and Transaction - state that this stage of the process is under the jurisdiction of the Steering Committee which is empowered to review, evaluate, and authorize bids technically, legally, structurally and financially, also holds authorization power concerning feasibility studies, short-listing and procurement processing.*
  - *However, while clause 6 of the Policy makes clear that final approval by Cabinet is required prior to signing, the text of clause 7 under Procurement and Transaction says that the ‘stage continues past bid evaluation to include... contact signature’, but also that “decisions on a PPP project will only be referred to Cabinet if there is guidance required by the PPP Unit”.*
  - *This apparent conflict between clause 6 and 7 creates a lack of certainty about whether final approval is required from Cabinet prior to contract signature.*
  - *To streamline the approval process and limit bureaucratic interference it is recommended that the sentences referred to are re-worded to provide clarity as to the correct procedure. Alternatively, another step after Procurement and Transaction can be added to the approval process titled ‘Contract Approval Prior to Signing’. This stage would require that the Steering Committee obtains Cabinet’s approval before the transaction may be officially concluded, which would be in harmony with the terms of clause 6.*
    - *It would need to be noted that, per regulation 2 and 12.1.2 of the Draft PPP Regulations, the Chief Accounting Officer of a Procuring Unit and the Minister are the parties responsible for signing the PPP Agreement.*

## Conclusions

The due diligence stage of the assignment provided a detailed assessment of international and regional best practice, a review of key documents that combine to provide the legal, policy and institutional framework governing the use of PPPs in Lesotho.

The analysis under the three sub-Sections for policy, legal and regulatory, and institutional issues identified the critical constraints to establishing a modernized operational environment for PPPs in Lesotho.

The Recommendations for the Mitigation of Issues Section provided both a general statement of appropriate action, as well as specific steps that may be taken to resolve certain minor deficiencies. Of primary importance is this regard is:

1. Harmonizing the PPP Policy and PPP Regulations to ensure coherence.
2. Reassessing the role of the PPP Unit by providing it with a greater regulatory role through its authorization to conduct preliminary review and deal directly with the Procuring Unit to address any concerns or queries.
3. Ensuring the roles and responsibilities of each of the relevant agencies are clearly defined such that ambiguity and institutional overlap is eliminated to the greatest extent possible.
4. Providing a clear and streamlined process for the evaluation of PPP projects that eliminates, where possible, unnecessary layers of review and authorization.

These findings established the basis for the revision of the PPP Policy and development of the PPP Act and Regulations.

## Inception Mission Feedback

The purpose of the Inception Mission was to meet with key representatives of the Government of Lesotho (GOL) to discuss the project and undertaken initial stakeholder consultation. Mr. Uven Bunsee undertook this mission as the Team Leader and PPP Legal and Regulatory Specialist of the Planet Partnerships Team. He was accompanied by Julian Jackson of the IFC, South Africa.

The Inception Mission entailed a series of meetings, facilitated by the IFC, which enabled the Planet Partnerships Team to discuss the current draft PPP framework with key stakeholders and identify current policy and legal issues within the existing PPP program. The project objectives, activities, and outcomes were well-received. Officials within the GOL participated enthusiastically in all meetings and demonstrated a commitment towards contributing to the success of the overall project.

The Scope of Work was discussed with both the GOL and the IFC. The Work Plan, subsequent activities, and tentative next steps were approved and confirmed.

### Meetings

The meetings were held on Tuesday, January 17, and Wednesday, January 18, 2017.

On the 17<sup>th</sup> of January, Mr. Bunsee met with the following entities:

- IFC
- Ministry of Finance

On the 18<sup>th</sup> of January, Mr. Bunsee met with the following entities:

- Ministry of Health
- Lesotho Central Bank
- Lesotho Lowlands Water Supply
- Department of Rural Water Supply & Sanitation
- Department of Energy
- Roads Directorate
- Ministry of Tourism
- Ministry of Communications, Science and Technology
- Lesotho Mounted Police Service
- Ministry of Public Works and Transport

### Key Issues Discussed

The following key items and issues were discussed with the official representatives from the Ministries and GOL entities:

- **Minister of Finance, Ministry of Finance:**

The Minister of Finance expressed concerns in regards to management of contingent liabilities. The Ministry Team also noted a preference for aspects of a Debt Management Law to capture and include PPP provisions.

- **Director of Planning, Ministry of Health:**

The Director of Planning expressed a strong preference for the development of a well-written PPP policy with set controls. In particular, the Ministry expressed concern about how PPP projects can be structured so that they are made easier to manage and monitor. The Ministry Team also asked for provisions within the policy to be clear when the value of the Rand is low.

- **LCB Financial Markets Departments and Director of Research, Lesotho Central Bank**

In terms of the foreign exchange market (Forex), the Central Bank is confident that they are in a position to manage demand for foreign currencies as they arise. The Director also raised matters in relation to contingent liabilities. Specifically, the matter of contingent liability under breakage was discussed, which is a key provision which the Treasury has also expressed support for.

The Director also provided further insight into several key items, as outlined in the following: As the official bankers to the GOL, the Bank contributes a significant portion toward the obligations of the GOL. The structure of assets to debt is a natural and hard currency hedge. The Central Bank does not invest in Euros due to low to no return. The Bank has a paying account for Euros only. Exposure to markets has contracted due to regulation and counterparts risk adverse behavior. For the United States Dollar (USD), Euro and Sterling, the Bank indicated an ability to cover demand for currency.

In terms of exotic currencies, the Bank has the necessary correspondent Banks and makes use of these contacts. The Bank has a relatively positive forward reserves position, as well as its import coverage foreign reserves position versus import bill. Their financing coverage can match foreign currency. Where financing comes from outside, bank to bank transactions are settled. The Bank in January of 2017 also launched a stock exchange and GOL shareholding is anticipated to be off-loaded. The Stock Exchange has a list of four (4) companies with their costs to be listed and tracked. There are 10-year bonds available. The risk free rate is 600 basis points with a risk premium of 400 basis points.

The Bank raised the key issues of debt management, local employment, and inclusiveness of local people. These various issues of fiscal management and contingent liabilities will be addressed in the due diligence and recommendations going forward.

Mr. Bunsee attended a wrap-up meeting with Permanent Secretaries for Health, Finance and Development Planning at the Department of Finance. Mr. Bunsee provided insight into the findings from the meetings, key messages, and presented the next steps for the PPP study. The Secretaries indicated support for the PPP framework and implementation of projects in Lesotho.

These discussions provided insight into the needs and desires of the GOL in regards to the new PPP Policy and Legal Framework. These perspectives and informed opinions will guide the next steps of the assignment by providing the GOL's stance on the framework.

In addition to these meetings, Mr. Uven Bunsee and the Planet Partnerships PPP Team also reviewed the key documents in relation to the framework.

## Key Priorities

The discussions with the IFC and GOL key stakeholders identified a variety of issues and priorities to guide the project moving forward.

The main priority following the Inception Mission is for the Planet Partnerships Team to harmonize past consultants' work on the PPP Policy and Legal Framework with the results of the findings from the stakeholder meetings and initial reviews of the documents. The meetings highlighted that, in particular, the issues of contingent liability management, debt management, and tightly-defined provisions must be addressed in the new framework. There will also be a need to develop a strategy to inform all of the Ministries and other stakeholders about the objectives and content of the PPP policy and framework. Currently, most Ministries lack a sound understanding of the PPP policy and process.

Moving forward, the Planet Partnerships Team will have to address the inconsistencies in the draft policy and legal approach and provide recommendations to facilitate the adoption and harmonization of the PPP Policy and Legal Framework.

### **Outcomes**

The GOL provided key feedback on the current draft PPP Policy and Legal Framework, confirmed support of the project, and confirmed the work plan, including a tentative timeline for the next tasks.

## Workshop 1 Feedback

### Workshop Details

Workshop One with the Government of Lesotho was conducted on May 11, 2017 at the Lehakoe Recreation Center. The Planet Partnerships team met with the GoL counterpart stakeholders for an initial briefing session on May 10, 2017. The agenda for the session is as follows:

Session	Time
<i>Registration</i>	9.00 am – 9.10 am
<i>Welcome and Opening Remarks (MoF)</i>	9.10 am – 9.20 am
<i>Introduction and Current Status of Project</i>	9.20 am - 9.30 am
<i>Due Diligence Summary</i>	9.30 am – 9.45 am
<i>Questionnaire Feedback</i>	9.45 am – 10.00 am
<i>Draft PPP Policy Discussion (Part 1)</i> <ul style="list-style-type: none"> <li>• Preamble</li> <li>• Section 1: Custodians of PPP Policy and Implementation</li> <li>• Section 2: PPP Policy Vision and Rationale</li> <li>• Section 3: Definition of PPP</li> <li>• Section 4: Scope of PPP Policy</li> </ul>	10.00 am – 10.30 am
<i>Coffee Break</i>	10.30 am – 10.45 am
<i>Draft PPP Policy Discussion (Part 2)</i> <ul style="list-style-type: none"> <li>• Section 5: Guiding Principles to the Lesotho PPP Program</li> <li>• Section 6: PPP Institutional Framework in Lesotho</li> <li>• Section 7: PPP Development and Implementation Process</li> <li>• Section 8: Probity Management</li> <li>• Discussion on Key Issues</li> </ul>	10.45 am – 12.45 pm
<i>Lunch Break</i>	12.45 pm – 1.45 pm
<i>Private Sector and the PPP Policy: Perceptions &amp; Perspectives</i>	1.45 pm – 2.00 pm
<i>Fostering PPP Project Pipeline: Strengthen Policy Accordingly</i>	2.00 pm – 2.15 pm
<i>Improving Framework: Streamlining and Recommendations</i>	2.15 pm – 2.30 pm
<i>Draft PPP Policy Discussion Conclusion</i>	2.30 pm – 2.45 pm
<i>Next Steps</i> <ul style="list-style-type: none"> <li>• Finalization of PPP Policy</li> <li>• PPP Legislation</li> </ul>	2.45 pm – 3.00 pm
<i>General Questions and Answers</i>	3.00 pm – 3.15 pm

The PowerPoint presentation for Workshop 1 is provided in Annex II.

### Feedback and Recommendations

Following the workshop, the key recommendations which have been incorporated into the updated version of the *Revised PPP Policy* are as follows:

- There will be no allowance made for the utilization of unsolicited proposals in the PPP Policy, nor PPP Act.
  - Reference to the potential use of such mechanisms in the next 7-8 years has been inserted into the Preamble, per the outcome of the workshop.
- The PPP Unit will report to the Permanent Secretary of Finance in terms of mandate, role, resources and PPP management.
- The Public Sector Investment Committee (PSIC) must be consulted on all potential projects by the relevant Procuring Unit, which will submit a Project Proposal to the Committee for its review and approval, as per the Revised PPP Act, prior to submission to the MoF.
- Cabinet should not play an authoritative approval role, but will instead be provided with periodic updates by the Ministry of Finance, the Ministry will be the ultimate authority for all approvals throughout the procurement process.
- The PPP Steering Committee will no longer be established. Its role and responsibilities regarding approval of the various procurement stages will be assumed by the Ministry of Finance.
- There will be new proposal approval process as follows:•
  - TA(0) – Approval of Project Proposal by the PSIC following submission by the Procuring Unit
  - TA(I) – An Approval Letter for the Feasibility Study signed by the responsible officer;
  - TA(II)A – An Approval Letter for Project Request for Proposals signed by the responsible officer;
  - TA(II)B – An Approval Letter for Appointment of the Preferred Bidder signed by the responsible officer, and;
  - TA(III) – An Approval Letter for the Chief Accounting Officer of the relevant Procuring Unit to sign a negotiated contract.
- The Client has requested that the Consultant prepare a Draft PPP Act in lieu of a revised PPP Regulations and supporting documents.

Our assessment of stakeholder needs was based not only during consultations during the Inception Mission, but also through the dissemination of a *Ministerial PPP Questionnaire* to key public bodies in order to properly evaluate views on the issues affecting the operational environment of PPPs in Lesotho. Annex III provides a sample questionnaire and responses from the stakeholders.

## Workshop 2 Feedback

Workshop Two was held on the 2nd and 3rd of July, 2017, at Avani Lesotho. Two representatives of the Planet Partnerships team engaged in a collaborative dialogue with staff from the Ministry of Finance and Ministry of Health on Day One of the Workshop to review changes made to the Policy, Act and Regulations and ensure outstanding issues were addressed in the revised versions of each document.

On Day Two the Planet Partnerships staff provided a comprehensive presentation to a diverse range of representatives from the following organizations and Ministries:

- Ministry of Finance
- Ministry of Health
- Ministry of Public Works and Transport
- Ministry of Energy
- Ministry of Development Planning
- Ministry of Public Works and Planning
- Ministry of Police and Public Safety
- Ministry of Tourism, Environment and Culture
- Ministry of Trade and Industry
- Central Bank of Lesotho
- Office of Parliamentary Council

Workshop Two involved comprehensive discussion and engagement with key stakeholders on the structure, objectives, key principles, and primary issues identified in the Final PPP Policy, Act and Regulations. The agenda was as follows:

Session	Time
<b>Registration</b>	9:00 am – 9:05 am
<b>Welcome and Opening Remarks (MoF)</b>	9:05 am – 9:10 am
<b>Introduction and Summary of Project</b>	9:10 am – 9:15 am
<b>Draft PPP Law Overview</b> <ul style="list-style-type: none"> <li>• Basis of Law</li> <li>• International Best Practices</li> <li>• Main Tenets</li> </ul>	9:15 am – 10:00 am
<b>Draft PPP Law Feedback</b> <ul style="list-style-type: none"> <li>• Comments from Stakeholders</li> </ul>	10:00 am – 10:15 am
<i>Coffee Break</i>	10:15 am – 10:30 am
<b>Draft Regulations</b> <ul style="list-style-type: none"> <li>• Key Tenets</li> <li>• Insights from Stakeholders</li> </ul>	10:30 am – 11:15 am
<b>Draft PPP Policy</b> <ul style="list-style-type: none"> <li>• Discussion of Response to Feedback</li> </ul>	11:15 am – 12:00 pm
<i>Lunch Break</i>	12:00 pm – 1:00 pm
<b>Draft PPP Policy, Law, and Regulations Discussion</b>	1:00 pm – 1:30 pm
<b>Next Steps</b> <ul style="list-style-type: none"> <li>• Finalization of Draft PPP Policy, PPP Law, and PPP Regulations</li> </ul>	1:30 pm – 2:00 pm
<b>Stakeholder Input and Suggestions</b> <ul style="list-style-type: none"> <li>• To be circulated in the Workshop Minutes</li> </ul>	2:00 pm – 2:15 pm



<b>Closing Remarks</b>	2:15 pm
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Of particular importance throughout the Workshop dialogue was focus on ensuring all stakeholders understood the institutional hierarchy and the roles of each public entity in the approval process from initial project identification through to financial close and contract management.

After consulting with members of the Technical Team from the Ministries of Finance and Health, limited changes were made to terminology and definitions to ensure conformity of the PPP framework with other relevant regulatory and policy platforms, as well as to ensure harmony among the Policy, Act and Regulations. Notable amendments are as follows:

- Altered the acronyms for the various approval stages from TA(0), TA(I), TA(II)A, TA(II)B and TA(III) to be PSIC(0), MFA(I), MFA(II)A, MFA(II)B and MFA(III).
  - PSIC(0) is the approval provided by the Public Sector Investment Committee following evaluation of the Concept Note and Project Proposal delivered by Procuring Units.
  - MFA(I) – MFA(III) are the approvals required of the MoF before Procuring Units are empowered to proceed to the next stage in the process.
- Reworded Sections 2 and 7 of the Act to reflect the MoF's view that the Chief Accounting Officer of Procuring Units hold the exclusive competence to sign PPP Agreements once approval has been granted by the Public Secretary of the Ministry of Finance to do so at MFA(III).
- Changed the definition of Project Officer such that this individual may only be appointed in accordance with the processes in the Public Service Act, rather than empowering the PPP Unit to do so as this contravenes that Act.
- Provided in Section 4.4.5 of the Act that Procuring Units are required to register the projects that receive approval under PSIC(0) with the PPP Unit.
  - This ensures that the MoF is involved at this early stage of project identification.
- Clarified that the Office of the Auditor General has the authority to audit any PPP project at any stage.

There were two key focal points of discussions during the Workshop:

1. Exemptions: Representatives from the Ministry of Finance defined the need for clear guidance on the criteria and process to be utilized by the PPP Unit in evaluating the merits of an application for an exemption from the application of the PPP Act by a Procuring Unit.
2. Unsolicited Proposals: As raised by representatives of the Ministries of Finance and Energy, it is seen as politically desirable that allowance is made for the use of unsolicited proposals. After an open discussion it was agreed that while unsolicited proposals certainly present benefits, they are an appropriate tool for mature PPP systems where staff are well-versed in the approval processes and there is the capacity to manage the comprehensive evaluation of these proposals alongside the day-to-day activities of line ministries.
  - a. However, following ongoing discussions between the Government of Lesotho, IFC and Planet Partnerships, it was determined that it was important to allow for the use of Unsolicited Proposals in a way that is transparent, competitive, fair, and which mitigates the potential imposition of cumbersome administrative and financial burdens on the Government.

There was also extensive discussion between the Planet Partnerships team and key stakeholder representatives over required next steps to ensure the pragmatic implementation of the PP scheme, which are discussed further in the Section ‘Priorities Moving Forward’ below.

## Priorities Moving Forward

At the conclusion of Workshop Two and following the finalization of the Final PPP Policy, Act and Regulations, there remain a number critical priority issues that the Government of Lesotho must address, each of which were the subject of intensive dialogue during the Workshop.

### Guidelines and Training

While the regulatory and policy framework for the use of PPPs in Lesotho has now been finalized pending enactment by the Government, the successful implementation of the PPP scheme is dependent on the capacity of staff in the PSIC, Procuring Units, PPP Unit, and Ministry of Finance to understand the pragmatic issues surrounding the day-to-day process involved in the use of PPPs.

For this reason, of paramount importance is the establishment of tailored on-the-job training programs for Government staff that focuses on the work of their Ministry and how PPPs may impact on their roles and responsibilities. These programs should be coupled with long-term training strategies that focus on institutional capacity building such that there is a seamless transfer of information between the PPP Unit, Ministry of Finance and Procuring Units so all staff are intimately familiar with relevant policies, procedures and processes.

It will also be critical to develop guidelines for Government staff to refer to in the execution of the roles in the procurement process. At this stage, we recommend focusing on the following topics:

- Guidelines on the Evaluations of Proposals and Unsolicited Proposals
- Guidelines on the use of Exemptions
- Guidelines on the Appointment of Transaction Advisors
- Guidelines on the Structuring of PPP Agreements
- Updating the PSIC Project Appraisal Guidelines

### PPP Screening Criteria

As discussed with staff from the Ministries of Finance and Health, it is imperative that the development of the PPP pipeline commences as soon as reasonably feasible to avoid undue delays between the entering into force of the Act and Regulations and public announcement of the Policy and the initiation of procurement for priority projects.

In this regard, the development of Screening Criteria to be used by Procuring Units, the PPP Unit and Ministry of Finance represent a critical step in ensuring that the PPP scheme is pragmatically implementable as Government staff are provided with the tools to accurately and efficiently evaluate the merits of potential projects.

## **Final PPP Policy**

### **PPP Policy**

### **Government of Lesotho Public-Private Partnership Policy**

### **Final Version**

**September 2017**

**FOREWORD**

“Let Lesotho pride itself with a healthy and a well-developed human resource base, a strong economy, a well-managed environment and a technology that is well established.

My people, let Lesotho, our beloved Kingdom in the Sky, seize this opportunity and reach for the pinnacle of its development in the coming two decades.”

King Letsie III,  
A Clarion Call on Lesotho’s Vision 2020

“It is equally important to note at this juncture that high and sustainable economic growth requires the existence and/or development of a vibrant and competitive private sector with adequate skills and technological know-how, and most critically, access to credit for investment.”

*Budget Speech to Parliament for the 2013/14 Fiscal Year*

*Honourable Dr. Leketekete Victor Ketso M.P.*

*Minister of Finance*

*22nd, February 2013*

## **Preamble**

By the year 2020, the Government of Lesotho envisions the establishment of a stable democracy, a united and prosperous nation at peace with itself and its neighbors. The Government aims at introducing a healthy and well-developed human resource base with a strong economy, a well-managed environment and the adoption of advanced technology for the benefit of its citizens, institutions, and businesses. The National Vision goals embedded in the National Strategic Development Plan (NSDP), Sustainable Development Goals and AU Agenda 2063, call for reduction of poverty and the promotion of sustainable development in Lesotho. Overarching NSDP objectives are to pursue high levels of employment creating broad-based economic growth; develop key infrastructure; enhance human capital and the skills base, adopt technology and build the foundation for an innovative economy, improve health, combat HIV and AIDS and reduce vulnerability; revert environmental degradation and adapt to climate change; and to promote peace, democratic governance and build effective institutions.

The Southern African Development Community (SADC) has developed a Short-Term Action Plan (STAP) which sets out the details for the short-term programme of SADC's Regional Infrastructure Development Master Plan (RIDMP). This RIDMP constitutes infrastructure projects, some of which have committed financing while others are in the feasibility, pre-feasibility and inception stages. The RIDMP is aligned to the Government of Lesotho's National Strategic Development Plan (NSDP) that is geared towards reducing poverty and creating sustainable development in Lesotho.

The projects that are contained in the STAP are all earmarked for implementation between 2012 and 2017. The total project cost of implementing the 98 projects contained in the STAP database is estimated at \$62 billion and include projects in six sectors namely energy, tourism, transport, ICT, meteorology and water. The STAP is the first implementation phase of the SADC Vision 2027, under which expenditure for the medium-term phase is estimated at \$39 billion (2017-2022) and \$72 billion of the final long-term phase (2022-2027), with a project total of \$173 billion.

### Public-Private Partnerships (PPP) in Lesotho: Establishing a PPP Framework and Clear Policy Statement

While PPPs have been identified as a central procurement mechanism for implementing the RIDMP, in order to be effectively executed they will require dedicated support and capability to coordinate and govern current and future PPP initiatives. To date, several PPP Units have been successfully implemented across the SADC region, most notably in South Africa and Botswana and PPP initiatives are underway in other SADC members ranging from national level PPP frameworks to sectoral and sub-national PPP transactions PPP as a service delivery tool is being mainstreamed in the SADC Community and member governments, supported by the public, private sector, and International Financial Institutions are building their capacity to use the policy instrument effectively.

### PPPs in Lesotho: Status and Policy Initiatives

In 2005, Lesotho launched its flagship PPP program to replace the 100-year old Queen Elizabeth II hospital, build a new clinic and upgrade three other primary-care clinics. The new Queen Mamohato Memorial Hospital (QMMH) and the four clinics have now been operational for five years successfully delivering improved health care outcomes to a large percentage of the country's population. However, despite the improvements the program has now become a substantial financial burden on the Government. It is imperative that recognizing challenges in the existing system and identifying strategies for overcoming deficiencies in the current PPP scheme that have led to this situation are mitigated.

Recognizing the importance of the PPPs throughout SADC as well as the need to better utilize this development mechanism internally, the Government of Lesotho is in the process of approving a policy on PPPs and developing the law which will be part of the modified Public Financial Management and Accountability Act of 2011. As part of this process the government has enlisted assistance in the design and establishment of a PPP Unit in the Ministry of Finance, through a comprehensive organisation design and recruitment plan to allow for rapid implementation. The PPP Unit will be the focal point for PPP policy implementation and will oversee the overall PPP and Public Financial Management process of utilizing private sector investment to assist government deliver public services and infrastructure.

In pursuance of these goals, the Government acknowledges that higher levels of investment will enhance productive capacity, economic diversification and export opportunities. This will require a sound investment climate that will attract private investment and will also require clear and understandable rules to govern the process of establishing and implementing partnerships with the private sector and civil society. Moreover, the Government is committed to a vision of using strategies to convert savings into viable private domestic investment, while employing innovative and cost-effective strategies for attracting and retaining foreign investment from diversified sources. In short, both domestic and foreign capital, technology, and management will be mobilized in Lesotho to contribute to economic growth, improved service delivery, and poverty alleviation. Public-Private Partnerships will be one of the tools that the Government will utilize to achieve these overall policy objectives.

#### PPP Objectives in Lesotho

The Government of Lesotho is committed to increase capacity to mobilize Public Private Partnerships (PPPs) aimed at developing new and rehabilitating existing infrastructure to increase access to services and markets and strengthening linkages between rural and urban markets. PPP is an effective financing and management instrument to integrate traditional sectors of the national economy such as agriculture into the domestic market and leverage the productivity of the tourism, mining, manufacturing, and service economy.

In order to achieve these objectives, the GOL will develop a proper PPP scheme based on a solid Policy Framework and in line with the Southern African Development Community (SADC) Regional Strategy Framework of May 2013. This framework aims to attract private sector participation in the delivery of infrastructure where public sector resources are either not available or competitive in terms of efficiency and accessibility.

However, the Government recognizes that provision of adequate infrastructure including access to reasonable quality and affordable services, remains a substantial challenge for Lesotho. The Government further acknowledges that capacity constraints exist in the domestic private as well as public sectors to deliver on these ambitions, in particular noting that the Government has limited resources to allocate funding for investments in realization of new or improved infrastructure or enhanced quality and coverage. Nevertheless, it is long-term improvements in service delivery through determined efforts to work in partnership with the private sector and the community at large that will make Lesotho's economy more competitive and give the citizens the services they deserve in a socially, financially, and environmentally sustainable manner..

The Government of Lesotho believes that a sound PPP policy framework that encourages private sector investment in public infrastructure and governs the process to ensure quality, efficiency, and value-for-money is of the highest national priority.

## 1. Custodians of PPP Policy and Implementation

This PPP Policy shall apply to all Government entities including the Department of Economic Policy, Ministries, Government Departments, Local Municipalities, District Councils, State-owned legal entities that have recourse to the State for debt, and; any other bodies covered by public Law or any project implementing authority authorized to carry out public infrastructure procurement. The overall responsibility for the implementation of this PPP Policy rests with the Ministry of Finance (MoF). The Policy also provides rules and regulations on the eligibility and process of PPP projects in a number of sectors. The Government of Lesotho has determined the acceptance of unsolicited proposals to be an important step in encouraging the submission of private sector-initiated projects that have the capacity to contribute to national development.

This Policy should be read jointly with the existing public procurement Law and subsequent amendments until such time that the PPP frameworks are in place and functional and the Public Financial Management and Accountability Act 2011. Until the Public Debt Bill that is currently under consideration is enacted, the Policy should also be read with the Loans and Guarantees Act 1967, as amended; Local Loans Act, 2001, Loans Statutory Bodies Act, 1975, and Public Debt Management Laws, and any other relevant Laws and other laws and acts that are relevant to PPP in Lesotho.

## 2. PPP Policy Vision and Rationale

The purpose of this Policy Framework is to set out the Government of Lesotho's rationale for the adoption of PPPs, its objectives associated with the application of PPPs, the envisioned PPP strategies, options, techniques, and the key considerations concerning the institutional establishment, implementation, and management of PPPs in Lesotho.

This PPP Policy sets out the Framework for the identification, analysis, design, and implementation of PPPs in Lesotho. This Policy is based on the Government of Lesotho's assessment of the domestic environment for PPPs, and on its previous experience with procurement and implementation of PPP projects.

The Government's vision is to accelerate the provision of infrastructure assets and services by utilizing the know-how and resources of the private sector and providing an environment for viable and mutually attractive investment opportunities. The rationale for the adoption of PPPs is based on the following:

**Efficiency and Effectiveness** — Experience demonstrates that the private sector is consistently more efficient in terms of delivering projects on time and on budget with high quality than the public sector, especially if appropriate incentives and penalties are utilized.

**Promotion of Innovation** — not only through a competitive procurement process, but the inherent characteristic of a PPP allows for innovation in the accomplishment of outputs rather than prescribing inputs. This allows the private sector to use its business creativity and ingenuity to solve problems and deliver services to customers. Private sector firms are more likely to be innovative in terms of design, construction, operations and other functions to deliver assets or services with more efficient uses of capital and/or life-cycle costs.

**Improved Services to Users** —The private sector is more capable than the public sector in providing a better customer experience. Citizen satisfaction with service delivery and options of standards of service is a priority for the Government of Lesotho's PPP policy.



**Predictability of Capital Costs, Funding, and Management of Sovereign Management Financial Risks** —Effective PPP Governance and Procurement enables Government to more easily budget for its capital costs over an extended period of time through planned unitary payments, rather than attempting to manage large capital budgets over multiple periods. Moreover, by governing and regulating the process of government financial commitments, both direct and indirect, the Government is able to manage public financial risk while sharing or transferring appropriate risk to the private investor.

**Life-Cycle Approach** —PPPs consider a holistic approach towards integration of costs and revenue associated with design, construction, operation, and maintenance and transfer of assets and services in a single PPP contract thus leading to optimizing overall project costs.

**Managing maintenance costs and risks more effectively** —PPPs provide for maintenance services and prevent under-provision for maintenance due to low profile of maintenance operations and budgetary constraints. There also can be incentives for the private sector to provide higher quality and more regular maintenance of infrastructure assets at lower operating costs than with the public sector.

**Promotion of Private Sector** —PPPs will contribute to private sector development and the creation of higher quality private employment in Lesotho.

The Government of Lesotho clearly recognizes that the delivery of public services and assets via PPP types of procurement is a viable option that may, in combination with traditional procurement contribute to economic growth, accelerate Government's NSDP, promote the social development of Lesotho's population, and enhance the efficiency of public spending.

In this vein, the Government of Lesotho will ensure successful implementation of this PPP Policy by:

- Assuring its political commitment to promotion of PPP schemes and appointing champions for suitable identified eligible PPP projects;
- Adopting an enabling institutional, regulatory and legal framework to guide PPP development and process implementation;
- Developing a shared understanding of the concept and objectives of PPPs and the guiding principles to implement PPPs;
- Developing institutional capacity through strengthening the knowledge base and "hands-on" experience of managing PPP's;
- Introducing fair, equitable, transparent, competitive and cost-effective procurement processes for PPPs;
- Considering stakeholder dialogue throughout PPP procurement processes;
- Undertaking PPP projects through streamlined processes and principles;
- Ensuring application of guiding principles embarked upon in this PPP Policy such as Value-for-Money (VfM) analysis, , proper risk allocation, and affordability; and
- Attaining appropriate public oversight and long term monitoring of PPP projects and managing of PPP contract to enforce compliance and achieve the desired results.
- Managing and tracking the budgets of PPP projects and ensuring that the Government and associated projects are financially sound and that Government financial risk is minimized.

### 3. Definition of Public-Private Partnerships (PPP)

A PPP is defined as a contractual arrangement between a Procuring Unit and Private Partner whereby the private investor and/or operator designs, finances, constructs, operates, maintains and/ or rehabilitates a

public asset or service in whole or in part and in accordance with pre-defined output specifications on behalf of the Procuring Unit. The arrangement involves risk sharing between both parties. The Private Partner receives benefits/financial remuneration for the provision of assets or services according to pre-agreed terms by way of tariffs, user charges or government based payments or a combination thereof. PPP arrangements can take the form of short term (1-3 year) management or service contracts or can be longer term (7-35 years) agreements such as leases or concessions.

#### 4. Scope of PPP Policy

The application of PPPs must be closely aligned to the development goals, and strategies of the Government of Lesotho. The Procuring Unit may enter into various types of PPP arrangements with a Private Partner. The Government acknowledges as PPP both contracts for the operation of existing services/assets (e.g. Performance-based Management Contracts, and Lease Contracts or Rehabilitate, Operate, Transfer (ROT)) and/or contracts for the establishment of new services and/or assets (e.g. Design, Build, Finance, Operate/Maintain Transfer (DBFO/MT), Build, Operate, Transfer (BOT), Build, Own, Operate (BOO)), and any other PPP scheme as may be prescribed by supplementary guidelines or policies.

This Policy shall govern PPPs in the following infrastructure and services sectors:

- Energy Generation, Transmission, Distribution and Services (conventional and renewable);
- Infrastructure including municipal infrastructure, water, wastewater solid waste, industrial parks, sanitation, urban development, and irrigation systems;
- Transportation including: roads, bridges, railroads, airports, tunnels, and all public transport infrastructure;
- Wireless, fixed-line and broadband telecommunication;
- Social infrastructure including education, culture, health, tourism, sports and leisure related infrastructure;
- Other infrastructure opportunities including IT, corrections/prison, forestry, public housing, and public land management; and
- Any other type of infrastructure and services as the Government of Lesotho may designate is in the public interest.

#### 5. Guiding Principles to the Lesotho PPP Program

Lesotho is at early stages of developing and evolving its PPP program. It is essential that the planning and implementation of PPPs adheres to international and good governance practices including the following key principles:

- **Adherence to Development Objectives of Government of Lesotho**—all PPP projects must be consistent with the Government’s priorities regarding infrastructure development, sector growth, and pro-poor delivery of public services, set out in its Vision 2020 document, the NSDP, and other key economic policies;
- **Determining and Approving the Viability of PPP Projects including:**
  - **Value for Money (VfM) to the GOL and Basotho Tax Payers** — provision of an infrastructure asset or service by the Private Partner to be embodied in a PPP Agreement must result in a net benefit to the Government, and the Lesotho economy defined in terms of cost, price, quality, quantity, or risk transfer, or a combination thereof. To enhance the potential for obtaining VfM, the Government will foster competitive bidding; optimal

risk allocation between both public and private parties and define output-based procurement. Quantitative parameters and analyses will be established for all evaluated proposals that will compare the outputs and costs of the specific PPP against a benchmark, often referred to as the Public Sector Comparator (PSC). If quantification of VfM is not sufficient, the Procuring Unit may consider qualitative criteria when applying the VfM test to take into account the non-financial benefits of a given project such as the accelerated provision of the service, the access and quality of the service, or any other socially and economically important indicators.

- **Affordability** — financial commitments to be incurred by the Ministry of Finance or Procuring Unit in terms of the PPP Agreement must be met by funds designated within the existing budget. Any PPP involving fiscal support (whether through planned payments, guarantees or other forms) will be analyzed to ensure that the project demonstrates *fiscal affordability* to the Treasury of Lesotho and the users throughout the project lifecycle.
- **Fair and Responsible Risk Allocation** — an efficient risk allocation between all of the parties to a PPP is an essential determinant of whether VfM can be achieved in a given PPP project. Risks are to be allocated to the party best able to manage them, taking into account the public interest and the ability of the parties to bear and manage risks. The allocation of risks shall determine the selected method of private sector involvement and allocation of responsibilities. The GOL will analyze both financial risks and performance risks in this determination and structuring exercise.
- **Public Interest and Consumer Rights** — consideration of the 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 via a PPP, it is critical to ensure that the procurement process is structured such that it continues to be in the public interest. PPP projects should seek to safeguard the end user’s interest, particularly vulnerable groups;
- **Accountability and Governance** — The Procuring Unit is ultimately responsible for delivery of the service and asset outputs, including where PPPs are procured to deliver the outputs. At every stage of the PPP process, the procedures, laws, regulations and relevant policies must be followed. The Government will also establish mechanisms for post-award contract management and monitoring to ensure quality, customer satisfaction, and accountability on all sides.
- **Empowerment of the Lesotho private sector** — Where possible, all Lesotho PPP Projects shall include tangible Basotho enterprise empowerment and participation through a variety of mechanisms such as, but not limited to, local equity participation, a requirement for a minimum share of Basotho sub-contracting, skills transfer, and other mutually beneficial innovation to promote empowerment and growth of the local private sector.
- **Maintaining probity and transparency** — A key principle of the Lesotho PPP program will be to operate transparently and to ensure that the public is informed at all times about project opportunities, processes, and key issues. In order to engender public and investor confidence in the long term Lesotho PPP Program we will endeavor to demonstrate that the PPP Program in Lesotho operates with a “Level Playing Field” and that no person or group is advantaged or disadvantaged by a given project

## 6. The PPP Institutional Framework in Lesotho

In recognition of the need to introduce a clear and efficient institutional structure encompassing roles and functions related to project identification and implementation, oversight, review, clearance as well as

approval, the Government defines the basic roles and functions to be fulfilled and institutionalized to guide the development of PPP projects in Lesotho. The institutional framework set out in this PPP Policy shall not only serve to underpin the commitment of the Government of Lesotho towards sound Policy development and high-level reflection on the PPP Policy instruments, scheme, but will also ensure adequate project implementation processes. While institutional roles and responsibilities may change over time as Government's experience with PPPs evolves, the following institutions will be established and clearly mandated to assume key roles in the promotion and proper implementation of PPPs in Lesotho:

**Cabinet** – Cabinet will be provided with updates when determined appropriate by the Ministry of Finance of project progress, although Cabinet may request further information on any given proposal or active PPP project from the Ministry of Finance. No power of review or approval shall rest with this body, and the authority to reject or approve and potential project rests with the Ministry of Finance acting within the bounds of its authority as defined in this Policy and the PPP Act.

**The Ministry of Finance and its role in the PPP Framework** – The MoF will oversee and guide the PPP Unit to make sure it fulfills its responsibilities regarding PPP project development and coordination. It is the sole authority in charge of coordination, evaluation, and management of fiscal implications of PPPs. It evaluates the fiscal impact of PPP projects and acts to provide that they are consistent with Lesotho's fiscal constraints, and provides oversight so those fiscal risks are identified and managed appropriately. It ensures that economic, financial, and VfM assessments are conducted rigorously.

The responsibilities of the MoF with regard to fiscal management are to ensure that:

1. A representative from MoF participates during all stages of the PPP process.
2. Positive fiscal impact is given appropriate weight in prioritizing candidate PPP projects, and negative fiscal impacts are scrutinized.
3. The 'expected' and 'worst case' values of any fiscal commitments are identified, properly calculated, and highlighted in studies and other decision-documents on PPPs submitted to the MoF.
4. Economic and financial analysis is rendered properly and given appropriate prominence in decisions relating to PPPs;
5. Ensure that fiscal commitments related to PPPs are appropriately budgeted for, appropriated, and reported;
6. All fiscal commitments required by candidate PPP Projects are identified early in the process.
7. Liaise with relevant groups within MoF—such as the departments responsible for budget and debt management—providing a single point of contact between MOF and Public Sector/Procuring Unit.
8. Monitor fiscal risk across Government's portfolio of PPP Projects including receipt and assessment of risk reports from Procuring Unit.

The Ministry of Finance also holds ultimate authority for the approval of PPP project tenders from across each of the final four approval stages – MFA(I), MFA(II)A, MFA(II)B, and MFA(III).

Regarding these approval stages, the MoF is tasked with providing:

1. MFA(I) –An Approval Letter for the Feasibility Study signed by the responsible officer;
2. MFA(II)A – An Approval Letter for Project Request for Proposals signed by the responsible officer;
3. MFA(II)B – An Approval Letter for Appointment of the Preferred Bidder signed by the responsible officer, and;

4. MFA(III) – An Approval Letter for the Chief Accounting Officer of the relevant Procuring Unit to sign a negotiated contract.

**The National PPP Unit** — is the preliminary review and clearance body and an advisory agency for PPPs providing technical support to Public Sector/Procuring Units on matters related to PPP project identification, development, evaluation and implementation. It is also a strategic body driving the development of guidelines and best practices. It serves as the custodian of the PPP Policy and the driver of a constantly growing and evolving portfolio of viable PPP project opportunities. It shall function as an expert level unit charged with developing and improving the quality of PPP projects as well as an expert in the process of PPP rules, regulations, and guidelines. The PPP Unit will be established under the MoF.

The roles and responsibilities of the PPP Unit are to:

1. Coordinate the implementation of the PPP Policy, monitor and report to the Ministry of Finance on its progress.
2. Regulate the PPP scheme ensuring that the PPP pipeline and the projects are developed in accordance with the principles and procedures set out in this Policy.
3. Support with identification of projects appropriate for PPPs by providing technical assistance to various Procuring Units in structuring and evaluating PPPs throughout the first three stages of the PPP process. The Unit will assume an advisory role to Procuring Unit to guide and provide technical input through the entire procurement and tender process, including the appointment of suitable and skilled transaction advisors. It reviews the procedures and documentation submitted by bidders throughout the tender process including bid management, legal compliance management, and technical evaluation as well as compliance management. It acts as a first or preliminary clearance body prior to submission of documents and reports to the MoF.
4. Develop a PPP pipeline under the guidance of the MoF and Procuring Unit to make sure that the necessary approvals from PSIC are taken account of. It prepares an annual plan for identification and clearance of candidate PPP projects; and recommends their prioritization to the MoF. Through its understanding of PPP viability, risk, and “business cases, the PPP Unit will work with standardized approaches to ensure that the PPP pipeline features potential projects that meet the test of viability and advance accordingly. It will also serve as a gatekeeper to ensure that projects that do not qualify as PPP’s for any number of valid reasons do not advance or waste precious public sector time and resources.
5. Promote PPPs in Lesotho and internationally, and ensure public awareness among all stakeholders as well as facilitate capacity building across various Public Agencies/Ministries. The Unit will integrate best practices from around the world and in the SADC region to ensure that the development of PPP in Lesotho is informed.
6. Be a repository of knowledge and skills and continually build knowledge about identifying, developing, evaluating, implementing, and managing PPPs; including compiling and archiving information on PPP projects, and providing best practice and lessons learned.
7. Liaise with funding agencies and international development partners as well as private sector to obtain financial and technical support for PPPs.
8. Amend the PPP Policy as required upon receipt of approval from the Ministry of Finance.

The Principal Secretary of the Ministry of Finance will be responsible for general oversight of the PPP Unit in terms of Mandate, Role, Resources and PPP management.

**Procuring Unit** —as the “owner” of a PPP holds the lead role and interest in a candidate PPP Project. The Procuring Unit will apply the guiding principles in this Policy including, but not limited to VfM,

affordability, and proper risk allocation. It will submit candidate Projects to the PPP Unit (referred to below) including all information required for proper review and clearance.

The overall responsibility of the Procuring Unit is to:

1. Identify and develop candidate PPPs within the investment program of Procuring Unit, which is then to be assessed by the Public Sector Investment Committee (PSIC) for approval or deferral. Procuring Unit shall follow the actions and steps defined in the PSIC Project Appraisal Guidelines issued in November, 2013, by the Ministry of Development Planning of Government of Lesotho. All candidate projects will be developed using a standardized approach which demonstrates their viability, economic and financial benefits, and environmental compliance.
2. Prepare a Concept Note and Project Proposal in two stages in compliance with PSIC Project Appraisal Guidelines where it considers that a Project may be implemented as a PPP, and seek assistance from the PPP Unit if needed.
3. Carry out a Feasibility Study and PPP Structuring with technical assistance from the PPP Unit and the Transaction Advisor to be appointed by the Procuring Unit in consultation with the PPP Unit. The PPP Unit will then conduct a preliminary review before submitting the study and recommendations to the MoF.
4. Procure a PPP to be implemented - including receipt of bids, evaluation and selection, negotiation, and monitoring.
5. Enter into a written PPP Agreement with the successful Private Partner jointly with Ministry of Finance (MoF) in accordance with existing legislation for provision of a PPP.
6. Prepare a contract management plan, and arrange or provide for payments to Private Partner throughout the life cycle of the Project. Procuring Unit establishes a contract management team to manage the PPP Agreement upon financial close. The main responsibilities include:
  - Establishment of contract management and contract monitoring processes, including communication and reporting protocols within Government and with the Private Partner (This may include the creation of a contract monitoring team or unit);
  - Monitoring delivery of facilities and services specified in the contract;
  - Monitoring and managing risk under the contract, and reporting fiscal risk developments to MoF;
  - Managing changes in the contract, where these become necessary because of changing circumstances (with advice from the PPP Unit);
  - Enforcing the contract as necessary (with advice from the PPP Unit and legal counsel); and
  - Closing the contract at its termination.

**Project Officer** — is the person identified and appointed in terms of the Public Service Act that is tasked with the management of the proposed PPP project, from project identification until the expiry of the PPP Agreement in question. Following the signing of a PPP Agreement, the Project Officer shall serve as the contract manager of the PPP Agreement, and shall undertake such tasks as are required by the PPP Unit to ensure that the PPP Agreement in question is adequately managed.

**Public Sector Investment Committee (PSIC)** — provides initial oversight and review of the Concept Note and Project Proposal prepared by the Procuring Unit.

The PSIC is specifically required to:

1. Liaise with the Procuring Unit throughout the development of the Concept Note and Project Proposal.

2. Consider the Concept Note and Project Proposal against the standardized approach provided by the actions and steps defined in the PSIC Project Appraisal Guidelines with particular focus on viability, economic and financial benefits, and environmental compliance.
3. If deemed appropriate, grant final approval – referred to as PSIC(0) - prior to registration of the Project with the MoF, after which time the project will need to clear the remaining four stages of project approval.

An illustrative graphic outlining the roles and responsibilities of the key public sector agencies in the PPP Scheme is provided in **Annex I: Responsibilities of Key Public Sector Bodies**.

## 7. The PPP Development and Implementation Process

In recognition that PPPs are complex and take a long time to procure, the Government of Lesotho intends to introduce streamlined processes concerning procurement, management and implementation of such projects. The objective is to establish a coherent and clear PPP process aimed at improving credibility and transparency throughout the various stages of PPP Project development. Detailed guidelines will be issued following this PPP Policy by the PPP Unit to serve as a best practice guide for PPP Practitioners – both public and private sector-- addressing the requirements and driving forces throughout various stages of the PPP Project cycle. The relevant Procuring Unit is required to adhere to guiding principles set forth in this PPP Policy, and comply with existing legislation, regulations and procurement procedures as defined in Lesotho.

### Four Key Stages of PPP: From Inception to Award

A typical PPP Project cycle encompasses four stages including Concept Note and Project Proposal, Detailed Feasibility study and PPP Structuring, Procurement and Transaction, as well as Contract Management. At each stage, project inputs will be reviewed by the PPP Unit before approval to proceed to the next stage is granted by the MoF. The PPP Unit shall be involved actively and consulted throughout all stages of the PPP cycle.

**Figure 1: PPP Process Stages**

No.	Stage	Content and Objective
0	<b>Concept Note and Project Proposal</b>	Concept Note and Project Proposals to be approved by PSIC include a needs analysis and identification of proper assets and services to meet the appraisal criteria defined in the PSIC Guidelines issued in November, 2013 by the Ministry of Development Planning of Government of Lesotho
I	<b>Detailed Feasibility Study and PPP Structuring</b>	Design and develop viable PPP options and conduct the necessary detailed pre-feasibility or feasibility study with the objective of determining whether a proposed project is both financially viable and in harmony with the development objectives of the Government of Lesotho. The MoF will review, approve and decide on the project's capacity to fulfill the guiding principles set forth in this PPP Policy including, but not being limited to VfM, optimal risk transfer, and affordability.

<b>II</b>	<b>Procurement and Transaction</b>	Prepare the PPP Agreement. Prepare, manage the competitive bidding process and pass through various approval stages.
<b>III</b>	<b>Contract Management</b>	Establish a functioning contract management procedure (including contract monitoring unit or team) which assures a smart path including flexibility and reliability concerning the contractual terms specified in the PPP Agreement

## 7.1 Four Stages of PPP Process

The Government of Lesotho provides for identification, structuring of PPPs, and undertaking of feasibility studies as well as procurement and management thereof based on five approval stages.

### PSIC(0) — Concept Note and Project Proposal

#### *Concept Note*

Any PPP process starts with the review of existing service or infrastructure in the geographic location under consideration. The Procuring Unit must conduct a proper and thorough study of the distribution of assets and facilities. Procuring Unit must conduct an assessment of current and future demand for infrastructure and/or services by comparing standards and norms and thus deducing the existing infrastructure gaps. A Concept Note shall be prepared spelling out clearly the requirements concerning the infrastructure or service. The Concept Note indicates the revised plan for infrastructure and service delivery, which is to include the actions to be taken including:

- Reorganization of existing facilities aimed at optimizing service delivery;
- New facilities to be constructed or existing facilities to be refurbished to meet the demand (current and future) for services;
- Improvement in service delivery of existing facilities;
- Improvement in provision of specific services in a region.

The purpose of this stage is to identify those assets, and services—existing or new—that render best VfM, allow for optimal risk allocation, are affordable, and in public interest. The Projects identified shall abide by the guiding principles set forth in this PPP Policy.

The Procuring Unit submits the Concept Note to PSIC for an approval of the overall Project idea. The Concept Note is a summary of the suggested project which may follow the Project Appraisal Guidelines issued in November, 2013 by the Ministry of Development Planning of Government of Lesotho. Core elements of a Concept Note may include:

1. A concise description of Procuring Unit's need and Project objectives (overall objective/goal, purpose and results/outputs) and the work program (activities);
2. A detailed description of the various components of the Project;
3. A preliminary Feasibility to indicate that the project is well designed and will deliver tangible and sustainable benefits to target groups and an estimation of funding available both for the Project and the procurement process;
4. An outline of the key benefits of the Project and primary beneficiaries;



5. A “market analysis and business case” to demonstrate that the project has ample demand sufficient to attract private investment and the preliminary estimate of the investment and financing plan to determine viability, bankability, and affordability
6. A list of stakeholders and target groups that have been identified, equity and institutional capacity issues that are analyzed, and ownership demonstrated

PSIC’s overriding concern in assessing the Concept Note will be whether the Project aligns with Government of Lesotho’s investment priorities and strategic objectives and whether it should form part of the PPP Unit’s Pipeline.

### *Project Proposal*

In addition to the criteria mentioned in the PSIC Guidelines, the Project Proposal involves a confirmation of potential PPP opportunities through an initial assessment of: institutional needs, solution options, project costs and revenue, and a preliminary qualitative risk analysis. The Project proposal should give an early confirmation of the Project’s suitability for implementation as PPP. A detailed feasibility study, based on the pre-feasibility study, will be completed only upon approval by PSIC. The approval of the Concept Note and Project Proposal must be provided by the PSIC, which is referred to as PSIC(0).

### **MFA(I) — Detailed Feasibility Study including PPP Structuring**

Once approved, each need matter identified in the Project Proposal is structured and evaluated further to establish whether a PPP is the preferred option to develop the Project and/or deliver assets or services to the public. To determine whether the proposed PPP is in the best interest of a Procuring Unit, it must undertake a detailed feasibility study that:

1. Explains the strategic and operational benefits of the proposed PPP for the Procuring Unit in terms of its strategic objectives and government policy;
2. Describes in specific terms the nature of the Agency’s functions concerned and the extent to which this Agency’s function, both legally and by nature, may be performed by a Private Partner;
3. Demonstrates the affordability of the PPP for the Procuring Unit (in relation to a PPP pursuant to which a Procuring Unit will incur any financial commitments);
4. Sets out the proposed allocation of financial, technical and operational risks between the Procuring Unit and the Private Partner;
5. Demonstrates the anticipated VfM to be achieved by the PPP;
6. Explains the capacity of Procuring Unit to procure, implement, manage, enforce, monitor and report on the PPP.

A Procuring Unit may not proceed with the procurement phase of a PPP without prior written approval of the responsible officer at the MoF regarding the acceptability of the Feasibility Study.

Overall activities needed to structure the Project include carrying out a preliminary scoping, financial modeling, including making a choice between government funding and PPP. The preliminary scoping outlines the rationale and potential options for the PPP project to be pursued by the Procuring Unit for provision of assets or improvement in services and meeting demand. The scoping shall entail the following steps:

1. List a selected and reasonable list of PPP options to be considered.
2. Assess the advantages and disadvantages of each option based, for example, on:
  - Technical aspects including environmental and social assessments;

- Funding and financial impacts;
  - Thorough Risk analysis (qualitative and quantitative);
  - Market capability and demand.
3. Reject all options that are not legally sustainable, too expensive or too risky.
  4. Select the preferred option with justifications.

The choice of appropriate PPP arrangement is based on two major factors:

- Identification of risk and allocation of risks between Private Partner, and Procuring Unit;
- Analyzing the PPP option, understanding the context of each Project –technically, environmentally, legally, etc. -- and the resources available to both the Government and Private Partner and abiding by the guiding principles set out in Section 5 of this document.

Once the PPP structure has been thoroughly developed and a financial and viability assessment has been rendered, a detailed report is prepared and submitted for a preliminary review to the PPP Unit. Upon preliminary clearance of PPP Unit, the report is submitted to the MoF for its final review, clearance and approval. This approval stage is referred to as MFA(I), which involves the delivery of an Approval Letter for the Feasibility Study signed by the responsible officer at the MoF.

#### **MFA(I), MFA(II)A, MFA(II)B and MFA(III) — Procurement and Transaction Stage**

Following the determination of PPP structure, the next step in the PPP process is procurement. Based on the requirements of the PPP Project, the scope of work defined, and availability of bidders and private providers or developers in a specific sector, the most suitable procurement process should be followed as recommended by the PPP Unit.

The Procurement and Transaction Stage is constituted of three approvals required from the MoF:

1. MFA(II)A – An Approval Letter for Project Request for Proposals signed by the responsible officer;
2. MFA(II)B – An Approval Letter for Appointment of the Preferred Bidder signed by the responsible officer, and;
3. MFA(III) – An Approval Letter for the Chief Accounting Officer of the relevant Procuring Unit to sign a negotiated contract.

Procurement and all transaction documents have to be submitted to the PPP Unit for a preliminary review before delivery to the MoF for approval per MFA(II)A. The PPP Unit will be responsible for selecting the preferred bidder, and will require approval from the MoF of the selection per MFA(II)B. The final aspect of the Procurement and Transaction Stage continues past bid evaluation to include negotiation (if needed), contract signature, and financial close. Authority to provide approval to sign the negotiated PPP Agreement resides with the MoF, which is referred to as MFA(III).

Please refer to the graphic in **Annex II: PPP Approval Process** for the PPP approval and evaluation process as set out in the Draft PPP Regulations.

The transaction structure is further legally formalized in the form of a draft PPP Agreement. Under the transaction structure, the following information is to be provided:

1. The parties involved in the contract
2. The contractual relationship between the parties
3. The nature of the Agreement

4. The key risks and their allocation
5. Tariff structure
6. Government commitment
7. Duration of contract
8. Performance indicators
9. Payment terms
10. Award criteria
11. Contract management strategy

The purpose of this stage is to promote competitive bidding by well qualified bidders, so as to deliver value to the public. A transparent, accountable, non-discriminatory, competitive and timely procurement process is to be followed so as to encourage maximum participation by private sector and to generate public confidence in the procedure. This stage includes drafting the PPP Agreement, drafting Expression of Interest documents (EoI) to assess qualifying bidders, drafting the Request for Questions (RfQ) and Request for Proposals (RfP), developing criteria for selection of bidders at various stages of procurement, consulting with bidders, issuing the RfP, evaluating bids and recommending award.

### **Unsolicited Proposals**

The Government of Lesotho allows for the submission of Unsolicited Proposals by private parties in accordance with a process that is fair, transparent, and competitive as stipulated by provisions of the PPP Act and PPP Regulations. The objective is to use this mechanism as a method of stimulating private sector-initiated proposals that identify projects presenting concerted Value for Money and Affordability in priority sectors and in accordance with national development objectives as embedded in the National Strategic Development Plan (NSDP), as well as the Sustainable Development Goals and AU Agenda 2063.

### **Contract Management**

Upon closure of the transaction stage, the PPP Agreement implementation stage initiates. At this stage, the Procuring Unit needs to ensure that the terms of the contract are fulfilled and delivered properly, and that new events are responded to intelligently. This stage covers project implementation and monitoring over the life cycle of the PPP Project.

Contract management is not a passive reporting exercise. It is an active process that involves a wide range of skills. Projects are not static, conditions change and the capability of the public authority at the interface with the private sector party is therefore crucial. A contract management team is established to monitor PPP delivery and risk, manage change, and close the contract. The contract management and or monitoring team can work in or for governments and can be used to monitor several PPP contracts. The cost of contract management can also be included in the bidding documents.

## **7.2 Principles governing PPP Processes**

The principles set out in this Policy to guide review and approval of candidate projects are intended to ensure that:

- The PPP guiding principles are effectively and consistently applied;
- Government resources available to develop and implement PPP projects are used efficiently, by implementing first the highest priority projects that will deliver the most value;
- These projects are properly developed and evaluated, and meet the criteria set out in this Policy.

Throughout the final four approval stages in the procurement process (MFA(I)- MFA(III)), the PPP project undergoes a preliminary review and clearance by the PPP Unit prior to submission to the MoF for final review, clearance and approval. The project needs the final approval of the MoF prior to financial close.

## **8. Probity Management**

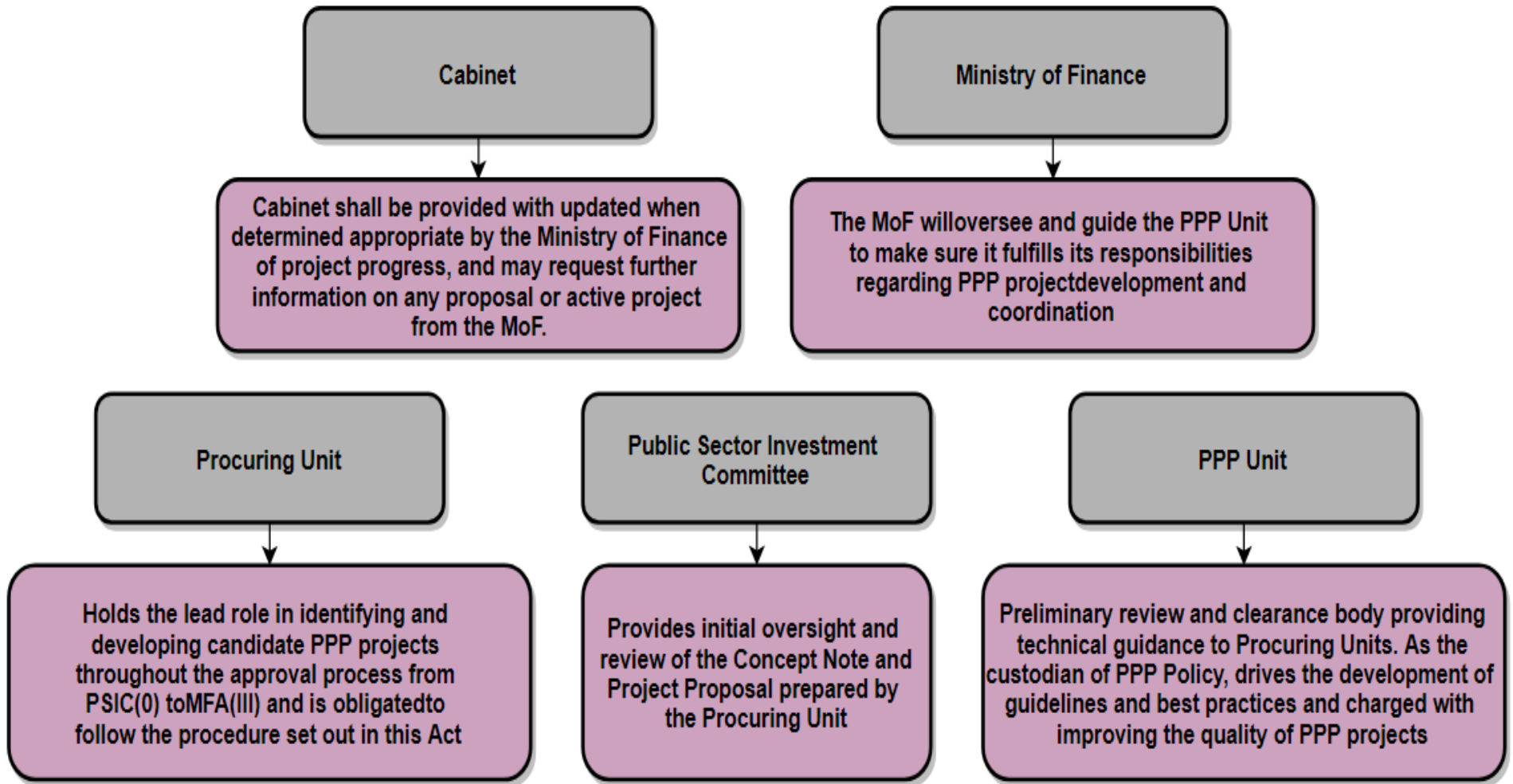
The Government of Lesotho is committed to probity and transparency with regard to all aspects of the PPP program. Probity management is the set of responsibilities and practices designed to promote the development and implementation of PPPs through a fair process, in which no person achieves personal advantage or disadvantage through involvement in the process.

The PPP Unit will oversee and implement probity management. This will be done through, among other things, the appropriate use of:

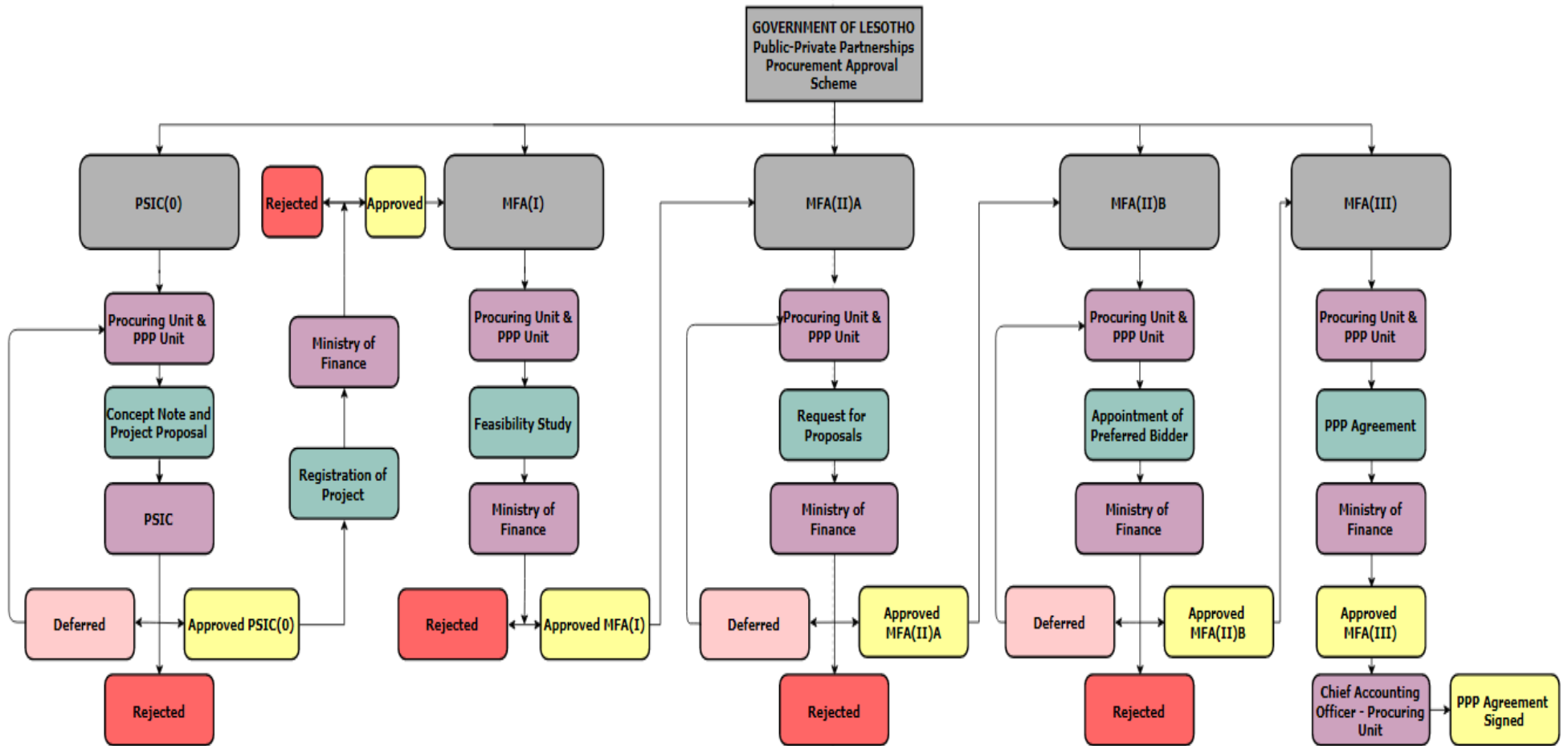
- Probity Advisors;
- Probity Audits;
- Transparency Procedures

The Office of the Auditor General has the right to audit any PPP project at any stage.

**Annex I: Roles and Responsibilities of Key GoL Agencies in the PPP Framework**



**Annex II: PPP Approval Process**



**Final PPP Act**

**Proposed Draft Public Private Partnership (PPP) Law**

**Supplement No. 1 to Gazette No..... of .....September, 2017**

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An Act to provide for ..... and to provide for incidental matters .

Enacted by the Parliament of Lesotho

**HONOURABLE DR MOEKETSI MAJORO**

Minister of Finance make the following Act:

**1. INTERPRETATION**

In this PPP Act unless the context indicates otherwise, a word or expression to which a meaning has been assigned in this Act, has the same meaning, and –

- 1.1. **“Affordability”** means that the financial commitments to be incurred by a Procuring Unit in terms of a PPP Agreement can be met—
  - 1.1.1. allocated within the Procuring Unit’s existing budget for the Procuring Unit Function to which the PPP Agreement relates; and/or
  - 1.1.2. destined for the Procuring Unit in accordance with the PSIC future budgetary projections for the Procuring Unit;
- 1.2. **“Attorney-General”** means office of the Attorney-General in Lesotho whose duties and responsibilities are defined in Section 98 of the *Constitution of Lesotho 1993* and *Office of Attorney General Act 1994*;
- 1.3. **“Authorized Officer”** means the Principal Secretary of the Ministry of Finance who is empowered to provide the final approval at the stages referred to as MFA(I), MFA(II)A, MFA(II)B and MFA(III);
- 1.4. **“Cabinet”** means collectively the Prime Minister and the other GOL Ministers who are responsible to report to the Houses of Parliament for any advice given to the King in terms of Section 88(1) of the Constitution;
- 1.5. **“Chief Accounting Officer”** means an officer in terms of Section ii of the Public Financial Management and Accountability Act of a Procuring Unit who is charged with responsibility for financial control over the Procuring Unit in question and who shall be tasked with applying for all project approvals as set out in this Act;
- 1.6. **“Concept Note”** means the summary of a proposed PPP project to be submitted to the PSIC for approval in accordance with the PSIC guidelines;
- 1.7. **“GOL”** means the Government of Lesotho;
- 1.8. **“Government’s Strategic Plan”** means the GOL’s strategic objectives or priorities as set out in the National Strategic Development Plan, or any other relevant plan developed and/or adopted by GOL which sets out the priority areas of development for Lesotho;
- 1.9. **“MDP”** means the Ministry of Development Planning;



- 1.10. **“Minister”** means the Minister responsible for Finance;
- 1.11. **“MoF”** means the Ministry of Finance of Lesotho, being the sole authority in charge of coordination, evaluation, and management of fiscal implications of PPPs. It ensures the fiscal impact of PPP projects is consistent with Lesotho’s fiscal constraints, and that fiscal risks are identified and managed appropriately. The MoF is tasked with not only ensuring that economic, financial, and Value for Money assessments are conducted rigorously, but also with providing approval at each stage of the PPP from MFA(I) to MFA(III) before eventual signing of a PPP Agreement;
- 1.12. **“MFA”** means the MoF Approvals required from the various approval stages during the procurement process, which are MFA(I), MFA(II)A, MF(II)B, and MFA(III);
- 1.13. **“MFA(I)”** means the MoF of the Feasibility Study which the Procuring Unit shall be obliged to obtain from the MoF as detailed in Section 5 before proceeding to development of the Request for Proposals for the purpose of procurement;
- 1.14. **“MFA(II)A”** means the MoF approval of the Request for Proposals which the Procuring Unit shall be obliged to obtain from the MoF in accordance with Section 1 of the PPP Regulations before proceeding to PPP Agreement Negotiations;
- 1.15. **“MFA(II)B”** means the MoF approval of the Appointment of the Preferred Bidder by the Procuring Unit in accordance with the requirements of PPP Agreement Negotiation as set out in Section 2 of the PPP Regulations;
- 1.16. **“MFA(III)”** means the MoF approval of the negotiated PPP Agreement which the Procuring Unit shall be obliged to obtain from the MoF prior to signing the PPP Agreement as set out in Section 3 of the PPP Regulations;
- 1.17. **“PFMAA”** means the Public Financial Management and Accountability Act No 51 of 2011, as amended from time to time;
- 1.18. **“PPP Agreement”** means the agreement to be entered into between the Procuring Unit and the Preferred Bidder which shall detail the terms and conditions upon which such a relationship is governed;
- 1.19. **“PPP Policy”** means the PPP policy adopted by the GOL in order to provide for the implementation and management of PPPs in Lesotho;
- 1.20. **“PPP Unit”** means the unit established in terms of this Act under the MoF as the advisory body responsible for preliminary review and clearance of all proposed PPP projects. It is also tasked with providing Procuring Units with technical assistance pursuant to the conclusion of a PPP Agreement, and during the term of an existing PPP project and hand back stage;
- 1.21. **“PSIC”** means the Public Sector Investment Committee which is responsible for providing initial review and approval of the Concept Note and Project Proposal, which is referred to as PSIC(0);
- 1.22. **“PSIC(0)”** means the PSIC approval of the Concept Note and Project Proposal which the

Procuring Unit shall be obliged to obtain from the PSIC in accordance the PSIC Guidelines and the requirements of Section 4 of this Act before proceeding to development of the Feasibility Study;

- 1.23. **“Preferred Bidder”** means the bidder, to be selected as the preferred bidder in terms of Section 2 of the PPP Regulations who shall become the Private Party to the PPP Agreement in question;
- 1.24. **“Private Partner”** means a private party to a PPP Agreement;
- 1.25. **“Procuring Unit”** means a ministry or other statutory body, or a local authority as which shall be entitled to conclude a PPP Agreement subject to this Act;
- 1.25 **“Procuring Unit Function”** means a service, task, assignment or other function that a Procuring Unit is entitled or obliged to perform –
- i. in the public interest;
  - ii. on behalf of the public service generally; or
  - iii. any part or component of any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function;
- 1.26 **“Project Officer”** means a person identified and appointed in terms of the Public Service Act tasked with the management of the proposed PPP project, from project identification until the expiry of the PPP Agreement in question;
- 1.27 **“Proponent”** means any person, whether natural or a corporate legal entity, who submits an Unsolicited Proposal in accordance with the Section 7 of this Act;
- 1.28 **“Public Private Partnership”** or **“PPP”** means a commercial transaction between a Procuring Unit and a Private Partner in terms of which the Private Partner –
- 1.28.1 performs a Procuring Unit function on behalf of a Procuring Unit; and/or
  - 1.28.2 acquires the use of State Property for its own commercial purpose; and
  - 1.28.3 assumes substantial financial, technical and operational risks in connection with the performance of the Procuring Unit function and/or use of State Property; and
  - 1.28.4 receives a benefit for performing the Procuring Unit function or from utilising State Property, either by way of-
    - 1.28.4.1 consideration to be paid by the Procuring Unit which is allocated in terms of the Procuring Unit’s existing budget
    - 1.28.4.2 tariffs, charges or fees to be collected by the Private Partner from users or customers of a service provided to them; or
    - 1.28.4.3 a combination of such consideration and such tariffs, charges or fees;

- 1.29 **“PSIC”** means the Public Sector Investment Committee, the highest administrative authority for the appraisal of projects for inclusion in the GOL’s capital estimates and the Public Sector Investment Program;
- 1.30 **“Request For Proposals (RFP)”** means a request to be published by the Procuring Unit which shall set out the criteria for selection of the Preferred Bidder;
- 1.31 **“Request for Qualifications (RFQ)”** means the request to be published by the Procuring Unit upon commencement of the procurement of a PPP to test the market for the existence of private entities capable of performing the Procuring Unit function and/or acquiring the use of State Property as the case may be;
- 1.32 **“State Property”** includes all movable, immovable property and/or incorporeal property belonging to the GOL as well as intellectual property rights vested in the GOL;
- 1.33 **“Transaction Advisor”** means a person or persons appointed contractually by a Chief Accounting Officer of a Procuring Unit in consultation with the PPP Unit, who has or have appropriate skills and experience to assist and advise the Procuring Unit in connection with the PPP project procurement;
- 1.34 **“Unsolicited Proposals”** means any proposal that is submitted to undertake a Public Private Partnership project initiated by a private party that is not received in response to the release of a Request for Proposals by the Government of Lesotho; and
- 1.35 **“Value for Money”** means that the provision of the Procuring Unit Function or the use of State Property by a Private Partner in terms of the PPP Agreement results in a net benefit to the Procuring Unit defined in terms of cost, price, quality, quantity, risk transfer or a combination thereof.

## 2. EXCLUSIVE COMPETENCY OF THE CHIEF ACCOUNTING OFFICER

- 2.1. The Chief Accounting Officer of the Procuring Unit is solely authorized to sign the PPP Agreement.

## 3. ROLES AND RESPONSIBILITIES

### 3.1. Cabinet

- 3.1.1. Cabinet shall be provided with updates when determined appropriate by the Ministry of Finance of project progress, and may request further information on any proposal or active project from the MoF.

### 3.2. The MoF

- 3.2.1. The MoF is tasked with oversight and guidance of the PPP Unit throughout project development and evaluation, and acts as the sole authority empowered to review and approve candidate PPP projects from MFA(I) to MFA(III).
- 3.2.2. The additional primary roles and responsibilities of the MoF are to:

- 3.2.2.1 monitor the GOL's financial risk in relation to each PPP Agreement signed with a Private Partner by assessing the relevant studies and reports submitted to the MoF by the Procuring Unit in question in accordance with this Act.
- 3.2.2.2 ensure that the fiscal impact of proposed PPP projects is consistent with the GOL's fiscal constraints, and that fiscal risks are identified and managed appropriately and assures that economic, financial and Value for Money assessments are conducted rigorously.

### 3.3 PPP Unit

- 3.3.1. This Act hereby establishes a PPP Unit under the MoF which shall be tasked with the preliminary review of all proposed PPP projects and shall be tasked with providing technical support to Procuring Units as well as recommendations on the review and approval of candidate PPP projects from stage MFA (I) to MFA (III), as set out in this Act and the PPP Policy.
- 3.3.1 In addition to those roles and responsibilities as set out in this Act, the roles and responsibilities of the PPP Unit shall be to:
  - 3.3.1.1 promote PPPs in Lesotho and internationally and to ensure public awareness and capacity building within Lesotho in relation to PPPs; and
  - 3.3.1.2 serve as the PPP regulatory body responsible for overseeing all signed PPP Agreements in conjunction with the Procuring Unit and Project Officer;
  - 3.3.1.3 ensure that the PPP pipeline and projects are developed in accordance with the principles and procedures set out in this Act and the PPP Policy;
  - 3.3.1.4 assist Procuring Units with the identification of projects that are appropriate to be undertaken as PPP projects;
  - 3.3.1.5 assist Procuring Units with liaising with funding agencies and the private sector to obtain financial support for a proposed PPP project;
  - 3.3.1.6 co-ordinate and monitor the implementation of the PPP policy, and report to the MoF on the progress of such implementation;
  - 3.3.1.7 provide technical assistance pursuant to the conclusion of a PPP Agreement, and during the term of a signed PPP Agreement and the implementation of a PPP project;
  - 3.3.1.8 archive information regarding all active and completed PPP Agreements, providing Procuring Units with information regarding best practice in relation to PPP projects.

### 3.4 Procuring Unit

- 3.4.1 The Procuring Unit holds the lead role in identifying and developing candidate PPP

projects throughout the approval process from PSIC(0) to MFA(III) and is obligated to follow the procedure set out in this Act.

- 3.4.2 The Procuring Unit is required to obtain the authorization of the PSIC and MoF under the various stages of the PPP Approval Process as set out in this Act.

### 3.5 Project Officer

- 3.5.1 The Project Officer identified and appointed in terms of the Public Service Act shall be tasked with the management of the proposed PPP project, from project identification until the expiry of the PPP Agreement in question.
- 3.5.2 Following the signing of a PPP Agreement, the Project Officer shall serve as the contract manager of the PPP Agreement, and shall undertake such tasks as are required by the PPP Unit to ensure that the PPP Agreement in question is adequately managed.

### 3.6 The PSIC

- 3.6.1 The PSIC shall be tasked with providing Procuring Units with approval of the Concept Note and Project Proposal described as PSIC(0) in accordance with this Act, evaluating all of the New Capital Budget Project Proposals according to the Project Appraisal Guidelines, and ensuring the inclusion of approved PPP projects into the GOL's Public Sector Investment Programme (PSIP).
- 3.6.2 In assessing whether or not to provide the Procuring Unit with approval under PSIC(0), the PSIC shall consider whether or not the proposed PPP project is aligned to Government's Strategic Plan and/or the Procuring Unit's investment priorities.
- 3.6.3 The granting of PSIC(0) shall occur in accordance with the PSIC Project Appraisal Guidelines.

## 4. PROJECT IDENTIFICATION

### Concept Note

- 4.1 As soon as the Procuring Unit's review of the existing services and/or infrastructure identifies a project that it believes would be well-suited to be concluded as a PPP project, the Chief Accounting Officer shall consult with the PPP Unit in order that the PPP Unit can provide recommendations as to the suitability of the proposed project as a PPP project.
- 4.2 The Chief Accounting Officer shall then proceed to submit a Concept Note to the PSIC for approval in accordance with the PSIC Appraisal Guidelines. Such a Concept Note shall:
- 4.2.1 set out the Procuring Unit and/or the GOL's needs in relation to the infrastructure and/or service/s that are proposed to be adopted as a PPP project;
- 4.2.2 provide for the revised plan for the infrastructure and/or service that is proposed to be undertaken as a PPP project, including how the proposed PPP project will result in improved service delivery, if applicable, and adherence to Government's Strategic Plan in relation to the infrastructure and/or service concerned;

- 4.2.3 comprise of between three to five pages; and
  - 4.2.4 be intended to save time, and as such shall rather be limited to providing a summary of the proposed PPP project as required by the PSIC guidelines.
- 4.3 The PSIC shall assess whether or not the proposed PPP project is aligned to Government's Strategic Plan and/or the Procuring Unit's investment priorities.
- 4.4 If the PSIC:
- 4.4.1 reject the Concept Note, the Procuring Unit shall not be entitled to proceed with the proposed PPP project;
  - 4.4.2 defers the Concept Note, the Procuring Unit shall be obliged to revise the Concept Note in accordance with the recommendations and/or queries raised by the PSIC and re-submit the revised Concept Note for PSIC approval; or
  - 4.4.3 approves the Concept Note, the Procuring Unit will then progress to the Project Proposal stage.

#### Project Proposal

- 4.5 The Procuring Unit shall develop a Project Proposal following approval of the Concept Note, in consultation with the PPP Unit, for submission to the PSIC which shall evidence that the proposed PPP project is relevant and feasible as a project to be undertaken by the GOL and for inclusion in the GOL's capital estimates and PSIP for pipeline projects.
- 4.6 The Project Proposal shall comply with the requirements of the PSIC Appraisal Guidelines in all respects, save those that are deemed by the PSIC as irrelevant to a specific proposed PPP project.
- 4.7 The two-stage approval of the Concept Note and Project Proposal by the PSIC shall be defined as PSIC(0) approval.
- 4.8 The Procuring Unit shall only be entitled to proceed to the Feasibility Study as set out in Section 5 below if PSIC(0) approval is obtained from the PSIC after assessment of the Concept Note then Project Proposal.
- 4.9 Once approval is granted by the PSIC to proceed to the Feasibility Study, the Procuring Unit must register the project in writing with the PPP Unit.

### **5. FEASIBILITY STUDY**

- 5.1 After obtaining approval at PSIC(0), the Procuring Unit shall be entitled to appoint a Transaction Advisor to assist with undertaking those tasks as required in this Act to conclude a PPP Agreement.
- 5.2 The procurement of a Transaction Advisor shall be undertaken in consultation with the PPP Unit.

- 5.3 In addition to the assistance to be provided by a Transaction Advisor as set out in Section 5.1 above, the Procuring Unit shall request technical assistance from the PPP Unit in carrying out the Feasibility Study and as may otherwise be required by this Section.
- 5.4 To determine whether the proposed PPP project is in the best interests of a Procuring Unit and the GOL, the Chief Accounting Officer of that Procuring Unit must undertake a Feasibility Study that:
- 5.4.1 explains the strategic and/or operational benefits of the proposed PPP project for the Procuring Unit and the GOL in terms of the Procuring Unit's strategic objectives and/or Government's Strategic Plan;
  - 5.4.2 describes in specific terms –
    - 5.4.2.1 in the case of a proposed PPP project involving the performance of a Procuring Unit function, the nature of the Procuring Unit function concerned and the extent to which this Procuring Unit function, both legally and by nature, may be performed by a Private Partner; and/or
    - 5.4.2.2 in the case of a PPP involving the use of State Property, a description of the State Property concerned, the uses, if any, to which such State Property has been subject to prior to the identification of this property as part of the proposed PPP project, and a description of the types of use that a Private Partner may legally subject such State Property to.
  - 5.4.3 in relation to a proposed PPP project pursuant to which a Procuring Unit will incur any financial commitments, demonstrates the Affordability of the proposed PPP project for the Procuring Unit;
  - 5.4.4 sets out the proposed allocation of financial, technical and operational risks between the Procuring Unit and the Private Partner;
  - 5.4.5 demonstrates the anticipated Value for Money to be achieved by the proposed PPP project;
  - 5.4.6 provides a comprehensive financial model of the proposed project;
  - 5.4.7 explains the capacity of the Procuring Unit to procure, implement, manage, enforce, monitor and report on the PPP; and
  - 5.4.8 proposes a procurement process to be utilized by the Procuring Unit in procuring the proposed PPP project, that:
    - 5.4.8.1 is in accordance with those procurement processes that are contained in the regulations; and;
    - 5.4.8.2 provides for the granting of a margin for those bidders who can demonstrate the requisite Basotho shareholding, as may be prescribed in the relevant national procurement legislation and/or regulations.
- 5.5 The Feasibility Study shall be submitted to the PPP Unit for preliminary review and evaluation.

- 5.6 The PPP Unit shall review the feasibility of the proposed PPP project and the method of procurement proposed by the Procuring Unit and either request further clarification on any aspect of the Feasibility Study as it deems appropriate, or submit directly to the MoF for final review and approval.
- 5.7 The MoF shall provide final review, clearance and approval of the Feasibility Study through delivery of an Approval Letter, which is defined as MFA(I).

## 6. PROCUREMENT

- 6.1. The Procuring Unit shall comply with the procurement process to be prescribed in the PPP Regulations.
- 6.2. Approval of the RFP by the MoF, defined as MFA(II)A, may not be granted unless the procurement process prescribed by the PPP Regulations is incorporated in each RFP.

## 7. UNSOLICITED PROPOSALS

### Eligibility of Unsolicited Proposals

- 7.1. A Procuring Unit shall not be obliged to consider an Unsolicited Proposal for a PPP unless the proposal:
  - 7.1.1. is independently originated by the Proponent without input, assistance or supervision from public authorities;
  - 7.1.2. provides sufficient detail so the Procuring Unit may determine the objective of the project, the significance of the project, and whether the project qualifies as a PPP per the definition provided in this Act in eligible infrastructure and services sectors as determined by the PPP Policy.
  - 7.1.3. includes a clear statement on how the project will assist the Government of Lesotho to meet its development objectives as reflected in the National Strategic Development Plan (NSDP), as well as under the Sustainable Development Goals and African Union Agenda 2063; and
  - 7.1.4. presents evidence that a comprehensive technical feasibility has been conducted establishing a clear business case including a description of the Value for Money proposition the project presents to the Government, as well as the project Affordability.
- 7.2. The Unsolicited Proposal must include the following information:
  - 7.2.1. the legal name, address and, if applicable, corporate registration details of the Proponent, including the same information of partner firms contributing to the proposal preparation, if any;
  - 7.2.2. a certification signed by an authorized representative of the Proponent that the proposal was prepared without any assistance or influence provided by public authorities that might reasonably be considered to provide the proponent with a competitive advantage over other



potential bidders;

- 7.2.3. a disclaimer that the proposal remains valid for not less than six (6) months from the date of submission; and
- 7.2.4. the identification of any proprietary or confidential information not to be made public if the project is subsequently advertised for competitive bidding.

#### Unacceptable Unsolicited Proposals

- 7.3. A Procuring Unit must consider an Unsolicited Proposal to be unacceptable against the requirements of Section 7.1 and 7.2 if the proposal does not:
  - 7.3.1. qualify as a PPP per the definition provided in this Act; or
  - 7.3.2. establish a clear business case demonstrating Value for Money, Affordability and the technical feasibility of the project; or
  - 7.3.3. involve a project within eligible infrastructure or services sectors; or
  - 7.3.4. sufficiently details how the project will assist the Government of Lesotho meet its development objectives.
- 7.4. When evaluating Unsolicited Proposals against the conditions provided in Section 7.3, a Procuring Unit shall request technical assistance from the PPP Unit.
- 7.5. If an Unsolicited Proposal is determined to be unacceptable under any of the conditions provided in Section 7.3, then a Procuring Unit must
  - 7.5.1. return the proposal to the Proponent within two (2) weeks from the date of determination; and
  - 7.5.2. ensure that the Proponent's proprietary information from the Unsolicited Proposal is not utilized in any way.

#### Acceptable Unsolicited Proposals

- 7.6. Where a Procuring Unit determines that an Unsolicited Proposal meets the conditions provided in Section 7.1 and 7.2, the Procuring Unit shall consult with the PPP Unit to conduct a feasibility study of the proposed project against the following criteria:
  - 7.6.1. the overall technical, scientific, and socio-economic merit of the Unsolicited Proposal;
  - 7.6.2. anticipated benefits of the project that assist the Government of Lesotho to meet its development objectives;
  - 7.6.3. the Value for Money proposition and Affordability of the project against the definitions provided in this Act and in the PPP Policy; and
  - 7.6.4. the extent of financial commitments incurred upon the Government, which will require

that the Procuring Unit:

- 7.6.4.1. consult with the PPP Unit to develop a financial model as required of the Feasibility Study under Section 5.4.6 of this Act.
- 7.7. The PPP Unit shall review the Feasibility Study of the Unsolicited Proposal and the method of procurement proposed by the Procuring Unit and either request further clarification on any aspect of the Feasibility Study as it deems appropriate, or submit directly to the MoF for final review and approval.
- 7.8. The MoF shall provide final review, clearance and approval of the Unsolicited Proposal Feasibility Study through delivery of an Approval Letter, which is defined as MFA(I) per Section 5 of this Act.
- 7.9. Before proceeding to procurement, the Procuring Unit must negotiate with the Proponent to determining reasonable costs to be reimbursed for preparation of the proposal and, if required, for the purchase of proprietary material should the contract be awarded to a competing bidder, and;
  - 7.9.1. the Procuring Unit shall ensure that in the procurement process the RFP discloses information on the agreed costs to be reimbursed to the Proponent and require that other bidders make allowances for these costs; and
  - 7.9.2. the Procuring Unit shall reimburse the agreed costs to the Proponent if it is not awarded the contract and claim such costs from the successful bidder.

#### Procurement

- 7.10. Following negotiation of the agreed reimbursements and after approval of the Feasibility Study for an Unsolicited Proposal is granted by the MoF per MFA(I), the Procuring Unit shall comply with the procurement process prescribed in the PPP Regulations.

#### Award of Unsolicited Proposal

- 7.11. Following approval of the RFP by the MoF as required by the PPP Regulations, defined as MFA(II)A, but before assessment and appointment of the Preferred Bidder, if the Proponent of an Unsolicited Proposal is not the winning bidder, a Procuring Unit shall:
  - 7.11.1. request that the Proponent match the winning bid; or
  - 7.11.2. request that the Proponent submit its best and final offer, in which case the Procuring Unit shall not disclose financial information on competing bids.
- 7.12. After providing the Proponent with the opportunity to match the winning bid or submit its best and final offer, the Procuring Unit shall proceed with the process for assessment and appointment of the Preferred Bidder as provided in the PPP Regulations.

### **8. AGREEMENT BINDING ON GOL**

- 8.1. In accordance with Section 2, a PPP Agreement or an agreement amending and/or varying a PPP

Agreement, binds the GOL only if such agreement was entered into on behalf of a Procuring Unit by the Chief Accounting Officer of that Procuring Unit and provided that all approvals under each stage as set out in this Act have been granted.

## 9. EXEMPTIONS

- 9.1. A Procuring Unit may approach the PPP Unit in order to apply for exemption whether in relation to a specific PPP Agreement or in general, from complying with any or all of the provisions as set out in this Act.
- 9.2. In considering an exemption application received from a Procuring Unit, the PPP Unit shall consider:
  - 9.2.1. the reasons advanced by the Procuring Unit for the proposed non-compliance with any of Sections of this Act; and
  - 9.2.2. whether or not compliance with this Act will result in the Procuring Unit's inability to further Government's Strategic Plan.

## 10. REPORTING AND AUDIT

- 10.1. A Procuring Unit that is party to a PPP Agreement shall be obliged to provide details of the PPP Agreement in its quarterly and annual reports in accordance with the requirements as set out in the regulations.
- 10.2. A PPP Agreement entered to which a Procuring Unit is a party shall be subject to audit by the office of the Auditor General in accordance with the provisions as set out in the regulations.
- 10.3. The Office of the Auditor General has the right to audit any PPP project at any stage.

## 11. TRANSITIONAL ARRANGEMENTS

- 11.1. All proposed PPP projects which have been identified by a Procuring Unit but have not yet been signed shall be subject to this Act.
- 11.2. This Act shall not be applicable to any PPP Agreement signed prior to the publication of this Act.

## Final PPP Regulations

### Draft Regulations – Lesotho National Public Private Partnership (PPP) Act

Provided below are regulations designed to guide Procuring Units throughout the procurement process to successfully implement the *Public Private Partnership (PPP) Act 2017*. These regulations must be read in conjunction with the *PPP Act 2017*.

#### 1. PROCUREMENT

1.1 Procuring Units shall follow a procuring process in proposed PPP projects that:

- 1.1.1. in all instances is in accordance with a system that is fair, equitable, competitive and transparent;
- 1.1.2. include a satisfactory due diligence including a legal due diligence in respect of the proposed Preferred Bidder in relation the Preferred Bidder's competence and capacity to enter into a PPP Agreement;
- 1.1.3. provide for the preparation and publishing of a Request for Questions, if applicable;
- 1.1.4. provide for the evaluation criteria for all bidders that respond to the Request for Proposals, if applicable.

1.2. A Procuring Unit shall not be entitled to proceed to assessment and appointment of the Preferred Bidder unless approval of the Request for Proposals is granted by the MoF, defined as MFA(II)A in the PPP Act.

#### 2. ASSESSMENT AND APPOINTMENT OF PREFERRED BIDDER

- 2.1. Prior to the issuing of any procurement documentation to any prospective bidder the Procuring Unit shall submit all procurement documentation to the PPP Unit for review and assessment.
- 2.2. After the evaluation of the bids, but prior to proceeding to the PPP Agreement Negotiation and Signing, the Procuring Unit shall submit a Value for Money Report to the PPP Unit that shall demonstrate how the criteria of Affordability, Value for Money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, how these criteria were satisfied in the Preferred Bid, and any other information as required by the PPP Unit.
- 2.3. The PPP Unit shall review the Value for Money Report submitted by the Procuring Unit and the PPP Unit shall submit the report together with recommendations to the Ministry of Finance.
- 2.4. After review and evaluation of the Value for Money Report by the MoF, approval for the Appointment of the Preferred Bidder will be granted before the appointment may be made official by the Procuring Unit, which is defined as MFA(II)B per the PPP Act.

#### 3. PPP AGREEMENT NEGOTIATION AND SIGNING

- 3.1. Following Appointment of the Preferred Bidder, the Procuring Unit, in consultation with the PPP Unit, will proceed to negotiating the terms of the PPP Agreement with the preferred bidder.
- 3.2. Upon conclusion of the PPP Agreement negotiations, the negotiated PPP Agreement shall be submitted to the PPP Unit for preliminary review.
- 3.3. The PPP Unit shall review the negotiated PPP Agreement and submit such a negotiated PPP Agreement together with any relevant recommendations to the MoF for final review and approval, which is defined as MFA(III) per the PPP Act.
- 3.4. Once approval through MFA(III) is obtained from the MoF, the Chief Accounting Officer of the Procuring Unit will be authorized to sign the negotiated PPP Agreement with the Private Partner.

#### 4. MANAGEMENT OF PPP AGREEMENTS

- 4.1. The Chief Accounting Officer of the Procuring Unit that is party to a PPP Agreement is responsible for ensuring that the PPP Agreement is properly implemented, managed, enforced, monitored and reported on by the Project Officer, and must maintain such mechanisms and procedures for –
  - 4.1.1. the development of a project management team in relation to the PPP Agreement which shall be comprised of the Project Officer, a representative of the Private Partner and a representative of the PPP Unit who shall ensure the oversight of the management of the PPP Agreement;
  - 4.1.2. measuring the outputs of the PPP Agreement;
  - 4.1.3. monitoring the implementation of the PPP Agreement and performance under the PPP Agreement;
  - 4.1.4. liaising with the Private Partner;
  - 4.1.5. resolving disputes and differences with the Private Partner;
  - 4.1.6. generally overseeing the day-to-day management of the PPP Agreement; and
  - 4.1.7. reporting on the PPP Agreement to the PPP Unit.
- 4.2. A PPP Agreement involving the performance of a Procuring Unit Function does not divest the Chief Accounting Officer of the Procuring Unit concerned of the responsibility for ensuring that such Procuring Unit Function is effectively and efficiently performed in the public interest or on behalf of the public service.
- 4.3. A PPP Agreement involving the use of State Property by a Private Partner does not divest the Chief Accounting Officer of the Procuring Unit concerned of the responsibility of ensuring that such State Property is appropriately protected against forfeiture, theft, loss, wastage and/or misuse.

- 4.4. The Procuring Unit shall request technical assistance from the PPP Unit in the management of the PPP Agreement as set out in this Section.

## 5. AMENDMENT AND VARIATION OF PPP AGREEMENTS

- 5.1. All proposed amendments and/or variations to a PPP Agreement that has been signed between a Procuring Unit and a Private Partner must be submitted to the PPP Unit for preliminary review, after which the amendments and/or variations will be submitted to the MoF for final approval.
- 5.2. If the MoF rejects the proposed amendments and/or variations of the PPP Agreement, the Procuring Unit shall not be entitled to effect such proposed amendments and/or variations.

## 6. REPORTING AND AUDIT

- 6.1. A Procuring Unit that is party to a PPP Agreement shall be obliged to provide details of the PPP Agreement in its quarterly and annual reports.
- 6.2. A PPP Agreement entered to which a Procuring Unit is a party shall be subject to audit by the Office of the Auditor General.
- 6.3. The Procuring Unit will oversee and implement probity management through the appropriate use of:
  - 6.3.1. Probity Advisors
  - 6.3.2. Probity Auditors
  - 6.3.3. Transparency Procedures
- 6.4. The Office of the Auditor General has the right to audit any PPP project at any stage.

## Annex I: Inception Mission Presentation

### PPP Framework for Lesotho Introduction

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- Appointment of Planet Partnership consortium for Framework Assessment, 13 January 2017 (PP and Turner and Townsend)
- Support from IFC Johannesburg, Nairobi- Julian Jackson, Jason Lee
- Consultant team- Matt Hensley, Uven Bunsee, other team members

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### Work elements

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- Due diligence
- Review draft documents previously drafted under the SADC mandate, PPIAF and IFC
  - draft PPP Policy
  - draft PPP regulations (PPP Regulations)
  - Note on the potential design of a PPP Unit
  - Note on unsolicited proposals existing documents

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## How will we do this

- Kick off meeting with PS of Finance
- Conduct a legal and regulatory due diligence of existing public finance laws and processes in Lesotho, including procurement processes eg PFMA, draft Public Procurement Law and Local Government Act
- Identify relevant stakeholders with an interest in developing a comprehensive PPP Legal framework
- Drawing on the foregoing, prepare an analysis of the legal, institutional, regulatory and policy issues, looking at deficiencies
- Propose mitigation measures

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## PPP Legal, Regulatory and Institutional Frameworks- editing work

- Edit and revise PPP policy
- Edit/ revise PPP Regulations, including unsolicited proposals
- Produce a PPP law
  - Rationale for PPP programme
  - Principles for pursuing a project on a PPP basis
  - Timeline for development and implementation of programme
  - Introduction to processes, instruments to govern PPP

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## Stakeholders workshops

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- **Have 2 workshops to be organized by MoF**
- **Workshop 1- Half day workshop to present the draft PPP policy and receive comments on draft policy**
- **Workshop 2- A 2-3 day presentation of the draft PPP law, PPP Regulations and solicitation of comments**

## Reporting

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- **Inception report**
- **Due Diligence and PPP Policy Report**
- **Consolidated PPP Legal Framework Report**

## Estimated Timeframe

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- **Delivery of Inception report - within 1 week**
- **Delivery of draft due diligence and PPP policy report- Mid February 2017**
- **Workshop 1- Mid March 2017**
- **Delivery of final due diligence and PPP Policy report- end March 2017**
- **Delivery of draft consolidated PPP Legal Framework report- end April 2017**
- **Workshop 2- mid May 2017**
- **Delivery of final consolidated PPP Legal framework report- end June 2017**

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## Best outcomes

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- **A stable PPP law and policy**
- **Strong, harmonized PPP institutional capacity across government**
- **Investor confidence**
- **Infrastructure growth (Roads, Water, Energy, etc)**
- **A portfolio of at least 5 PPP projects at inception, from when the new law is enacted or adopted**

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## Annex II: Workshop One Presentation



Jason Lee  
Uven Bunsee

**IFC, GoL, and Planet P**

Planet Partnerships, LLC



## Agenda

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- ▶ Draft PPP Policy
  - ▶ Sections
    - ▶ Revisions
    - ▶ Feedback
  - ▶ Mauritius outcome
  - ▶ Private Sector and the PPP Policy
  - ▶ Fostering the PPP Pipeline
  - ▶ Improving Framework
  - ▶ Conclusions
  - ▶ Next Steps
  - ▶ Questions & Answers





## Preamble

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▶ Revisions and rationale

- ▶ By the year 2020, the Government of Lesotho envisions the establishment of a stable democracy, a united and prosperous nation at peace with itself and its neighbors.
- ▶ The Government aims at introducing a healthy and well-developed human resource base with a strong economy, a well-managed environment and the adoption of advanced technology for the benefit of its citizens, institutions, and businesses.
- ▶ The National Vision goals embedded in the National Strategic Development Plan (NSDP), Sustainable Development Goals and AU Agenda 2063, call for reduction of poverty and the promotion of sustainable development in Lesotho.
- ▶ Overarching NSDP objectives are to pursue high levels of employment creating broad-based economic growth; develop key infrastructure; enhance human capital and the skills base, adopt technology and build the foundation for an innovative economy, ;improve health, combat HIV and AIDS and reduce vulnerability; revert environmental degradation and adapt to climate change; and to promote peace, democratic governance and build effective institutions.

▶ Discussion

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## Section I: Custodians of PPP Policy & Implementation

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- ▶ Revisions and rationale
  - ▶ This PPP Policy shall apply to all Government entities including Ministries, Government Departments, Local government, State-owned legal entities that have recourse to the fiscus,
  - ▶ Any other bodies covered by public Law or any project implementing authority authorized to carry out public infrastructure procurement. The overall responsibility for the implementation of this PPP Policy rests with the Ministry of Finance (MoF).
  - ▶ The Policy also provides rules and regulations on the eligibility and process of PPP projects in a number of sectors as well as gives guidance on how to treat proposals that are received in an unsolicited manner from qualified private investors.
  - ▶ Discussion
- 



## Section 2: PPP Policy Vision & Rationale

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- ▶ Revisions and rationale
  - ▶ The purpose of this Policy Framework is to set out the Government of Lesotho's rationale for the adoption of PPPs, its objectives associated with the application of PPPs, the envisioned PPP strategies, options, techniques, and the key considerations concerning the institutional establishment, implementation, and management of PPPs in Lesotho.
  - ▶ The Public sector receive assets, operations and services over long term
  - ▶ Discussion
- 



## Section 3: Definition of PPP

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- ▶ Revisions and rationale
  - ▶ A PPP is defined as a contractual arrangement between a Public Agency/Procuring Unit and Private Partner whereby the private investor and/or operator designs, finances, constructs, operates, maintains and/ or rehabilitates a public asset or service in whole or in part and in accordance with pre-defined output specifications on behalf of the Public Agency/Procuring Unit.
  - ▶ The arrangement involves risk sharing between both parties. The Private Partner receives benefits/financial remuneration for the provision of assets or services according to pre-agreed terms by way of tariffs, user charges or government based payments or a combination thereof.
  - ▶ Discussion
- 





## Section 4: Scope of PPP Policy

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- ▶ Revisions and rationale
  
  - ▶ The application of PPPs must be closely aligned to the development goals, and strategies of the Government of Lesotho.
  - ▶ The Public Agency/Procuring Unit may enter into various types of PPP arrangements with a Private Partner. The Government acknowledges as PPP both contracts for the operation of existing services/assets (e.g. Performance-based Management Contracts, and Lease Contracts or Rehabilitate, Operate, Transfer (ROT)) and/or contracts for the establishment of new services and/or assets (e.g. Design, Build, Finance, Operate/Maintain Transfer (DBFO/MT), Build, Operate, Transfer (BOT), Build, Own, Operate (BOO)), and any other PPP scheme as may be prescribed by supplementary guidelines or policies.
  
  - ▶ Discussion
- 



## Section 5: Guiding Principles to the Lesotho PPP Program

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### ▶ Revisions and rationale

- Adherence to Development Objectives of Government of Lesotho
- Public Interest and Consumer Rights
- Accountability and Governance
- Empowerment of the Lesotho private sector
- Maintaining probity and transparency

### ▶ Discussion



## Section 6: PPP Institutional Framework in Lesotho

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- ▶ Revisions and rationale
  - In recognition of the need to introduce a clear and efficient institutional structure encompassing roles and functions related to project identification and implementation, oversight, review, clearance as well as approval, the Government defines the basic roles and functions to be fulfilled and institutionalized to guide the development of PPP projects in Lesotho.
  - The institutional framework set out in this PPP Policy shall not only serve to underpin the commitment of the Government of Lesotho towards sound Policy development and high-level reflection on the PPP Policy instruments, scheme, but will also ensure adequate project implementation processes.

- ▶ Discussion

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## Section 7: PPP Development & Implementation Process

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- ▶ Revisions and rationale
    - ▶ In recognition that PPPs are complex and take a long time to procure, the Government of Lesotho intends to introduce streamlined processes concerning procurement, management and implementation of such projects.
    - ▶ The objective is to establish a coherent and clear PPP process aimed at improving credibility and transparency throughout the various stages of PPP Project development.
    - ▶ Detailed guidelines will be issued following this PPP Policy by the PPP Unit to serve as a best practice guide for PPP Practitioners –both public and private sector - addressing the requirements and driving forces throughout various stages of the PPP Project cycle. The relevant Public Agency/Procuring Unit is required to adhere to guiding principles set forth in this PPP Policy, and comply with existing legislation, regulations and procurement procedures as defined in Lesotho.
    - ▶ Unsolicited proposals for PPPs will not be allowed in the PPP policy and Law
  - ▶ Discussion
- 



## Section 8: Probity Management

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- ▶ Revisions and rationale
  
  - ▶ The Government of Lesotho is committed to probity and transparency with regard to all aspects of the PPP program. Probity management is the set of responsibilities and practices designed to promote the development and implementation of PPPs through a fair process, in which no person achieves personal advantage or disadvantage through involvement in the process.
  
  - ▶ The PPP Unit will oversee and implement probity management. This will be done through, among other things, the appropriate use of:
    - ❖ Probity Advisors;
    - ❖ Probity Audits;
    - ❖ Transparency Procedures
    - ❖ Auditor- General
  
  - ▶ Discussion
- 



## Process flow

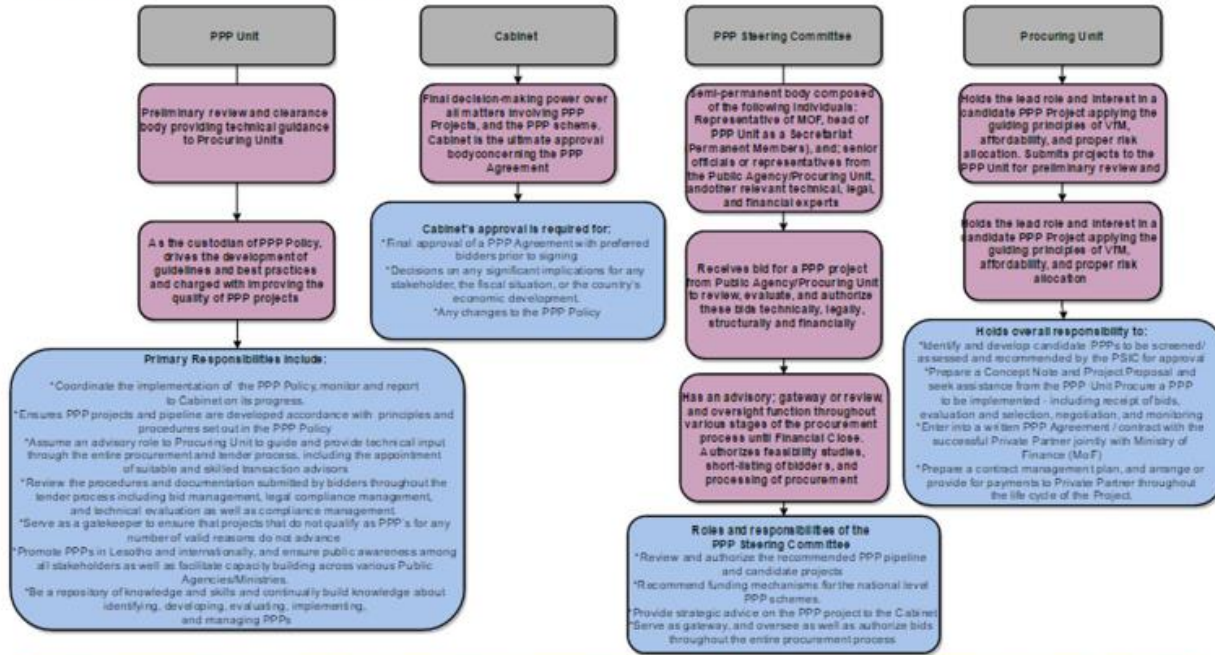
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# PPP Policy Key Issues

## Revisions and rationale



## Mauritius: PPP Outcome

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### *Public-Private Partnership Policy Statement 2003*

It is Government's intention to encourage innovation in as many areas as possible. Traditionally, PPP has been applied to the infrastructure sector - in particular in the electricity, telecoms, water, transport and solid waste sectors, - and increasingly in the social (health and education) and IT sectors.

In the early stages of PPP, Government will focus on the following key areas of development:

- Transport
  - Public utilities (energy and water)
  - Solid and liquid waste management
  - Health
  - Education and vocational training
  - ICT
- 





## Private and Public Sector & the PPP Policy: Perceptions & Perspectives

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### ▶ Private Sector Perceptions

- Require stable PPP policy and law
- Certain, short and effective approval procedures
- Certain contracting provisions and budgeted amounts where applicable

### ▶ Incentives for Private Sector

- Long term contracts with public sector
- Developing economic sectors previously excluded

### ▶ Balancing Private Sector and Public Sector Interests

- The private and public sector benefit from the long term nature of the contract
  - The services are long term and of measurable quality
- 



## Fostering PPP Project Pipeline: Strengthening PPP Policy

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- ▶ **PPP Policy and Development of PPP Projects**
    - Government policy must be definable and easy to implement
    - The development of projects must happen in the line ministries with assistance from MoF
    - The PPP policy must be a “live” document that gives certainty but is yet flexible to accommodate market conditions to make projects bankable
  - ▶ **Key Factors to Foster Strengthening of Pipeline**
    - The line ministries and MoF must identify suitable projects
    - These identified projects to be taken through a pre-feasibility study
    - Once in the process, support from line ministries, MoF, Project development facility and donors must be sequenced and programmed
- 



## Improving Framework: Streamlining & Recommendations

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### ▶ Identified Issues

- Too long approval process
- Uncertainty of the role of the PSIC in approving PPP projects
- Definitions of PPP in the PPP draft law
- The institutional structure and placement of the PPP Unit

### ▶ Proposed Solutions

- Streamline the approval process of PPP projects
- Ensure that Cabinet processes are not prohibitive and can stop well designed projects due to political interference
- PPP Guidelines should be established in due course for various sectors





## Draft PPP Policy: Conclusions

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### ▶ Best Practices

- Mauritius is a similar jurisdiction to Lesotho, given size and development potential

### ▶ Key Takeaways

- Keep the policy and law simple
- Let the private sector know you are serious about the sector
- Keep the approval process simple and streamlined
- Provide sector guidance early, after the PPP policy and law are adopted

### ▶ Final Revisions and Feedback

- We have made recommendations in the Due diligence and PPP policy document





## Recommendations

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This due diligence and PPP policy report has provided a detailed assessment of international and regional best practice, a review of key documents that combine to provide the legal, policy and institutional framework governing the use of PPPs in Lesotho.

The analysis under the three sub-sections for policy, legal and regulatory, and institutional issues identified the critical constraints to establishing a modernized operational environment for PPPs in Lesotho.

The Recommendations for the Mitigation of Issues section provided both a general statement of appropriate action, as well as specific steps that may be taken to resolve certain minor deficiencies. Of primary importance is this regard is:

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## Recommendations

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1. Harmonizing the Draft PPP Policy and Draft PPP Regulations to ensure coherence.
  2. Reassessing the role of the PPP Unit by providing it with a greater regulatory role through its authorization to conduct preliminary review and deal directly with the Procuring Unit to address any concerns or queries.
  3. Ensuring the roles and responsibilities of each of the relevant agencies are clearly defined such that ambiguity and institutional overlap is eliminated to the greatest extent possible.
  4. There will be no provision for unsolicited proposals in PPPs
  5. Providing a clear and streamlined process for the evaluation of PPP projects that eliminates, where possible, unnecessary layers of review and authorization.
- 





## Next Steps

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### ▶ Finalization of PPP Policy

- we need to finalise PPP policy as an outcome of this workshop
- we need to incorporate final workshop commentary
- we need to adopt final PPP policy prior to workshop 2

### ▶ PPP Legislation and Regulations

- we need to revise PPPs into a Bill with Regulations by 16<sup>th</sup> June 2017
- we need to ensure that the PPP policy is in line with tabled Regulation

### ▶ Workshop 2

- 12<sup>th</sup>; 13<sup>th</sup> July 2017 to discuss and recommend PPP Bill and Regulations





**Questions?**

Feedback and Discussion





Thank you

Planet Partnerships

## Annex III: Workshop Two PowerPoint



**Workshop 2:  
*Draft Consolidated PPP Legal Framework  
Report***

Planet Partnerships, LLC & International Finance Corporation



## Agenda

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- ▶ Summary of Project
- ▶ Applying the Framework: PPPs in Practice
- ▶ Revised PPP Policy Feedback
  - ▶ Approval Process
  - ▶ Institutional Framework
- ▶ Revised PPP Law:
  - ▶ Overview
  - ▶ Feedback
- ▶ Revised Regulations
- ▶ Revised PPP Policy, Act and Regulations Conclusions
- ▶ Next Steps
- ▶ Questions & Answers

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▶ 2

## Applying the Framework: PPPs in Practice

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- ▶ Ramifications of the Framework in a Real-World Context
  - ▶ A transparent, coherent and implementable scheme for the utilization of PPPs in Lesotho to encourage private sector engagement in public sector development
  - ▶ Empowers the Government of Lesotho to meet its development objectives through a partial transfer of the financial burden for project development to private sector partners
  - ▶ Lays the groundwork for adaptation of the PSIC Project Appraisal Guidelines to this new Framework, development of Transaction Advisor Guidelines, and establishment of PPP Project Screening Criteria
  - ▶ Positions Lesotho to move beyond the privatization model and ensure that required infrastructure and service sector developments are financially attainable and technically excellent

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▶ 3



## Revised PPP Policy Feedback

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### ▶ Comments Received

- ▶ Power of review and approval throughout PPP life cycle is not to rest with Cabinet;
- ▶ Ministry of Finance is to act as the final authority for review and approval at the various approval stages PSIC(0)-MFA(III);
- ▶ PPP Unit is to report to the Principal Secretary in the Ministry of Finance in terms of mandate and role;
- ▶ PPP Steering Committee to be removed;
- ▶ Line Ministries must seek approval from the PSIC prior to PPP projects being registered with the PPP Unit;
- ▶ Unsolicited proposals are not to be utilized
- ▶ Amendment of Approval Gates.

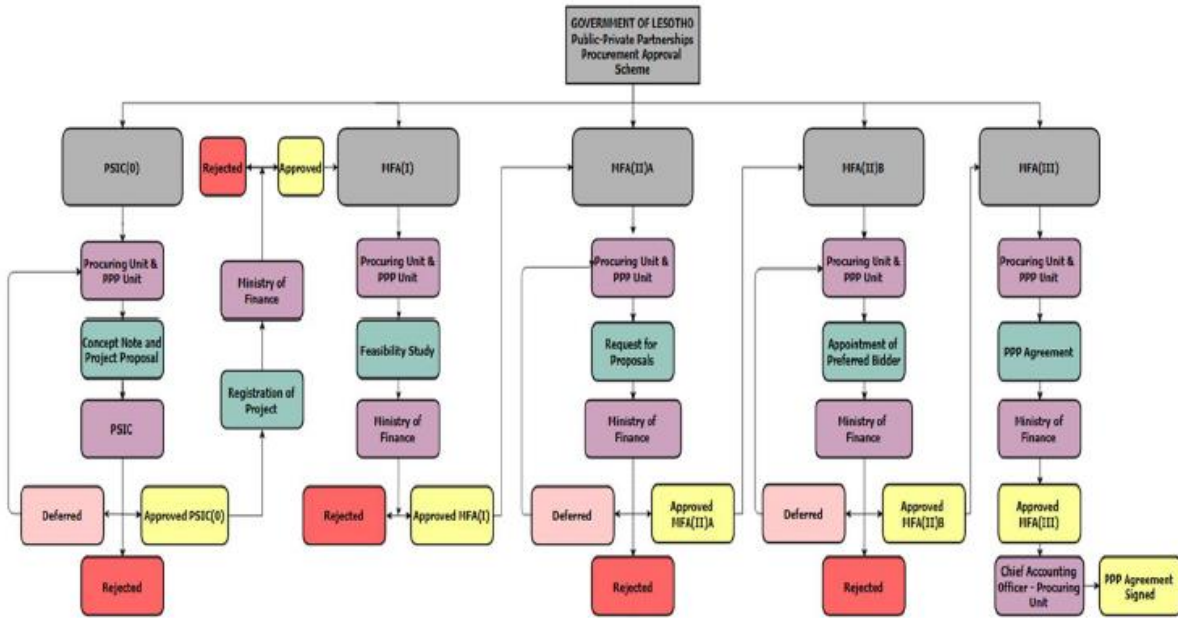
### ▶ Further Comments or Clarifications?

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▶ 4



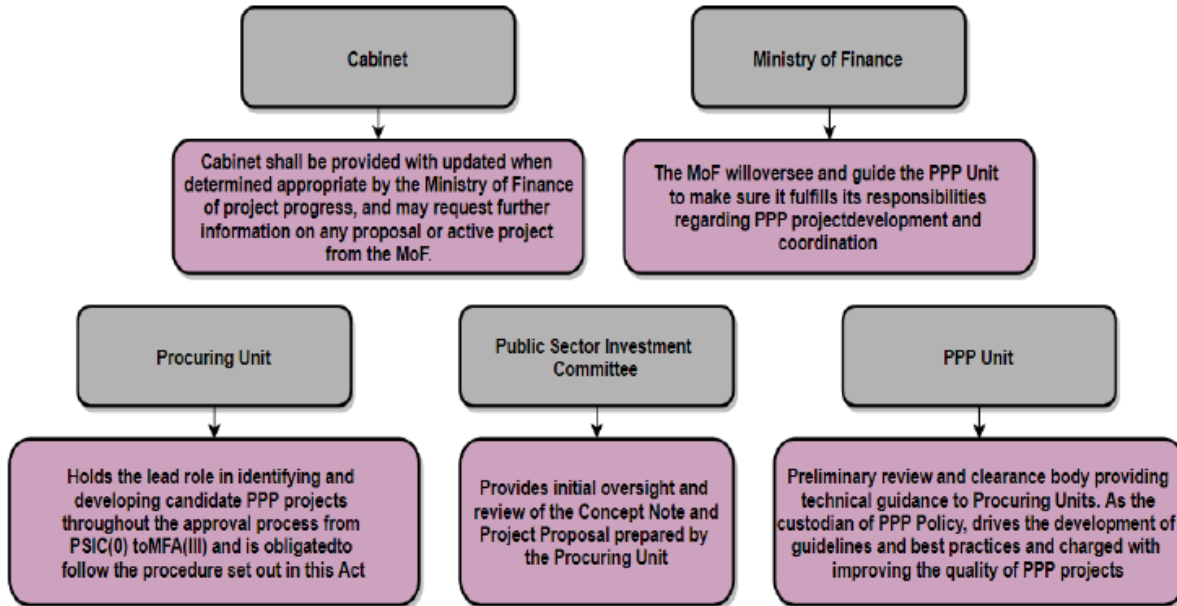
# PPP Approval Process



▶ 5



# Institutional Framework





## Revised PPP Law Overview

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- ▶ **Basis of Law**
  - ▶ Proposed Public Private Partnership Law of 2017, to be enacted by the Parliament of Lesotho
  - ▶ To be read alongside the PPP Policy and Regulations to ensure an accurate interpretation and implementation
  
- ▶ **Main Tenets**
  - ▶ Defines concepts, terms and agencies
  - ▶ Provides the roles and responsibilities of key entities
  - ▶ Details the required actions involved at each stage of the Approval Gates, with the scope of authority for the respective entities corresponding to their roles and mandates as provided in the PPP Policy and earlier in the Act
  - ▶ Stipulates the procurement process is provided in the Regulations

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▶ 7



## Revised PPP Law Overview – Con

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### ▶ Main Tenets

- ▶ Ensures the PPP Agreement is binding on the Government
- ▶ Allows for an application for exemption
- ▶ Specifies reporting and auditing requirements in support of the Regulations
- ▶ Prevents the retrospective application of the Act
- ▶ Disallows the use of Unsolicited Proposals unless amended
- ▶ Provides the Office of the Auditor General power to review any project at any times

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▶ 8



## Revised PPP Law Feedback

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- ▶ Received Comments
  - ▶ Separation of the Concept Note and Project Proposal – still identified together under approval PSIC(0) for the purpose of procedural simplicity
  - ▶ Guidelines need to be developed to define the mandate of Transaction Advisors with respect to feasibility studies
  - ▶ Regulations on the procurement process to be developed as separate to the Act, although they are to be read together
  - ▶ Unsolicited proposals are not to be utilized
  - ▶ Exemptions are to be retained
  
- ▶ Further Comments or Clarifications?

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▶ 9



## Revised Regulations

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### ▶ Key Tenets

1. Procurement: Fair, Equitable, Competitive and Transparent Project Evaluations
2. Assessment and Appointment of Preferred Bidder: Review of Value for Money Report by PPP Unit
3. PPP Agreement Negotiation and Signing: Preliminary Review by PPP Unit, Approval by MoF
4. Management of PPP Agreements: Overseen by the Chief Accounting Officer of Relevant Procuring Unit
5. Amendment and Variation of PPP Agreements: Preliminary Review by PPP Unit, Approval by MoF
6. Reporting and Audit: PPP Agreements to be Detailed in Procuring Units' Reports; Subject to Audit by Office of the Auditor General; probity management a responsibility of the Procuring Unit

### ▶ Comments or Clarifications?

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▶ 10

## Revised PPP Policy, Law, and Regulations: Conclusions

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### ▶ Best Practices

- ▶ Consistency between the PPP Policy, Act and Regulations
- ▶ A clear and pragmatically implementable procurement process from initial project identification to financial close and subsequent contract management
- ▶ Transparent framework of responsible entities appropriately empowered to execute their mandate with a well-structured organizational hierarchy
- ▶ Focus on upholding the core principles of transparency, financial viability, adherence to the Government's development objectives, consistency with the public interest, and empowerment of the private sector



## Priorities Moving Forward

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- ▶ Establishment of targeted on-the-job training courses for line ministry employees on implementation of the Act, Policy, Regulations and Guidelines
- ▶ Development of tailored Guidelines that assist in the specific implementation of the Act and Regulations
- ▶ Establishment of PPP Screening Criteria to assist and facilitate Pipeline development



## Next Steps

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- ▶ Circulate Minutes of the Workshop
  
- ▶ Incorporate Comments Received During the Workshop to the Policy, Act and Regulations
  
- ▶ Finalize Revised Versions of the:
  - ▶ PPP Policy
  - ▶ PPP Law
  - ▶ PPP Regulations
  
- ▶ Project Close

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▶ 13



**Questions?**

Feedback and Discussion



Thank you

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## Annex IV: Ministerial Survey

Scoring:

1= Non Existent

2= Significant Weakness

3= Adequate but not in keeping with international standards or norms

4= Good but areas of improvement possible

5= Fully in keeping with international standards and norms

The Government of Lesotho official should take time to complete all these questions, as far as he or she is able to, so that a holistic view can be determined by the consultant team.

No.	Question	Comments	Score	Cumulative Total
<b>Macro-Economic Climate</b>				
1	Stable interest rates			
2	Stable exchange rate			
3	Balance of Payments			
<b>Business Climate</b>				
4	Predictable taxation policies			
5	Reasonable corporation tax levels			
6	Ease of business start up			
7	Any restrictions on repatriation of profits?			
8	Convertibility of foreign exchange			
<b>Financial Environment</b>				
9	Banking system sufficiently developed to serve corporate needs			

No.	Question	Comments	Score	Cumulative Total
10	Developed insurance market			
11	Clear and effective provision for bankruptcy and limited shareholder liability			
12	Financial sector long term debt instruments for infrastructure financing			
13	Established Bond Market?			
<b>Governance and Capacity</b>				
14	Government procurement is competitive, fair and transparent			
15	There is effective political commitment to eradicate public sector corruption			
16	There is effective community and stakeholder participation in government policy making			
17	Environmental laws are clear and transparent and are all available from a single source			
18	PPP process has gaining sufficient political support, due to positive record or political "champion"			
19	Defined government mechanisms in place to coordinate PPP needs upon implementation of the framework			
20	Staff of relevant government agencies' level of adequate expertise in project finance and training/resources/information/documentation for managing the PPP process, for conducting feasibility studies and risk apportionment strategies upon implementation of the framework			
<b>Legal and Regulatory Provisions for PPP</b>				
21	Legal basis for private sector participation in PPP is clearly defined			

No.	Question	Comments	Score	Cumulative Total
22	Related laws have been reviewed and amended where necessary to ensure that there are no provisions preventing successful PPP implementation			
23	Limited restriction on participation of foreign investors in PPP projects			
24	Regulatory authority is clear for all PPP types expected			
25	Price and quality regulated to protect consumers and others			
26	Price regulation sufficiently flexible to adjust to major cost changes			
27	Powers and resources are adequate to regulate and monitor PPPs			
28	Regulators demonstrate competence, independence and efficiency			
29	Investors can appeal against ruling of regulators			
30	Government has ratified international conventions on protection of foreign investment			
31	Property rights enforceable and compensation for expropriation			
32	Protection for intellectual property effective			
33	Judiciary demonstrates competence, independence and efficiency			
<b>PPP Policy Framework</b>				
34	Private participation in PPP projects has clear basis in draft policy, with broad government support			

No.	Question	Comments	Score	Cumulative Total
35	Draft PPP policy has clearly allocated authority and responsibility within government			
36	Effective process defined for proposing, identifying and structuring projects			
37	Policy framework generates commercially viable project proposals			
38	Sectoral competition and regulatory regime chosen to limit market power			
39	Projects are integrated with the national and local budget and planning process			
40	Stakeholders can participate in project planning and implementation			
41	Government prepared to offer minimum income guarantees to support project viability			
<b>Priorities</b>				
42	In 4 bullet points, please identify the key priorities for your Ministry or agency in terms of draft PPP policy objectives, gaps in the draft PPP framework, risks, and potential for capacity building.	1. 2. 3. 4.		

## Explanatory Notes for questionnaire completion

No.	Question	Reason for question
<b>Macro-Economic Climate</b>		
1	Stable interest rates	<i>PPP firms are concerned about planning their future expenses. Unpredictable or excessive interest rates make this difficult. Unstable interest rates point to instability in the economy as well. Real interest rates (interest rates less inflation) reflect the actual cost/return to capital of the firm</i>
2	Stable exchange rate	<i>Stable exchange rates are important for firms who may want to repatriate profits, who may import raw materials, and who are choosing projects based on expected return. They are also an important indicator of the country's external position and stability. Devaluation is more likely to signal economic trouble than appreciation, but rapid swings in either direction are danger signs. In general the exchange rate should be measured against a basket of the major world currencies</i>
3	Balance of Payments	<i>This is a forward-looking measure that has implications for the exchange rate, capital transfer, and industrial production. The balance on the current account should ideally be near zero, though it may vary from zero for a variety of positive or negative reasons. It is generally accepted that a large current account deficit increases the risks of devaluation or depreciation, which would be a negative factor for a PPP firm if foreign transactions are involved. A large current account surplus would normally not be a problem, but may be a counterpart to unhealthy capital outflows</i>
<b>Business Climate</b>		
4	Predictable taxation policies	<i>Taxation systems can be complicated and difficult to understand. Some taxes may not be transparent at first, and may even not be the same for all firms. A tax system that is transparent and equitable helps PPP firms to plan and to operate effectively</i>
5	Reasonable corporation tax levels	<i>PPP firms typically face regulated prices and pressures to maintain low costs. If excessive tax burdens limit their room for maneuver, the most capable firms may resist participation. Requirements for imported equipment may leave these firms particularly vulnerable</i>
6	Business start up easy?	<i>The speed and ease with which new businesses receive official permission to operate represents the extent to which government cooperates with enterprise or, alternatively, assists in rent-seeking. Important are 1) the number of places that must be</i>

No.	Question	Reason for question
		<i>visited to register a business, 2) the actual number of steps / agencies that must be dealt with, and 3) the actual average time to establish a new enterprise. The first and second of these can be roughly captured by measuring the third</i>
7	Any restrictions on repatriation of profits?	<i>Because of scarce local capital or technology, many PPP firms will be foreign companies. It is important to these firms to be allowed to take their profits out of the country to the home country</i>
8	Convertibility of foreign exchange	<i>Even if there are no rules against repatriation of profits, it may be difficult or time consuming for PPP firms to transfer their profits into their own domestic currency. Therefore ease and reliability or being able to convert currency are important</i>
<b>Financial Environment</b>		
9	Banking system sufficiently developed to serve corporate needs	<i>Handling finances domestically will be greatly facilitated if the country has a well developed banking system, with a variety of financial products and instruments intermediating between depositors and borrowers</i>
10	Developed insurance market	<i>The pension and insurance markets represent an important source of funds for many PPP projects, as they are two of the few sources of long-term capital in some countries. In addition they are well suited for PPP financing as the duration of PPP debt is similar to their liabilities, and government guarantees are often given, making the PPP risk profile attractive to pension and insurance</i>
11	Clear and effective provision for bankruptcy and limited shareholder liability	<i>Firms and the government benefit from bankruptcy laws in several ways. As creditors it helps each party to quickly obtain as much of its loan as possible. As debtors, it limits liability that may protect individuals or a base company at home</i>
12	Financial sector long term debt instruments for infrastructure financing	<i>Long-term finance may be assembled by bankers if they have the capacity for assessing and coping with risk. By contrast, banking sectors which have been primarily directed by the government may not even have learned to assess the financial soundness of borrowers and the profitability of proposed investments. While international sources of finance are available, the risk to the country's system is reduced when long-term finance is available internally.</i>
13	Established Bond Market?	<i>Whilst not essential for every project, a developed bond market is useful to enable bonds to be issued for individual projects where considered desirable over project finance.</i>
<b>Governance and Capacity</b>		
14	Government procurement is competitive, fair	<i>Procurement procedures should encourage</i>

No.	Question	Reason for question
	and transparent	<i>competition for large contracts and should ensure that goods and services are bought that are of good quality and fair price</i>
15	There is effective political commitment to eradicate public sector corruption	<i>If the reaction to corruption is resignation and acceptance, it will be very difficult to create any kind of watchdogs with teeth or interest in stopping corruption. It will be very difficult to find those who are willing to investigate corruption, and especially difficult to punish it when it is found. A strong commitment and lack of acceptance of corruption is necessary in order to fight it.</i>
16	There is effective community and stakeholder participation in government policy making	<i>Government will be more effective at including many stakeholders if it is experienced in consulting with communities concerning a broad range of policies. The practice of integrating community input requires its own set of skills</i>
17	Environmental laws are clear and transparent and are all available from a single source	<i>PPP projects should be done with a minimum of environmental disruption to ensure the sustainability of the environment. Environmental legislation helps to protect the environment through specific regulations.</i>
18	PPP process has sufficient political support, due to positive record or political "champion"	<i>Without a political champion and high level political support, PPP Programmes tend to fail</i>
19	Defined government mechanisms in place to coordinate PPP needs	<i>Without 'joined up' government, it is difficult to ensure that projects flow through the necessary institutions smoothly and without unexpected objections</i>
20	Staff of relevant government agencies have adequate expertise in project finance and training/resources/information/documentation for managing the PPP process, for conducting feasibility studies and risk apportionment strategies	<i>Capacity within Government to deliver PPPs is a vital component in their success. Investors, before entering into a procurement programme will be looking to ensure that their counterparts are sufficiently knowledgeable</i>
<b>Legal and Regulatory Provisions for PPP</b>		
21	Legal basis for private sector participation in PPP is clearly defined	<i>If there is not a superseding PPP enabling law, then individual sector legislation may have to be modified. For example, some countries do not allow private provision of telecommunications, or of water, etc. The target sectors chosen for PPP may need to have explicit legal provision enabling private participation</i>
22	Laws have been reviewed and amended where necessary to ensure that there are no provisions preventing successful PPP implementation	<i>It is a vital prerequisite to ensure successful project implementation and needs to be carried out prior to procurement of the first project to avoid increasing market reluctance following a stalled or failed project caused by legal impediments</i>
23	Limited restriction on participation of foreign investors in PPP projects	<i>Where restrictions are placed over the participation of foreign investors, this can seriously impact upon the ability of a government</i>

No.	Question	Reason for question
		<i>to develop its competitive market in the country and to develop national firms to enable them to compete for projects</i>
24	Regulatory authority is clear for all PPP types expected	<i>Whether economic regulation is done by line agencies specialized by type of project, or by authorities empowered for all PPP projects, the authority needs to be clearly specified and understood by all parties. Disputes between agencies can lead to serious delays and unpredictability for private parties. Clear authority for technical regulation may also be an issue at times</i>
25	Price and quality regulated to protect consumers and others	<i>Some monopoly power often goes with infrastructure provision, so that consumers need to be protected by quality requirements and price limits. Other regulation may be necessary as with any industry, to protect others affected by the business</i>
26	Price regulation sufficiently flexible to adjust to major cost changes	<i>Regulation must base pricing on cost in a way that permits adjustment to large changes. The relation of price to cost should permit an adequate return on investment, and not be forced to reduce profits by the entire amount of any unforeseen costs if they are beyond the control of the company</i>
27	Powers and resources are adequate to regulate and monitor PPP's	<i>Effectiveness of regulation may require specific powers to command and investigate relevant information, to inspect quality of service, and to enforce findings. Financial and other resources must be sufficient to make these powers effective</i>
28	Regulators demonstrate competence, independence and efficiency	<i>The degree of professionalism and expertise by regulators will influence the predictability of the PPP investment, as well as enable effective quality for consumers without unnecessary cost</i>
29	investors can appeal against ruling of regulators	<i>This requirement is a vital pre requisite for implementation of any PPP project subject to regulation. Without such a procedure being in place, it is extremely unlikely that a procuring authority will be able to obtain any interest in investing in their project.</i>
30	Government has ratified international conventions on protection of foreign investment	<i>In order to give investors confidence in the protection of their investments and to encourage financial institutions to lend.</i>
31	Property rights enforceable and compensation for expropriation	<i>A fundamental pillar of the legal system is the right to dispose of property freely. This may be infringed by government, unless its power is restricted, but also by lack of clarity in the case of disputes between private parties. Expropriation is sometimes necessary, but must be limited to cases</i>



No.	Question	Reason for question
		<i>that can be justified with reference to specific criteria, and must be fairly compensated</i>
32	Protection for intellectual property effective	<i>Adequate protection of intellectual property.</i>
33	Judiciary demonstrates competence, independence and efficiency	<i>The professionalism, expertise and overall capacity in the judiciary will influence the smoothness with which policy can engage the advanced technology and complex management available in the private sector for PPP projects. Significant delays or uncertainty may result if judiciary capacity or performance is limited</i>
<b>PPP Policy Framework</b>		
34	Private participation in PPP projects has clear basis in policy, with broad government support	<i>The rationale for PPP, and the supporting requirements, should be firmly understood and accepted by policymakers. In the course of PPP projects there will inevitably be surprises, and it is important that the PPP policy be clear, strong and flexible enough to survive these</i>
35	PPP policy has clearly allocated authority and responsibility within government	<i>Confusion and tension between different parts of government, who naturally have very different perspectives, has been a major source of difficulties for PPP projects. It is important to clearly define the respective authority and responsibility between national and local government and between central and line agencies. Full consideration must be given to adequacy of the resources required</i>
36	Effective process defined for proposing, identifying and structuring projects	<i>The process must be defined in advance, with anticipation of requirements for transparency and with criteria for appropriate projects well understood. Over time, the relevant agencies should develop formats and guidelines for proposal generation, to ensure careful consideration of issues likely to be raised by common project types. In general the projects will need to fit into overall policy frameworks for the sector involved, to be effective. Responsibilities for project proposal should be clearly defined.</i>
37	Policy framework generates commercially viable project proposals	<i>The perspective of the private sector needs to be fully recognized, and risks effectively managed, so that the PPP framework consistently generates proposals that pay for themselves (with governmental support if justified by social priorities)</i>
38	Sectoral competition and regulatory regime chosen to limit market power	<i>PPP projects are established in the context of a regime to limit market power by providers in the industry. Some industries, such as electric power distribution or ports, are natural monopolies and require price regulation. Others, such as telecommunications, may be practical candidates</i>

No.	Question	Reason for question
		<i>for a competitive industry and require only enforcement against collusion. In general, the choice of regime should prefer a competitive approach when it is practical because of the inefficiency of price regulation</i>
39	Projects are integrated with the national and local budget and planning process	<i>The perspective of the private sector needs to be fully recognized, and risks effectively managed, so that the PPP framework consistently generates proposals that pay for themselves (with governmental support if justified by social priorities).</i>
40	Stakeholders can participate in project planning and implementation	<i>It is important that those who will be affected by projects participate in their planning, to best take advantage of the project potential and to forestall as many difficulties as possible. A history of involving the community in the decision process is beneficial</i>
41	Government prepared to offer minimum income guarantees to support project viability	<i>Any support that the Government can provide to assist in the affordability of the project will be beneficial</i>

## Country Readiness Assessment Questionnaire: Response 1

Scoring:

1= Non Existent

2= Significant Weakness

3= Adequate but not in keeping with international standards or norms

4= Good but areas of improvement possible

5= Fully in keeping with international standards and norms

The Government of Lesotho official should take time to complete all these questions, as far as he or she is able to, so that a holistic view can be determined by the consultant team.

No.	Question	Comments	Score	Cumulative Total
<b>Macro-Economic Climate</b>				
1	Stable interest rates	The interest rate is relatively stable.	5	
2	Stable exchange rate	Lesotho Currency (Loti) is at par with South African Rand and any changes to the Rand also happens to Loti.	5	
3	Balance of Payments		4	
<b>Business Climate</b>				
4	Predictable taxation policies	One key aspect that ensures predictability is almost non-existent discretionary powers provisions. But improvement can be made in terms of making the necessary literature, guidelines and information more and readily available.	4	
5	Reasonable corporation tax levels	The top corporate tax rate is 25% for majority of sectors which compares well globally.	5	
6	Ease of business start up	<ul style="list-style-type: none"> <li>- Company registry is fully automated and offer on-line services.</li> <li>- Name search and reservation is done immediately</li> <li>- services of the lawyers are no longer required to register a company</li> <li>- Company registration is done simultaneously with tax registration</li> <li>- Company search is free on-line</li> <li>- Takes 1-3 days to register and issue company documents</li> <li>- Business in the service sector can now operate from home therefore</li> <li>do not require pre-inspection for Maseru City Council</li> <li>- It takes 1-3 to issue a traders</li> </ul>	4	

No.	Question	Comments	Score	Cumulative Total
		license		
	Ease of Business for tax purposes	<p>There appears to be a lot of documentation requirements for starting or registering a business for tax purposes. Some of the requirements seem to be geared towards minimizing future tax evasion and avoidance.</p> <p>A holistic approach to taxpayer registration needs to be undertaken. Link-up with other regulatory authorities may also ease registration</p>	3	
7	Any restrictions on repatriation of profits?	There is no legislation and /or regulation that governs restrictions of repatriation of profits.	1	
		<p>There are indirect restrictions in the form of high withholding tax on gross, generally 25% on gross and with Lesotho having limited treaty network this induces treaty shopping, through mainly the use of Lesotho – South Africa double taxation agreement.</p> <p>The requirement for tax clearance certificate for purposes of transferring funds outside Lesotho need to be reviewed, especially the monetary values that have stood for decades without inflationary adjustments.</p>	3	
8	Convertibility of foreign exchange	Convertibility of foreign exchange is not a challenge as major currencies are exchanged with ease in most commercial banks.		
<b>Financial Environment</b>				
9	Banking system sufficiently developed to serve corporate needs		4	
10	Developed insurance market		4	
11	Clear and effective provision for bankruptcy and limited shareholder liability	- Companies Act 2011 has clear provisions on liquidation of companies Part XVI	4	

No.	Question	Comments	Score	Cumulative Total
		<ul style="list-style-type: none"> <li>- The Act also sets a solvency test to determine the liquidity of the company</li> <li>- The Act provides that the liquidation order issued by the court is a final liquidation order</li> <li>- The liability of shareholders and members is limited to the shares they hold or contribution they made.</li> <li>- The Act sets out clear requirements of appointment and qualification of the liquidator</li> <li>- Companies Regulations stipulates who can be a liquidator</li> </ul>		
12	Financial sector long term debt instruments for infrastructure financing		3	
13	Established Bond Market?		3	
<b>Governance and Capacity</b>				
14	Government procurement is competitive, fair and transparent	In terms of Public Procurement law indeed the principles governing the procurement includes transparency, competitiveness, accountability and fairness. There is need to ensure enforcement and to have actual procurement professionals within the procurement cadre (allow me to use this for lack of a better word). Non - compliance is a serious issue. However, Government is trying to cure these defects through the existing draft policy, draft Bill and Regulations. This is to the extent of traditional procurement only. A lot of work needs to be done.	3	
15	There is effective political commitment to eradicate public sector corruption	No. the politicians themselves perpetuate corruption and it takes years before cases of corruption and economic offences are prosecuted. This is regardless of the existence of Directorate of corruption and economic offence established through an Act of Parliament.	2	
16	There is effective community and stakeholder participation in government policy making	Not as effective as it should happen	2	
17	Environmental laws are clear and transparent and are all available from a	From my personal perspective, there is Environment Law that is	4	

No.	Question	Comments	Score	Cumulative Total
	single source	quite modern. There is however still deviations that go unpunished. The Laws are indeed available from the Government Printer and online.		
18	PPP process has gaining sufficient political support, due to positive record or political "champion"	This is not very easy to respond to because there is no political champion on PPP's, however regardless of no champions government takes its commitments very seriously because any change in political landscape does not affect the existing PPP's in any way.	3	
19	Defined government mechanisms in place to coordinate PPP needs upon implementation of the framework	I am not sure as to whether I understand the statement even the explanatory notes but my take will be that there are no defined "PPP mechanisms" that I am aware of but the Ministries of Finance and Health have unofficially committed themselves to deal with any PPP Issues in the absence of established, clear frameworks in place.		
20	Staff of relevant government agencies' level of adequate expertise in project finance and training/resources/information/documentation for managing the PPP process, for conducting feasibility studies and risk apportionment strategies upon implementation of the framework	There are already people in the system who have knowledge although not covering all areas. These people can be identified and placed accordingly. However, there is huge need for capacity development and training to conduct what has been mentioned.	2	
<b>Legal and Regulatory Provisions for PPP</b>				
21	Legal basis for private sector participation in PPP is clearly defined	There is no legal basis because of non-existence of PPP legal and regulatory frameworks	1	
22	Related laws have been reviewed and amended where necessary to ensure that there are no provisions preventing successful PPP implementation	PPP is a new concept hence the request for new frameworks as such no laws have been amended to accommodate private sector participation which in my opinion has never been regulated and/or prohibited.	1	
23	Limited restriction on participation of foreign investors in PPP projects	No restrictions that I am aware of. There is no legal instrument regulating PPP's.	1	
24	Regulatory authority is clear for all PPP types expected	No regulatory authority and no types of PPP's defined.	1	
25	Price and quality regulated to protect consumers and others	No law on price and regulation policy. These maybe regulated on	1	

No.	Question	Comments	Score	Cumulative Total
		a broader spectrum of Southern African Customs Union. Not domestically wherein Lesotho is a Member.		
26	Price regulation sufficiently flexible to adjust to major cost changes	Prices are not regulated.	1	
27	Powers and resources are adequate to regulate and monitor PPPs	The Government is in the process of mobilizing resources to regulate, monitor and establish a stable environment with resources and necessary powers.	2	
28	Regulators demonstrate competence, independence and efficiency	There is no legal regulation of some sort yet.	1	
29	Investors can appeal against ruling of regulators	Although there is no law. Lesotho courts allow anyone aggrieved to appeal and even institute disputes whenever needed without restrictions all jurisdiction determinants having been clearly defined of course.	5	
30	Government has ratified international conventions on protection of foreign investment	Yes	5	
31	Property rights enforceable and compensation for expropriation	Yes	4	
32	Protection for intellectual property effective	Not really. Intellectual property is like any other Sub-Sahara African country. It is not considered as critical as the developed countries do.	1	
33	Judiciary demonstrates competence, independence and efficiency	Yes. To a large extent.	4	
<b>PPP Policy Framework</b>				
34	Private participation in PPP projects has clear basis in draft policy, with broad government support	I suppose that if such is not included in the draft policy then please consider advising on such. Nothing prohibits such in Lesotho laws.	1	
35	Draft PPP policy has clearly allocated authority and responsibility within government	To an objective extent yes	4	
36	Effective process defined for proposing, identifying and structuring projects	Yes	4	
37	Policy framework generates commercially viable project proposals	Yes	5	
38	Sectoral competition and regulatory regime chosen to limit market power		-	
39	Projects are integrated with the national and local budget and planning process	Yes	3	
40	Stakeholders can participate in project planning and implementation	Most of relevant stakeholders do not participate in project planning and implementation.	3	

No.	Question	Comments	Score	Cumulative Total
41	Government prepared to offer minimum income guarantees to support project viability	No. The new draft Debt Management Bills seeks to abolish any form of guarantee to private sector to curb abuse and adhere to best international practices on sovereign debt.	1	
<b>Priorities</b>				
42	In 4 bullet points, please identify the key priorities for your Ministry or agency in terms of draft PPP policy objectives, gaps in the draft PPP framework, risks, and potential for capacity building.	<ol style="list-style-type: none"> <li>1. Draft PPP policy approval.</li> <li>2.capacity building</li> <li>3. Alignment of the frameworks flowing from the draft policy including closing any gaps.</li> <li>4. Functioning PPP institutions / structures.</li> </ol>		



## Country Readiness Assessment Questionnaire: Response 2

Scoring:

1= Non Existent

2= Significant Weakness

3= Adequate but not in keeping with international standards or norms

4= Good but areas of improvement possible

5= Fully in keeping with international standards and norms

The Government of Lesotho official should take time to complete all these questions, as far as he or she is able to, so that a holistic view can be determined by the consultant team.

No.	Question	Comments	Score	Cumulative Total
<b>Macro-Economic Climate</b>				
1	Stable interest rates			
2	Stable exchange rate			
3	Balance of Payments			
<b>Business Climate</b>				
4	Predictable taxation policies	One key aspect that ensures predictability is almost non-existent discretionary powers provisions. But improvement can be made in terms of making the necessary literature, guidelines and information more and readily available.	4	
5	Reasonable corporation tax levels	The top corporate tax rate is 25% for majority of sectors which compares well globally.	5	
6	Ease of business start up	<ul style="list-style-type: none"> <li>- Company registry is fully automated and offer on-line services.</li> <li>- Name search and reservation is done immediately</li> <li>- services of the lawyers are no longer required to register a company</li> <li>- Company registration is done simultaneously with tax registration</li> <li>- Company search is free on-line</li> <li>- Takes 1-3 days to register and issue company documents</li> <li>- business in the service sector can now operate from home therefore do not require pre-inspection for Maseru City Council</li> <li>- It takes 1-3 to issue a traders license</li> </ul>	4	
	Ease of Business for tax purposes	<p>There appears to be a lot of documentation requirements for starting or registering a business for tax purposes. Some of the requirements seem to be geared towards minimizing future tax evasion and avoidance.</p> <p>A holistic approach to taxpayer registration needs to be undertaken.</p>	3	

No.	Question	Comments	Score	Cumulative Total
		Link-up with other regulatory authorities may also ease registration		
	Any restrictions on repatriation of profits?	<p>There is no legislation and /or regulation that governs restrictions of repatriation of profits. There are indirect restrictions in the form of high withholding tax on gross, generally 25% on gross and with Lesotho having limited treaty network this induces treaty shopping, through mainly the use of Lesotho – South Africa double taxation agreement.</p> <p>The requirement for tax clearance certificate for purposes of transferring funds outside Lesotho need to be reviewed, especially the monetary values that have stood for decades without inflationary adjustments.</p>	3	
8	Convertibility of foreign exchange			
<b>Financial Environment</b>				
9	Banking system sufficiently developed to serve corporate needs			
10	Developed insurance market			
11	Clear and effective provision for bankruptcy and limited shareholder liability	<ul style="list-style-type: none"> <li>- Companies Act 2011 has clear provisions on liquidation of companies Part XVI</li> <li>- The Act also sets a solvency test to determine the liquidity of the company</li> <li>- The Act provides that the liquidation order issued by the court is a final liquidation order</li> <li>- the liability of shareholders and members is limited to the shares they hold or contribution they made.</li> <li>- The Act sets out clear requirements of appointment and qualification of the liquidator</li> <li>- Companies Regulations stipulates who can be a liquidator</li> </ul>	4	
12	Financial sector long term debt instruments for infrastructure financing			
13	Established Bond Market?			
<b>Governance and Capacity</b>				
14	Government procurement is competitive, fair and transparent	In terms of Public Procurement law indeed the principles governing the procurement includes transparency, competitiveness, accountability and fairness. There is need to ensure	3	

No.	Question	Comments	Score	Cumulative Total
		enforcement and to have actual procurement professionals within the procurement cadre (allow me to use this for lack of a better word). Non - compliance is a serious issue. However, Government is trying to cure these defects through the existing draft policy, draft Bill and Regulations. This is to the extent of traditional procurement only. A lot of work needs to be done.		
15	There is effective political commitment to eradicate public sector corruption	No. the politicians themselves perpetuate corruption and it takes years before cases of corruption and economic offences are prosecuted. This is regardless of the existence of Directorate of corruption and economic offence established through an Act of Parliament.	2	
16	There is effective community and stakeholder participation in government policy making	Not as effective as it should happen	2	
17	Environmental laws are clear and transparent and are all available from a single source	From my personal perspective, there is Environment Law that is quite modern. There is however still deviations that go unpunished. The Laws are indeed available from the Government Printer and online.	4	
18	PPP process has gaining sufficient political support, due to positive record or political "champion"	This is not very easy to respond to because there is no political champion on PPP's, however regardless of no champions government takes its commitments very seriously because any change in political landscape does not affect the existing PPP's in any way.	3	
19	Defined government mechanisms in place to coordinate PPP needs upon implementation of the framework	I am not sure as to whether I understand the statement even the explanatory notes but my take will be that there are no defined "PPP mechanisms" that I am aware of but the Ministries of Finance and Health have unofficially committed themselves to deal with any PPP Issues in the absence of established, clear frameworks in place.		
20	Staff of relevant government agencies' level of adequate expertise in project finance and training/resources/information/documentation for managing the PPP process, for conducting feasibility studies and risk apportionment strategies upon implementation of the framework	There are already people in the system who knowledge although not covering all arears. These people can be identified and placed accordingly. However, there is huge need for capacity development and training to conduct what has been mentioned.	2	

No.	Question	Comments	Score	Cumulative Total
<b>Legal and Regulatory Provisions for PPP</b>				
21	Legal basis for private sector participation in PPP is clearly defined	There is no legal basis because of non-existence of PPP legal and regulatory frameworks.	1	
22	Related laws have been reviewed and amended where necessary to ensure that there are no provisions preventing successful PPP implementation	PPP is a new concept hence the request for new frameworks as such no laws have been amended to accommodate private sector participation which in my opinion has never been regulated and/or prohibited.	1	
23	Limited restriction on participation of foreign investors in PPP projects	No restrictions that I am aware of. There is no legal instrument regulating PPP's.	1	
24	Regulatory authority is clear for all PPP types expected	No regulatory authority and no types of PPP's defined.	1	
25	Price and quality regulated to protect consumers and others	No law on price and regulation policy. These maybe regulated on a broader spectrum of Southern African Customs Union. Not domestically wherein Lesotho is a Member.	1	
26	Price regulation sufficiently flexible to adjust to major cost changes	Prices are not regulated.	1	
27	Powers and resources are adequate to regulate and monitor PPPs	The Government is in the process of mobilizing resources to regulate, monitor and establish a stable environment with resources and necessary powers.	2	
28	Regulators demonstrate competence, independence and efficiency	There is no legal regulation of some sort yet.	1	
29	Investors can appeal against ruling of regulators	Although there is no law. Lesotho courts allow anyone aggrieved to appeal and even institute disputes whenever needed without restrictions all jurisdiction determinants having been clearly defined of course.	5	
30	Government has ratified international conventions on protection of foreign investment			
31	Property rights enforceable and compensation for expropriation	Yes	4	
32	Protection for intellectual property effective	Not really. Intellectual property is like any other Sub-Sahara African country. It is not considered as critical as the developed countries do.	1	
33	Judiciary demonstrates competence, independence and efficiency	Yes. To a large extent.	4	
<b>PPP Policy Framework</b>				
34	Private participation in PPP projects has clear basis in draft policy, with broad government support	I suppose that if such is not included in the draft policy then please consider advising on such. Nothing prohibits such in Lesotho laws.	1	
35	Draft PPP policy has clearly allocated authority and responsibility within	To an objective extent yes	4	

No.	Question	Comments	Score	Cumulative Total
	government			
36	Effective process defined for proposing, identifying and structuring projects	yes	4	
37	Policy framework generates commercially viable project proposals	Yes	5	
38	Sectoral competition and regulatory regime chosen to limit market power	-	-	
39	Projects are integrated with the national and local budget and planning process	yes	3	
40	Stakeholders can participate in project planning and implementation	-	-	
41	Government prepared to offer minimum income guarantees to support project viability	No. The new draft Debt Management Bills seeks to abolish any form of guarantee to private sector to curb abuse and adhere to best international practices on sovereign debt.	1	
<b>Priorities</b>				
42	In 4 bullet points, please identify the key priorities for your Ministry or agency in terms of draft PPP policy objectives, gaps in the draft PPP framework, risks, and potential for capacity building.	<ol style="list-style-type: none"> <li>1. Draft PPP policy approval.</li> <li>2. Capacity building</li> <li>3. Alignment of the frameworks flowing from the draft policy including closing any gaps.</li> <li>4. Functioning PPP institutions / structures.</li> </ol>		