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HOW TO CRAFT A FAVOURABLE PPP FRAMEWORK IN KENYA

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Public Private Partnerships (PPPs) have been hailed as the antidote for the perennial insufficiency of public funds to finance infrastructure projects. Through PPPs, the private sector is expected to finance projects such as roads, rail, ports, bridges, housing and urban developments, medical centres and power plants.

In return, the private developers shall generate revenues including by way of charges to the public for use of the facilities, for example toll roads, the sale of the output, such as electricity from a power plant or the periodic service fees or lease rental payments from the government once the infrastructure is up and running.

While the PPP concept is straightforward, implementation of PPP arrangements can be a web of complexity. Questions such as how to identify suitable projects, gauge the risks involved and test the likelihood of success need to be answered. In addition, selecting the most qualified project developer for a specific project can be a tricky task when the pool of investors with capacity for PPPs is limited. The legal framework for PPPs is central to these issues as it sets the parameters for awarding and contracting PPPs.

The PPP Act started in 2013 and with it, the institutional framework including the PPP Unit and the PPP Committee. Six years later, following significant efforts and funding injected, the PPP scorecard shows that few projects have reached financial close, albeit with a good number of others in the pipeline.

This result begs the question whether the PPP framework is helping or hurting the development of successful PPPs. Are the requirements too onerous and how can some of the hurdles be eliminated?

This is a loaded question that cannot be adequately probed within this article. We provide some proposals, which, together with changes to the regulatory framework (already in the pipeline), could trigger an increase in the quantity and quality of PPP projects crossing the finish line.

One crucial element revolves around clear timelines for considering proposals and communicating decisions to private investors. Currently, the PPP Regulations, 2014, provide for a proposal evaluation team to assess bids within seven days of opening the technical bids and for the PPP Committee to approve or reject the evaluation report within 21 days of the report being received by the from the Contracting Authority.

However, it is not clear what happens when these timelines are exceeded. Worse still, there are no timelines at all for the evaluation of a Privately Initiated Investment Proposal (PIIP), which is a stumbling block for potential investors who may opt to withdraw when their patience runs out.

Some delays in responding to bidders are blamed on the failure to achieve quorum at the various levels required to provide approval, which hampers expeditious decision making. The membership of the PPP organs may need to be expanded, or revisited to consider availability commitments to improve the chances of convening regular meetings where pending business can be progressed.

PPPs are largely intended to be driven by Contracting Authorities in the public sector, such as the authorities in the roads, power, health and housing sectors. Hearteningly, the PPP Amendment Bill, 2017, contains specific provisions for county governments to enter into PPPs, in acknowledgement of the abundant PPP opportunities at the county level.

One recurring concern with the Contracting Authorities is their capability to procure and manage PPPs effectively.

> SUITABLE PROJECTS, THE RISKS AND TEST THE LIKELIHOOD OF SUCCESS NEED TO BE KNOWN

The PPP Unit is charged with providing technical support to the Contracting Authorities but they still have to engage transaction advisers. The Transaction Advisers can provide much needed support but the Contracting Authorities still need to make decisions for which responsibility cannot be delegated. Contracting qualified transaction advisers is also a challenge and fortuitously, the Bill proposes a new requirement for contracting authorities to consult the PPP Unit when engaging transaction advisers.

At any rate, PPP capacity building for contracting authorities remains a priority, and the county level they will need especial handholding as they are new to the world of PPPs.

Project developers and bidders also require additional support and incentives in order for the PPP initiative to gain significant traction.

In the case of PIIPs, the private investor has to submit a detailed feasibility report which involves retaining consultants to assess the environmental, social and financial implications of a project.

Given the time, data and expertise required, the costs can be substantial despite there being no guarantee that the proposal shall be approved.

To avoid front-loading heavy feasibility study costs on a project proposer in the early stages of PPP conceptualisation, the PPP Unit should consider reviewing a proposal based on an initial high-level study.

In the event that a contracting authority or the PPP Unit would like to open a PIIP to other bidders for more competitive pricing, then the proposer should qualify for some incentives such as the payment of developer's fees as reimbursement for proposal costs incurred.

Other incentives may include giving the PIIP proposer a bid bonus of additional points when scoring their proposal. A Swiss challenge can also be used to give the PIIP proposer a chance to match the winning bid by another party.

In terms of improved transparency and communication, bidders and project proposers would also benefit from a secure web based portal where proposals are uploaded and visibly tracked as they proceed through the chain of approvals. Additional information can also be requested and uploaded.

A common complaint regarding PPP procurement is the multi-layered approval. From the PPP Act, a CA needs both a PPP node and a project preparation and appraisal team, yet it should be possible for a single team to handle both aspects.

Moreover, the CA is required to have a tender evaluation committee and a contract negotiation committee when one team may be more expedient since the two functions are interconnected.

Providentially, the Bill also proposes to reduce the steps for which PPP Committee approval is required, as well as to limit the approvals required from the Cabinet and Parliament in order to make the process smoother and swifter.

The PPP regulations also contain de minimis thresholds such that PPP rules only apply to national projects worth at least Sh85 million and county projects worth at least KES 5 million.

PPPs remain Kenya's best chance for infrastructural development as the government's external and domestic borrowing capacity is increasingly constrained. Modifying the PPP procurement framework to increase and speed up successful PPPs should be a top priority.