



PUBLIC BENEFITS ORGANIZATIONS ACT COMMENCEMENT SCENARIOS: Preparedness Options for Civil Society Organizations in Kenya

Call for Expression of Interest

Terms of Reference

Introduction

Civic Freedoms Forum (CFF) was founded in October 2021 as a platform comprised of civil society organizations (CSOs) operating at national level with a track record and commitment to the protection of human rights, civil liberties, and democracy. The main purpose of CFF is to consolidate and coordinate actions/interventions of CSOs to realize civil liberties in Kenya. CFF strives to be the umbrella convener on civic space matters, coordinate joint actions of civic space actors, advocate for an enabling environment for CSOs in Kenya, advocate for an expanded civic space for CSOs and citizens. See more at <https://www.cff.or.ke/>.

CFF is currently hosted by PEN Kenya, a member of CFF and a Non – Governmental Organization (NGO) registered since December 2001 as Poverty Eradication Network but has since changed its name to Partnerships 4 Empowerment & Networking in Kenya. PEN Kenya believes that a strong civil society sector is fundamental to the development of any country and its ability to have sustainable impact upon poverty. PEN was established to contribute towards the eradication of absolute poverty in Kenya, through building and strengthening the institutional capacity of civil society organizations (CSOs) and other not-for-profit organizations and public institutions. See more at <https://www.penkenya.org/>

Context and Background

In February 2006, the Parliament of Kenya adopted a Sessional Paper on Non-Governmental Organizations as the first ever government policy on the sector, setting up the stage and the pace for the review of the outmoded Non-Governmental Organizations Coordination Act of 1990. This was the first ever government policy on not-for-profit organizations. Sessional Paper No. 1 on Non-Governmental Organizations was the culmination of a consultative policy formulation process that started in December 2001. In its development, the NGOs Coordination Board involved stakeholders, culminating in the adoption of a comprehensive regulatory framework that would reflect the Government's plan towards enhanced, efficient and quality service delivery in the public benefit organizations sector. Review of the Non-Governmental Organizations Coordination Act [1990] was the main directive principle of Sessional Paper No. 1 of 2006, culminating in the adoption by Parliament of the Public Benefit Organizations Bill in 2012 and its subsequent assent by former President H.E. Mwai Kibaki on January 14, 2013, into the Public Benefit Organizations Act, 2013.

The Attempts for Amendment of the PBO Act: On 13th November 2013, the Statute Law (Miscellaneous Amendments) Bill, 2013 was tabled in the National Assembly. The Bill sought to

introduce several amendments to the PBO Act that would have significant impact on civil society in Kenya, through among other things, restricting the amount and sources of income available to PBOs; and limiting the Independence of the PBO Regulatory Authority. The Statutes Law Miscellaneous Amendment Bill of 2013 was rejected by Parliament in December 2013. Between 2014 and 2015, there were three additional attempts to introduce constraining amendments to the PBO Act through various bills in Parliament. In May 2016, CSOs met with the Cabinet Secretary, Ministry of Devolution and Planning, for discussions on the operationalization of the PBO Act. The Ministry sought views on proposals to amend certain provisions of the PBO Act 2013, as part of the steps it wanted to take towards operationalization of the law. Through the courts, the government was given 14 days to appoint and publicise a date for the coming into operation of the PBO Act. The judge had declared that the decision by the Ministry to appoint a taskforce to amend and or propose amendments to the PBO Act, before it became operational, was illegal and contravened Articles 10, 94, 116(2), 129 and 153(4) of the Constitution.

Efforts by the Civil Society towards commencement the PBO Act:

On 21st November 2013, CSOs submitted 13,032 signed petitions against the Statutes Law Miscellaneous Amendment Bill of 2013 to the Clerk of the National Assembly. The petition was received by Hon. Gladys Wanga representing Homa County, on behalf of the Clerk of the National Assembly. Hon. John Mbadi, Hon. Keynan Adan and Hon. Gladys Wanga made speeches, acknowledging the impact of Civil Society in Kenya and supported rejection of the proposed amendments.

- On 21st November 2013, CSOs met with the Cabinet Secretary, Ministry of Planning and Devolution, Hon. Anne Waiguru. The CSOs stated their rejection of the proposed amendments to the PBO Act, through the miscellaneous amendment bill, on grounds that the process of its development was not participatory or transparent, and that the proposals breached provisions enshrined in the Constitution.
- On 3rd December 2013, CSOs met with members of the National Assembly Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act. They also met with officials from the office of the Solicitor General, to seek support for rejection of the proposed amendments to the PBO Act.
- In January 2014, members of the CSO Reference Group met with the Attorney General in an effort to garner support from his office in pressing for the commencement of the PBO Act and to advice against proposed amendments to the PBO Act;
- On March 12, 2014, Civil Society Organisations presented a public petition to the Cabinet Secretary Ministry of Devolution and Planning, urging her to commence the PBO Act 2013.
- In May 2014, CSOs met with members of the National Assembly's Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act, which went against enabling the sector. The Committee members reassured the CSOs that they were unlikely to support the 15% cap on funding for PBOs and stated that they would propose amendments to make the Regulatory Authority an independent regulatory body answerable to the National Assembly.
- In June 2015, Civil Society Organisations filed a constitutional Petition (No. 351 of 2015) seeking orders to compel the Cabinet Secretary for Devolution and Planning to commence the PBO Act, 2013. On October 31st, 2016, through Honorable Justice J.L. Onguto, the court ruled that by failing to appoint a date for the coming into operation of the PBO Act, the Cabinet Secretary for the Ministry of Devolution and Planning, contravened the Constitution and acted contrary to the wishes of Parliament. He gave the Cabinet Secretary 14 days to appoint and

publicize a date for the coming into operation of the PBO Act. The judge also declared that the decision by the Ministry to appoint a Taskforce to amend and or propose amendments to the PBO Act, before it became operational, was illegal and contravened Articles 10, 94, 116(2), 129 and 153(4) of the Constitution.

- In March 2016, Civil Society Organisations, with the support of the MP for Ndhiwa Constituency, Hon. Agostinho Neto, tabled a bill in Parliament – the PBO (Amendment) Bill, 2016 – seeking to commence the PBO Act. The Bill sought to amend the clause in the PBO Act that gives the Cabinet Secretary of the Ministry of Devolution and National Development the discretion to decide when the PBO Act 2013 shall commence. Bill went through the first reading on April 27, 2016, and through the second reading on August 11, 2016.
- In June 2016 the clerk of the National Assembly called upon the public to submit memoranda on the Bill, in line with public participation requirements. However, Parliament was annulled before the Bill made it to the third reading or last stage in the legislative process.
- In December 2016, CSOs filed contempt of court proceedings against the Cabinet Secretary, Ministry of Devolution and Planning, the Ministry of Interior and National Coordination and the Attorney General, for failing to obey court orders to commence the PBO Act.
- On 12th May 2017, Justice Mativo found the CS, Ministry of Interior to be in contempt of court and directed him to obey court orders and operationalize the PBO Act. To date the orders have not been complied with.
- In February, 2017, civil society leaders held the 2nd PBO Leaders' Summit. The Summit sought to facilitate policy dialogue between the sector and the new parent Ministry of the Interior and Coordination of National Governmental and discuss collective strategies towards the transformation of the sector. The Ministry did not participate in the meeting.
- On 7, July, 2017, the Civil Society Reference Group convened the 3rd PBO Leaders' Summit. During the meeting six candidates/representatives for office of the President candidates signed pledges assuring CSOs that they would work towards protecting the civic space before, during and after the elections. Specifically, they pledged to commence or support the commencement of the PBO Act following the elections.
- On 11, October 2018, the CSOs under the auspices of Civil Society Reference Group petitioned the National Assembly Committee on Implementation raising concerns over the inordinate delay in commencing the Public Benefit Organizations Act.
- On 8, November 2018, the National Assembly Committee on Implementation accorded the CSRG delegation a hearing, and pledged to support the civil society in its efforts to unlock the impasse on the operationalization of the PBO Act. The Committee asked the CSRG delegation to supply it with additional information it needed on efforts that the sector had made to get the Executive to act and operationalize the PBO Act.
- On 23, November 2018, the CSRG communicated with the Implementation Committee, filing with the Office of Clerk of the National Assembly, additional information and a policy brief on actions it could take to get the relevant government Ministry to put the PBO At into operation. In 2019, the Civil Society Reference Group sent a follow-up letter to the Committee on Implementation after it went mute. CSOs concerned that after showing so much enthusiasm, the Committee did not appear interested in getting back to the sector on any progress it had made on the matter. The Committee never communicated to the CSRG thereafter.

- On August 20, 2019, the Civil Society Reference Group petitioned the former Prime Minister and African Union High Representative for Infrastructure Development in Africa, the Right Hon. Raila Odinga to intercede and appeal to his colleague in 'The Handshake' H.E. President Uhuru Kenyatta.
- The Kenya Kwanza regime promised in their plan to commence the PBO Act immediately on ascendancy to office. This promise, like many others, has now become a mirage as CSOs continue to wait for the CS to gazette the commencement date.

The Objective and Scope of the Assignment

Considering the above, CFF seeks the services of a consultant to build possible scenarios on PBO Act commencement and corresponding preparedness by CSO. Specifically, the consultant will be expected:

1. To identify opportunities and threats in case the PBO Act is commenced and establish how CSOs need to position themselves to leverage the existing opportunities and mitigating the threats.
2. To identify potential opportunities and threats for the CSOs in case the PBO Act is not commenced.

This assignment is expected to be conducted during the months of April and May 2024.

Expected Deliverables

The consultant will be expected to:

1. Produce a draft report with clear recommendations for each scenario.
2. Facilitate a stakeholders' validation forum.
3. Produce final report after considering feedback from the stakeholders.

Required Experience and Qualifications

1. Must demonstrate solid knowledge and understanding of CSO legal framework in Kenya.
2. Knowledge of the political and legal intrigues on PBO Act in Kenya.
3. Minimum of 7 years of experience in similar work.
4. Graduate degree in Law or public policy or any other relevant degrees.
5. An ability to work within tight deadlines.
6. Good analytical and report writing skills.
7. Good communication and facilitation skills

Application

Interested candidates can submit their detailed profile, technical and financial proposal to info@cff.or.ke copied to jowegi@cff.or.ke by COB 17th April 2024.