UPDATED COMMENTARY ON KENYA'S NEW PPP LEGISLATIVE FRAMEWORK

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In April 2021, we discussed the salient features of the Public Private Partnerships Bill, No. 6 of 2021 published on March 12th, 2021 (the "PPP Bill"). On December 7th, 2021, the President assented to the Public Private Partnerships Act, No. 14 of 2021 with a commencement date of December 23rd, 2021 (the "PPP Act").

We highlight below a few key features in the PPP Act that were introduced during the legislative process, and which may be of interest to potential private parties, practitioners and contracting authorities at both levels of government.

Application of the PPP Act

The PPP Act, 2021 introduces Restricted Bidding as one of the procurement methods for PPP projects in Kenya.

Section 4 of the PPP Act introduces sub-section (3) which seeks to clarify that the provisions of the Public Procurement and Assets Disposal Act, 2015 (PPADA) shall not apply to PPP projects if all the monies for the project are from the private party. However, PPADA shall "*apply if there is counterpart funding, that is, including public funds*", for the PPP project. This is a curious last-minute inclusion as it implies that where there are viability gaps in PPP projects that may require co-financing from the government of Kenya, then the PPADA, and not the PPP Act would be applicable.

It appears that the new Section 4(3)(b) contradicts Section 81(3) of the PPP Act which states that the moneys received into the Fund shall be utilised towards, amongst things, extending viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government. To this end, R. 11 of the PPP (Project Facilitation Fund) Regulations, 2017 provides that viability gap funding shall be available to support project capital costs and recoverable land acquisition costs of proposed PPP projects.

Co-financing would be particularly useful where the government may seek to financially support a project that is an economically viable user-pays project, but where the projected revenue - on the basis of use - is insufficient for the project to be commercially viable. Other reasons for co-financing include the need to structure the price of services provided by the assets in the PPP project at a level that would be socially and politically acceptable for the population.

As the Project Facilitation Fund is a public fund within the meaning of, and is managed in accordance with, the provisions of the Public Finance Management Act, 2012, it will be of interest to see how this new provision will be interpreted by the Directorate and courts.

Institutional Framework & Role of Public Parties

The composition of the PPP Committee established under Section 6 of the PPP Act remains at 10 members including the Director General but the permanent secretary responsible for matters relating to industrialisation has been replaced by a second person nominated by the Council of County Governors. However, new provisions relating to co-option of various persons including the principal secretary responsible for the Contracting Authority whose PPP project is under consideration as well as any other persons from the public or private sector whose knowledge or experience is necessary for the PPP will ensure that projects from various sectors other than those represented on the PPP Committee are well considered. Such co-opted members will not be eligible to vote, and their term of co-option is limited to one (1) year.

New grounds for removal of members of the PPP Committee now include breach of the provisions of Chapter Six of the Constitution of Kenya which addresses matters relating to leadership and integrity as well as where a member is deregistered by a professional body for professional misconduct. Qualifications for the role of the Director General have been expanded beyond finance, economics and law to specifically include engineering and project management.

A key role of the PPP Directorate that was of concern in the PPP Bill related to its mandate under Section 19(1)(c) under which the Directorate was expected to "lead" contracting authorities in project structuring, procurement, tender evaluation, contract negotiation and deal closure. The Directorate will now only provide "guidance and advice" to contracting authorities in project structuring, procurement and tender evaluations but continue to lead in the contract negotiations and deal closure.

This is a welcome amendment as it ensures that there is no conflict of interest within the Directorate which would previously have had to approve projects and tender processes in which it had played a critical lead role in structuring. For good measure, Section 19(3) has been introduced to oblige the Directorate to issue standard bidding documents for use by Contracting Authorities who are then required, under Section 37(3) to use these in all their PPP procurements.

S. 21(2) of the PPP Act clarifies and caps the maximum term for PPP projects at 30 years

Section 22(1) of the PPP Act introduces an obligation on Contracting Authorities to ensure that there is public participation on a project. This is crucial in light of key projects proposed to be implemented in Kenya that have faced significant resistance from the general public. Recent court decisions on what constitutes adequate public participation have been guided by decisions of constitutional courts in jurisdictions such as South Africa and it is hoped that the Public Participation (No. 2) Bill, 2019 or its successor will finally find its way through the legislative chain into law to guide this process.

As far as determining which projects should be included in the Directorate's list is concerned, Contracting Authorities are now obliged to ensure that their projects are part of the national development agenda. This is a slightly different requirement from Section 25 of the PPP Bill which only required the proposed PPP projects to be part of the Contracting Authority's development programme. It is hoped that this amendment will see the end of the era in which Contracting Authorities worked in silos with no coordination of their projects and activities and in some instances, where two entities listed the same project in its development agenda much to the consternation of the private sector participating in these procurement processes.

Timelines

The PPP Bill had failed to address some key timelines that were crucial for progressing projects in a timely manner. Section 33(2) of the PPP Act now obliges the PPP Committee to reach a determination on whether or not to approve a Contracting Authority's feasibility study and for the procurement of the project as a PPP within 21 days. As far as the Petition Committee is concerned, Section 75(7) introduces the right of an aggrieved party to make an application for review by the Committee of its decision within 7 days of the decision in question.

However, some crucial timelines, especially during the negotiation process, are still missing. These include timelines for post-bid negotiations between the Contracting Authority and the first and second ranked bidders and these are due to be published as guidelines by the Directorate. Further, where the Contracting Authority's negotiating committee has forwarded recommendations to the Directorate which are not approved, the Section 58 of the PPP Act fails to provide timelines for notification by the Directorate to the Contracting Authority of its decision.

Section 60 requires Contracting Authorities to notify (i) all bidders of the decision of the PPP Committee; and (ii) Cabinet of the Committee's approval to enter into the project agreement with the successful bidder but again, fails to provide a timeline for these important notifications.

Section 61, which addresses the execution of project agreements introduces a new timeline of 12 months from the project agreement execution date during which the private party should commence the project. This timeline however seems to ignore the fact that once the Project Agreement is executed, the private parties then enter into negotiations with its lenders to reach financial close which can, in many instances, exceed the twelve-month period. It will be crucial to understand if there will be an opportunity to extend this period, especially where financial close is dependent on government support measures that may involve protracted negotiations, as Section 61(3) entitles the Contracting Authority to terminate the project agreement with no further liability attached to it or the Government of Kenya.

PPP Act introduces revenue sharing obligations where the PPP project's performance exceeds the negotiated target ROI

Procurement Methods

As noted in our commentary on the PPP Bill, the 2013 PPP Act provided for only two procurement methods, namely, a two-stage competitive bidding process or through privately initiated investment proposals. Section 37 of the PPP Bill broadened the scope of engagement to include direct procurement. The PPP Act now introduces Restricted Bidding where (i) competition for the contract is restricted to prequalified tenderers due to the complexity or specialised nature of the works or services; (ii) the time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the works or goods to be procured; (iii) if there is evidence that there are only a few known suppliers of the works or services; or (iv) an advertisement is placed, where applicable, on the authority's website regarding the intention to procure through limited tender.

Section 45(2) requires that Contracting Authorities engaging in restricted bidding do so in the manner prescribed but it is not clear whether such guidelines are to be issued by the Directorate or in the form of Regulations to be promulgated by the Cabinet Secretary responsible for Finance and this clarity will be welcome in due course.

Revenue Sharing

Provisions relating to the minimum obligations of parties to the Project Agreement have been expanded in Section 70(2) of the PPP Act to require that every project agreement shall make provision for the revenue sharing mechanisms and thresholds between the private party and the Government, where a project's revenue performance meets and exceeds the targeted return on investment negotiated under a project agreement.

Conclusions

The enactment of the PPP Act, 2021 is a welcome development and practitioners and private parties will now be keen to see its successful implementation starting with the development and publication of the various standard templates, practice manuals and guidelines that will hopefully provide consistency, clarity and a reduction in transaction procurement and negotiation timelines for PPP Projects.

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