Commercial Practice
Issue 3| April 2021

KENYA SEEKS TO OVERHAUL ITS PPP FRAMEWORK

The Public Private Partnerships Bill, No. 6 of 2021 published on March 12th, 2021 (the "PPP Bill") is intended to present a solution to current institutional and governance hurdles that have plagued the successful implementation of PPPs in Kenya over the last 8 years. If passed into law, the proposed legislation will repeal the Public Private Partnerships Act, No. 15 of 2013 (the "PPP Act").

The PPP Bill comes at a time when both the public and private sectors are at their wits end at the protracted delays and inefficiencies that have come to be associated with PPPs, casting doubts about the effectiveness or suitability of PPPs as a procurement mechanism for large scale infrastructure projects in the country.

The Public Private Partnerships Bill, 2021 proposes to enhance the efficiency in the regulatory process of engagement of private parties in PPPs are conducted.

We highlight below a few key features in the PPP Bill which may be of interest to potential private parties, practitioners and contracting authorities at both levels of government.

PPP Arrangements

The PPP Bill reiterates the definition of a PPP in the PPP Act with a notable addition to the definition being the inclusion of the requirement that the private party transfer the facility that is the subject of the PPP arrangement to the contracting authority. This is important because, unlike privatisations which envisage that the public party will transfer legal ownership of the asset to the private party, PPPs only transfer the economic benefit of the asset to the private party for the agreed term while the legal ownership of the asset is retained by the public party.

Section 23 of the PPP Bill lists several factors that must be considered in determining the duration of a PPP arrangement. With the clarification in Section 2 that the private party must transfer the facility, it will be important that considerable thought be put into the condition of the asset or facility during the hand-back stage. Guidelines can be published to include a minimum threshold of remaining asset life, and there are internationally accepted standards ranging from 20 - 30% depending on the sector. This is important whether the government decides to re-tender the operation and maintenance of the asset, or manage it on its own. It also imposes an obligation on the private party to make some investments on the asset or facility prior to hand-back.

As far as the PPP arrangements enumerated under the Second Schedule are concerned, these have remained largely the same with five new arrangements including (i) Brownfield Concessions, (ii) Build Transfer, (iii) Annuity-Based Design, building, Finance and Operate, (iv) Joint Ventures and (v) Strategic Partnerships. While Strategic Partnerships are currently categorized as a specially permitted procurement procedure under Section 114A of the Public Procurement and Asset Disposal Act, 2015, it is envisaged that an amendment to S. 114A will likely be forthcoming and if not, this is addressed by including a superseding clause under Section 5 of the PPP Bill.

Institutional Framework

The PPP Unit, which serves as the secretariat to the PPP Committee, is headed by a Director will now replaced by a Directorate, established under Section 15 and headed by the Director General. The Director General will be eligible to serve a maximum of two four-year terms unlike the Director's two five-year terms. For purposes of civil

service grading structure, the Director General is at least two job rankings higher than the Director, coming in just below the Principal Secretary who serves as the administrative head of a state department within a Ministry.

The PPP Committee has retained most of its present structure. Notably, it now proposes three Principal Secretaries down from the current seven and the Attorney General will be replaced by the Solicitor General on the Committee. There will now be three private sector representatives down from the current four. County Governments finally now have a seat at the table with one representative to be nominated by the Council of Governors and the PPP Bill proposes more detailed provisions for the implementation of PPPs by County Governments under Sections 63 – 66.

The PPP Bill incorporates more comprehensive provisions for the implementation of PPPs by County Governments

Contracting Authorities will no longer be required to establish a PPP Node which is the internal structure charged with initiation of the PPP process and identifying and selecting projects for approval by the PPP Committee and Cabinet. Contracting Authorities will be obliged to constitute a Project Implementation Team that will liaise with the Directorate which will now play a more visible role in the identification screening and prioritization of the projects by Contracting Authorities under Sections 19 and 21 of the PPP Bill.

The Project Implementation Team will oversee the conduct of the feasibility studies, prepare the project for procurement, conduct the tender stage and negotiate the necessary project agreement.

Financial Close

The term financial close is not defined in the current PPP Act and appears only as part of the definition of transaction advisors, the PPP Bill seeks to provide clarity on what this entails and defines it to mean the date when all conditions precedent required to be met to achieve the first draw down on senior debt under a project agreement are met. With clearer processes and timelines to get to financial close, it is hoped that the PPP Bill will usher in a new burst of energy into the sector.

Local Content

As Kenya seeks to promote more local content through the participation of its citizens in the project life cycle, the term “Local Content” is now defined to include the procurement of locally available workforce, services and supplies and the systematic development of national capacity and capabilities. Section 77 and the Third Schedule of the PPP Bill further require that the project agreement address local content obligations which was not a requirement under the current legislative framework.

This is aligned to the current local content endeavours that is captured in various other sector and procurement legislation, including the Mining Act 2016, Energy Act 2019 as well as the Public Procurement and Asset Disposal Act 2015 and the Regulations promulgated thereunder in 2020.

Procurement Methods

Under the current PPP framework, Contracting Authorities can only engage with the private sector through a two-stage competitive bidding process or through privately initiated investment proposals. The latter has, in particular, seen many a private sector player lose several hundred thousand, and sometimes, millions of dollars, in project development for projects that ventured nowhere.

Section 37 of the PPP Bill now broadens the scope of engagement to include, in addition to the two currently in place, direct procurement. One criterion that may cause concern

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for a project to be directly procured is the requirement of *"…an urgent need for the works or services, and any other procurement method is impracticable…".*

It could be argued that since urgency is already adequately covered under the Public Procurement and Asset Disposal Act, and that the whole premise of implementing PPPs is to ensure that value for money is achieved, not just at the outset, but also maintained throughout the project life cycle.

It is hoped that particular criterion will be excluded as urgency and value for money are unlikely bedfellows within the PPP regime and the "urgent" project would be implemented at the expense of value for money. Given that Section 72 of the Bill empowers the Directorate to initiate an amendment and variation process if it is of the view that there has "arisen an imbalance in the distribution of benefits, and to promote the sustained transfer of project-linked economic benefit to the people of Kenya…" private sector players should be wary of participating in direct procurement processes under the guise of urgency.

Special Mention on Unsolicited Proposals

Private Parties initiating qualified unsolicited proposals may be eligible for compensation of development costs if they're unsuccessful in a subsequent competitive process for the project

Like the current PPP Act, the procurement of projects through Privately Initiated Investment Proposals (PIIPs) may be considered by a Contracting Authority under specified circumstances. New conditions have been included such as alignment of the proposal to national infrastructure priorities, assessment of fiscal affordability and potential contingent liabilities as well as meeting demonstrated societal needs. The project is also required to demonstrate both value for money and the ability to be delivered at a fair market price.

Contracting Authorities are required under Section 40(4) to submit the PIIPs to the Directorate for assessment and approval on payment of a non-refundable review fee of the lower of either 0.5% of the estimated project cost or US$50,000. The Contracting Authority and Directorate are obliged to undertake detailed due diligence of the PIIP's proponent and directors.

Private parties will welcome the inclusion of specified timelines for the evaluation of PIIPs including 90 days for proposal evaluation and 5 days for the preparation of the assessment report to the PPP Committee which shall make a determination within 14 days of such receipt.

Another interesting feature of the PIIPs is the six-month project development period during which the private party is required to prepare specific project development activities to prepare the project for award under Section 43. Private parties and the Contracting Authority may enter into a Project Development Agreement outlining the terms under which the project development activities will be undertaken. This has been a deal breaker for many entities including infrastructure funds seeking to participate in PIIPs but have been unable to without the comfort of the Project Development Agreement.

Where the Directorate is of the view that the project can, in the public interest, be procured more competitively in the market in the public interest, then the private party that proposed the project in the first place and fails to be the winning bidder, may be entitled to compensation of the development costs.

Under Section 44, such compensation would be limited to 0.5% of the estimated project costs and would only be payable if the costs are borne by the successful bidder. It will therefore be important for bidding documents to address this obligation and potential liability for the winning bidder.

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Government support Measures

Section 28 of the PPP Bill enumerates a more comprehensive list of government support measures that may be issued including a binding undertaking, a letter of support, a letter of credit and a full or partial credit guarantee amongst others. These measures are aligned to the Government Support Measures Policy of October 2018 and provide clarity for interested private parties on what could possibly be available for them.

Is there Scope for Improvements to the Bill?

One key area of concern is the potential conflict of interest that would be faced by the Directorate in the implementation of the new PPP framework. On the one hand the Directorate is expected to lead the project structuring, procurement, tender evaluation, contract negotiation and deal closure. Section 30 in particular states that the Contracting Authority and the Directorate shall be responsible for conceptualizing and undertaking the preparatory and tendering process of the project. The Contracting Authority's Project Implementation Team includes a representative of the Directorate while the Negotiation Committee is led by the Directorate.

However, the same Directorate is mandated to review and approve project proposals, feasibility studies and tender evaluation reports submitted by the Contracting Authorities. The Directorate would therefore sit in judgement of documentation before it, in which it played a significant role in creating. It would be prudent to reconsider this dual role.

Finally, it is hoped that the Third Schedule shall also include, as a minimum contractual obligation, the requirement for the private party to share with the government a percentage of any refinancing gains derived from a re-negotiation of the debt terms, or the substitution of the existing pool of lenders and loan agreement by another new agreement with more favourable terms.

It may come as a surprise to many Kenyans to know that some of the countries that have achieved great success in the implementation of multi-million dollar PPPs such as the United Kingdom and Australia, do not have substantive legislation enacted, with many working with a set of policies, regulations and/or guidelines, which, when properly adhered to, have proven to be very effective.

At the end of the day, investors want to see a comprehensive pipeline of well prepared and structured projects, a track record of success, consistency in implementation of the PPP framework in whatever form it takes, strong political commitment and support, public acceptability of the proposed projects and most importantly, fiscal sustainability.

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