

REPUBLIC OF KENYA



THE PRESIDENCY  
MINISTRY OF DEVOLUTION AND PLANNING  
STATE DEPARTMENT OF DEVOLUTION

**DEVELOPMENT OF INTERGOVERNMENTAL ALTERNATIVE DISPUTE  
RESOLUTION FRAMEWORK FOR MANAGEMENT OF DEVOLUTION**

**TERMS OF REFERENCE FOR CONSULTANT TO DEVELOP  
INTERGOVERNMENTAL ALTERNATIVE DISPUTE RESOLUTION  
REGULATIONS UNDER SECTION 38 OF THE INTERGOVERNMENTAL  
RELATIONS ACT**

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**1. Legal background**

The Constitution in Article 159 (2) entrenches the principle of reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as means of dispute resolution herein after referred to as ADR. To further deepen, enhance, and widen the scope of its application, the Constitution in Article 189 (3) declares that “in any dispute between Governments, the Governments shall make every reasonable effort to settle the dispute including by means of procedures provided under national legislation. Article 189 (4) demands that **“National Legislation shall provide procedures for settling Intergovernmental disputes by alternative dispute resolution mechanisms, including negotiations, mediation and arbitration”**.

The foregoing constitutional provisions are further fortified by the Intergovernmental Relations Act 2012, which dedicates the entire part IV to dispute resolution mechanisms. In particular Sections 32, 33, 35 and 36 deal broadly with the manner in which intergovernmental disputes are to be handled. Both the Constitution and the Statute referred to above contemplated that disputes between the two levels of Government would be settled amicably and only in exceptional circumstances would such disputes be subject of judicial interventions.

## **Jurisprudence for ADR**

In a ruling delivered in Constitutional and Human Rights Division Petition Case Number 370 of 2015 between *Isiolo County Assembly Service Board and Another vs The Ministry of Devolution and Another*, Justice Onguto upheld both the spirit and the letter of the Constitution by holding that unless and until all alternative dispute resolution mechanisms provided in both the Constitution and the Statutes are fully applied and declared to have failed, any matter brought before court for determination would be in contravention of the Law. He therefore directed that parties pursue resolution of the dispute as by law provided. This ruling will hold and apply to all disputes unless vacated by a court of higher jurisdiction.

## **2. Justification**

However, notwithstanding the foregoing legal framework, intergovernmental disputes continue to find their way in courts even before the mechanisms as by law established are exhausted. This has led to strained relations between the National and County Governments and unnecessary huge financial costs incurred as legal fees paid to prosecuting and defending advocates.

While the Law has in broad terms set forth the principal of alternative dispute resolution, it is observed that specific legal structures and procedures on how to actualize and manage the process have not been provided for. It is for this reason that the intergovernmental relations Act in section 38 gives the Cabinet Secretary Powers in consultation with the Summit to make regulations and procedures for dispute resolution mechanisms. Under the provisions of the forgoing section the department of devolution intends to come up with an institutional and legal framework by enacting regulations that will guide the conduct of ADR process.

Once in place and implemented; the regulations will form the National Framework for Alternative Dispute Resolution. The establishment of this framework will yield significant reduction in litigation resulting from intergovernmental conflicts and enhance cooperation and consultation in the discharge of functions between the two levels of government.

It is in this regard that the State Department of Devolution seeks to establish a process to oversee the development of the ADR mechanism. It is proposed that an expert consultant together with a technical team will make draft proposals that will thereafter be subjected to due process before the ADR mechanism can be operationalized.

### **3. Objectives**

In enacting and operationalizing the regulations, the following objectives will be achieved:

- (i) Give effect to the Constitutional dictates and principles set out in Article 159(2), 189(3) and (4) for promoting mediation, arbitration and traditional dispute resolution as a means of dispute settlement.
- (ii) Actualize Sections 32, 33, 35, 36 and 38 of the Intergovernmental Relations Act by establishing a legal framework (structure) for processing and determining intergovernmental disputes.
- (iii) Promote intergovernmental relationships by embracing ADR as opposed to adversarial system of Dispute Settlement.
- (iv) Ensure speedy and cost effective determination of disputes for accelerated growth.

### **4. Scope of Work**

The consultant will be expected to:

1. Review existing national legal framework for Alternative Dispute Resolutions.
2. Carry out a comparative best practice analyses of dispute resolution mechanisms in jurisdictions with similar political systems.
3. Carry out a review of the past intergovernmental conflicts to determine causes, nature and scope.
4. Plan, prepare and conduct consultative meetings with relevant stakeholders with a view to obtaining information that will lead to the determination of the composition of an entity/entities that will hear and determine disputes that are intergovernmental in nature.
5. Develop proposed legislative instrument to provide for:
  - a. Institutional framework for dispute resolution mechanism
  - b. Description of the qualifications, appointment criteria and procedures of persons to serve in the entity/entities
  - c. Outline of the powers and functions of the entity/entities created under paragraph 2 above
  - d. Funding, management and operational structures of the entity/entities
  - e. Hearing, determination and enforcement of arbitral/ awards and judgments
  - f. Any other necessary provision, procedure, and or mechanism for effective dispute resolution

- g. Propose procedures for referring the dispute to court in a failed dispute resolution process
6. Make recommendation, with appropriate justification and supporting memoranda, on whether the deliverables of (1) and (2) above would be developed as regulations of the Intergovernmental Relations Act 2012 or as separate legislation.

## 5. Deliverables

- a) **Inception Report:** This report will be used to assess consultant's interpretation of the task, the approach to be used, and definition of the key stakeholders and implementation plan. The report will incorporate the minutes of the Inception Meeting. This output will be due two (2) weeks after signing of the contract
- b) **Baseline Report on the status of intergovernmental relations:** This report will, as a minimum document review past and existing disputes that are intergovernmental in nature, including a diagnosis of causes and sources specific to the conflicts identified; an overview of the key successes in out of court resolutions to some of the conflicts, including existing formal and informal mechanisms if any; a comparative best practice approach in ADR from jurisdictions with similar political systems, lessons learned from the experience in the three years of implementing devolution; as well as fact-based possible approaches or models of intergovernmental conflict mechanisms. This output will be due four (4) weeks after commencement.
- c) **Proposed draft ADR framework:** Based on the draft Baseline Report, a draft legislative instrument should be proposed. The draft legal instrument should be designed to conform to the outline provided under item 3 in these TOR. This output will be due eight (8) weeks after commencement.
- d) **Consultative Workshops:** These workshops will be targeted at participants drawn from institutions critical to the success of devolution (e.g. national government departments and independent commissions; the judiciary, parliament county governments, regulators; parastatals, etc). The workshop will be for both consultation and capacity-building. As such, the outputs described in (b) and (c) above are to be discussed at these workshops. The Ministry will cater for conferencing logistics for these workshops. This output will be due ten (10) weeks after commencement of the consultancy.
- e) **Final draft legislative instrument for Alternative Dispute Resolution Mechanisms.** This will incorporate outcomes of the Consultative Workshop and memoranda in support of the draft regulations. The form in which this final

deliverable will be made will be in conformity with accepted legal drafting standards in the country. This output will be due fourteen (14) weeks after commencement.

## 6. Timelines and Payment Schedules

The project is expected to take a maximum of fourteen (14) weeks. The payment schedule is as indicated herein.

<b>MILESTONE</b>	<b>DELIVERABLES</b>	<b>TIMELINE</b>	<b>% PAYMENT</b>
Inception	Inception report	2 weeks	20%
ADR Mechanism framework	Draft ADR regulations	8 weeks	30%
Finalization of the Draft ADR Mechanism Instrument	Final draft of legal instrument on ADR	14 weeks	50%

## 7. Consultant Qualifications and Experience

The following are the minimum qualifications and experience expected of the consultant:

- a) A degree in law from a University Recognized in Kenya.
- b) Be a member of the Law Society of Kenya with a current practicing certificate
- c) Experience in legislative drafting;
- d) Minimum 10 years' practical experience in Law;
- e) Experience in county and national legal frameworks, constitutional law and intergovernmental relations;
- f) Experience in stakeholder management;
- g) Excellent written and communication skills;
- h) Ability to work and deliver within strict deadlines.

## 8. Consultant Selection Criteria

<b>Criteria</b>	<b>Points</b>	<b>Score</b>

1. Qualifications	10%	20
2. Experience	30%	30
3. Proposal	40%	40
1. Competences	20%	10

The Technical Evaluation Committee appointed shall use the following matrix developed from the above criteria for evaluating the bids submitted

NO.	Technical Proposal Scoring Criteria	Max. Points	Remarks
<b>1.</b>	<b>Qualification of the Consultant (20 marks)</b>		
	a) Degree in Law, public policy, public administration or governance from a University Recognized in Kenya.	10	
	b) Qualification in Legislative Drafting	5	
	c) Holder of Current Practicing Certificate	5	
<b>2.</b>	<b>Experience (30 marks)</b>		
	a) Minimum 10 years' practical experience in Law;	10	
	b) Experience in county and national legal frameworks, constitutional law and intergovernmental relations;	5	
	c) Experience in stakeholder management;	5	
	d) Experience in public policy formulation; <ul style="list-style-type: none"> <li>• 10 years and above</li> <li>• 6-9 years</li> <li>• 1-5 years</li> </ul>	10 10 6 4	
<b>3.</b>	<b>Proposal (40 marks)</b>		
<b>3.1</b>	<b>Approach to Methodology:</b>  Clear methodology indicating various stages on how the consultant intends to achieve TOR objectives. The evaluation will consider the following;		

	<b>a)</b> The consultants understanding and interpretation of TOR and the assignment	<b>10</b>	
	<b>b)</b> Breakdown of activities leading up to deliverable which should include data collection, analysis and report writing etc	<b>5</b>	
<b>3.2</b>	<b>Work Plan:</b>  Clear work plan indicating the various activities and when the deliverable are expected. Work plan/ Gantt chart to be provided indicating timelines for each of identified activities	<b>15</b>	
<b>3.3</b>	<b>Organization</b>  Will consider the manner in which the consultant has structured resources to ensure successful and timely completion of the tasks. The consultant should disclose whether he/she will be a single consultant or will work with assistants. Where it's a team, consultant must disclose the number and qualifications of the assistants	<b>10</b>	
<b>4.</b>	<b>Competence (10 marks)</b>		
	a) Evidence of participation in drafting of legislation	<b>5</b>	
	b) Evidence of Presentations of legal journals or professional papers	<b>2</b>	
	c) Evidence of Training in Public policy, Public administration or governance	<b>3</b>	
	<b>Total</b>	<b>100</b>	