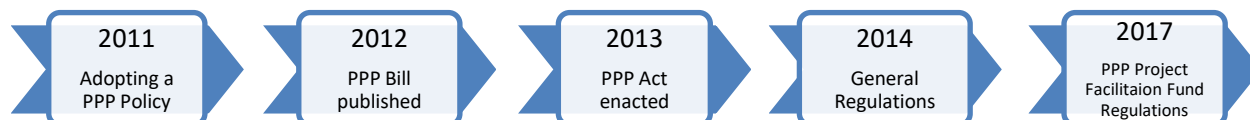


Kenya: Letter of Support

Brief overview of Government Support

In a bid to promote and facilitate private sector involvement in the development agenda of Kenya, the Government has taken active steps towards establishing a Public Private Partnerships (PPP) framework resulting in the enactment of the Public Private Partnerships Act, 2013 (“the **PPA Act**”) and the Regulations as shown below.



According to the PPP Status Report, there are 70 PPP projects in the pipeline in Kenya as of September 2017.

One of the key benefits available under the PPP Act that private investors can explore is that the Government may, where it considers it necessary to support a project and to reduce premiums factors for political risks, issue a guarantee, undertaking or binding letters of comfort in relation to a project.

The most common form of support that is presently offered by the Government to PPP projects is a Letter of Support.

What is a Letter of Support?

The term “*Letter of Support*” does not have a legal definition under Kenyan law but can be construed to be the “*binding letter of comfort*” referred to under the PPP Act. The Letter of Support is issued by the Cabinet Secretary for National Treasury in consultation with the Debt Management Office and the PPP Committee.

What is purpose of the Letter of Support? Is it a guarantee?

The Letter of Support is intended to insulate a private investor from certain elements of country and political risk (and by extension, the investor’s lenders) where, upon entering into a contract with a government entity, such entity is unable to perform its obligations under the contract due to the occurrence of a political event.

The Letter of Support is couched in language that ensures the instrument is not construed to be a guarantee. There are numerous reasons for this, including – were the instrument to take the form of a guarantee – the need for it to be approved by the National Assembly.

Accordingly, rather than be an outright underwriting obligation, a Letter of Support provides that upon the happening of an event that triggers the Government’s obligations thereunder, it will “*purchase*” the underlying project, often at a prescribed or pre-determined value.

It is arguable that at least in spirit, there is little to distinguish between a guarantee and a Letter of Support and that, this is simply a matter of semantics, but for as long as the instrument does not fall within the definition of a “*guarantee*” (as defined by the Kenyan Constitution) and absent judicial interpretation to the contrary, there does seem to be a clear line between the two types of obligations.

Is there a template? Are the terms negotiable?

There is no standard template or prescribed form of a Letter of Support. However, over the past few years, we have noticed the Letters taking a certain form depending on the sector involved i.e. the Letters being issued in a particular sector may not necessarily be replicated for a different sector. Our experience has been that, while the Letter of Support is open for negotiations, there are certain bare minimum terms that the Government may not accept to negotiate on basis of either the commercial effect or government policy.

At a minimum, the Letter of Support should offer support to the investor in connection with the implementation of the relevant project. This would include support in procuring necessary permits and other authorizations. However, and understandably, infrastructure projects require much more.

Accordingly, it is not unreasonable for the beneficiaries of a Letter of Support to expect the Government's obligations to be triggered upon the happening of any of the following events:

- Nationalization and expropriation of either the project or any entity upon which the project relies for its income flows
- Unlawful revocation of any permit or authorization
- Riots
- Acts of war
- Change in law (including in certain cases, change in tax) the remedy for which is not adequately captured in the project or concession agreement

There are a number of other headings for which “cover” can be sought (and given) but the negotiations on these are often driven by the bargaining powers of the parties around the table, Government policy and the need for the Government to be seen to be consistent.

At the extreme end, we have also come across Letters of Support which simply say “*we see you and welcome you*”, but quite obviously, these carry little value.

The role of Lenders

It is inevitable that projects are funded principally through debt. Accordingly, lenders have a direct interest in ensuring that Letters of Support – payments under which would flow to them through security granted by the investor (and primary beneficiary of the Government's obligations) – are sufficiently robust to cover as many political and default events as possible.

It is therefore important for an investor to engage with and involve lenders in its negotiations with the Government not only to avoid the need to re-open (usually difficult) negotiations, but also to benefit from lenders who have previous experience with such instruments and are able, with the benefit of practical examples, to hold ground on key issues.

What sectors have so far been issued with the Letters of Support?

Typically, Letters of Support are issued to encourage and increase bankability of private sector investment and involvement in certain sectors where the Government would like to promote growth and development. In Kenya, the infrastructure and energy sector have been seen to have benefited with issuance of such letters so far.

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