

**ESTABLISHING AN EFFECTIVE REGULATORY FRAMEWORK
FOR PPPs IN KENYA.**

By

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G62/75423/2014

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS OF THE DEGREE OF MASTERS OF LAWS,
SCHOOL OF LAW, UNIVERSITY OF NAIROBI**

NOVEMBER 2018

DECLARATION

I, **BERYL ZORAIMA NALO**, do hereby declare that this is my original work and has not been submitted for a degree in any other University.

Signed.....

BERYL ZORAIMA NALO

This Thesis has been submitted for examination with my knowledge and approval as the University Supervisor.

Signed.....

PROF. MIGAI AKECH

DEDICATION

This Thesis is dedicated to my beloved children, Maya, Sasha and Caesar who have taught me that even the largest task can be accomplished if done one step at a time.

ACKNOWLEDGMENTS

I sincerely thank those who made this Thesis possible:

Highest honour to the Almighty God for seeing this work to its completion.

Deep gratitude to my Supervisor, Prof. Migai Akech for his patience and expert guidance in this thesis.

My love and thanks to my family for offering me the much-needed support and encouragement, particularly my father, Mr. Joash Nalo for always believing in me and my husband Nixon Korir for never doubting my capabilities.

Much appreciation to my colleagues who willingly listened to my ideas, views, interpretations, analysis and offered criticisms and additional pointers.

Lastly, my regards and blessings to all those who supported me in any respect during the completion of this project.

ABSTRACT

The provision of public infrastructure and services is a key mandate of the Government. The provision of these services are a fundamental prerequisite for economic growth and development. However, fiscal constraints experienced by countries have resulted in the need for developing new and innovative strategies to the provision and financing of public infrastructure and services, gradually supplementing the traditional role of government as the primary provider of such infrastructure and services. The private sector provision of public infrastructure and services has the potential to offer enhanced value for money and enables the Government to use the private sector's delivery and project completion expertise and capability for the benefit of the people. PPPs are therefore a significant economic vehicle if well implemented and regulated. Any loopholes in the regulatory framework may result to significant wastage, bottlenecks in the implementation of the programmes and eventually eroded public confidence in the system. An over regulated regime in the sense of heavy government involvement may be counter-productive as it may put off the potential private sector investors. Conversely, a regime that is under regulated may result to lack of transparency and accountability.

The study seeks to interrogate the existing PPP regulatory system in Kenya as well as propose recommendations on how the system could be improved to ensure effectiveness in the implementation of PPP projects to facilitate economic growth and development in the country.

LIST OF STATUTES

- 1.** Public Procurement and Disposal Act, 2005 (now repealed)
- 2.** Public Private Partnerships Act, 2013
- 3.** Public Private Partnership Regulations, 2014.

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CHAPTER 1

INTRODUCTION TO THE STUDY

With Kenya's population steadily increasing at an estimated annual growth rate of 2.7%,¹ there is increased demand for quality and affordable services including but not limited to transport, water and sewerage, telecommunications, power and social services. The increased demand for quality services is however not matched with a proportionate increase in public resources and governmental capacity to deliver the required services and to the expected and required quality. To remedy the gulf between the demand for quality services and the ever shrinking government resources, innovative measures in resource mobilization and service delivery have become a necessity. One of these measures is the involvement of key stakeholders including the private sector in the public service delivery. Private sector involvement in delivery of public services takes many forms including the Public Private Partnerships (PPPs).

PPPs can be defined as a long-term contract between a private party and a government entity, for providing a public asset or service,² in which the private party bears significant risk and management responsibility, and remuneration is linked to performance.³ Essentially, PPPs embody a form of cooperation between public authorities and the private sector in the delivery of public services which are usually money intensive. These partnerships have benefits including: equitable distribution of risks between the partners on the basis of who can better deal with them, the mechanism of payment of the public sector is linked to performance indicators, improved management of the site and the quality of services and better value for money.

1 Information accessed at <http://data.worldbank.org/indicator/SP.POP.GROW/countries/KE?display=graph>. Last accessed on 13th January, 2016.

² Can be defined as assets or services provided by or on behalf of the government to benefit its citizens. Such services include health care, transport, or the removal of waste. Such assets or services are provided for the public interest.

³ World Bank Group, PPP Knowledge Lab accessed at <https://PPPknowledgelab.org/>. Last accessed on 13th January, 2016.

From the foregoing it is clear that PPPs incorporate more than one player in their establishment and implementation. As already pointed out, the private sector and the government are the direct players involved. However, a third participant and perhaps the most significant of them all is the general public, the citizenry. The public is the constituency the PPPs are intended for, the beneficiaries thereof and ultimately the financiers. While the government's concern is the provision of quality services and assets at the minimum possible cost, the private sector's main concern on the other hand is maximizing their opportunities and profits. These competing and parallel interests if unchecked may lead to bottlenecks in the implementation of the PPPs, mistrust between the partners, wastage and ultimately troubled implementation of PPP projects.

To achieve the above, the existing regulatory framework should ensure a delicate balance between these competing interests consequently guaranteeing the general public optimal benefits from the implementation of these projects.

The World Bank's 2017 report conceded that governments need proper frameworks and capacity to identify the projects that are best done as PPPs, to procure them transparently and efficiently, and to undertake contract management and regulation so as to achieve the expected value-for-money for government and consumers and sustain investment.⁴

PPPs in Kenya are regulated under the PPP Act, 2013 and the PPP Regulations, 2014. The Act and Regulations provide for comprehensive legal and institutional framework for the regulation of PPPs in Kenya. The Act lays down a broad legal framework for regulation of PPPs which are operationalised by the Regulations. The Act and the regulations seek to provide comprehensive legal regulations of PPPs. As far as institutional framework is concerned, the Act establishes the Public Private Partnership

⁴ [Benchmarking PPP Procurement 2017](#) p.5 accessed on 17th of November 2018

Committee (PPPC)⁵ which replaces the Public Private Partnership Steering Committee established under the 2009 regulations under the PPDA of 2005. The functions of the Committee are listed under section 7 of the Act.⁶ Section 9 of the Act allows the Committee to delegate its duties to a sub-committee as it deems necessary. The Act also establishes a Public Private Partnership Unit under the state department responsible for matters relating to finance.⁷ The functions of the Unit are serving as the secretariat and technical arm of the Committee; and provide technical, financial and legal expertise to the Committee and any node established under the Act.⁸ The Act makes it a requirement that a contracting authority that intends to enter into a public private partnership arrangement with a private party establishes a public private partnership node.⁹

Part V of the Act provides for the general regulation of the PPPs. Aspects of PPPs addressed under this part include provisions with regard to project agreements, duration of PPP, approval of projects by the Committee and Cabinet, pre-qualification procedures by contracting authority, price setting and success fees. Part VI of the Act provides for project identification and selection of private party. Section 29 of the Act provides that all PPP projects shall be procured by way of competitive bidding process except as provided for under the Act. Part VII deals with provisions on the procedures with respect to solicited proposals by contracting authorities while Part VIII covers provisions respecting privately initiated investment proposals. Part IX makes provisions on the management of project agreements.

This study seeks to establish whether the legal framework established by the Act and the Regulations ensures effective regulation of PPPs in Kenya. The study shall therefore undertake an indepth analysis

⁵ Section 4 of the PPP Act 2013

⁶ These include formulating policy guidelines on public private partnerships, ensuring that all projects are consistent with the national priorities specified in the relevant policy on public private partnerships, approving project proposals submitted to it by a contracting authority, formulating or approving standards, guidelines and procedures for awarding contracts and standardized bid documents, examining and approving the feasibility study conducted by a contracting authority under the Act, reviewing the legal and institutional and regulatory framework of public private partnerships, overseeing the monitoring and evaluation by contracting authorities of a public private partnership from the commencement to the post completion stage and ensuring the efficient implementation of any project agreement entered.

⁷ Section 12

⁸ Section 14

⁹ Section 17

of the Act and Regulations with a view to identifying the shortfalls that need addressing for purposes of enhancing effectiveness in PPP regulation. The study shall then make recommendations on how the legal framework regulating PPPs should be strengthened to ensure effective regulation of PPPs in Kenya.

1.1 PROBLEM STATEMENT

PPPs are an important vehicle for the government to provide essential services without expending too much of its limited resources by involving the private sector. The involvement of the private sector introduces another dynamic in public service provision as while the Government's main concern is ideally provision of services for the public's benefit, the private sector players would more often than not seek to make profits from these ventures.

Effective execution and implementation of PPP projects has impelled many countries to great heights. However, in Kenya there has been significant delays in a number of projects where the contract delivery period has been overrun, negotiation breakdowns have been suffered, substantial changes have been requested by the investors in the middle of contract execution and in some cases the entire project has been rejected by the public for whom it was intended for. The root cause of these delay causing issues is easily traceable to the country's regulatory and institutional framework, being the PPP Act 2013 and the PPP Regulations 2014.

The delays and poor implementation are attributable to the regulatory gaps which fail to balance the conflicting interests between the government and the private sector. It is therefore important that the relevant legal framework for regulation of PPPs ensures timely and cost-effective public service delivery whilst not being too restrictive on the private sector actors.

Based on this, the research seeks to study the state of the existing PPP legal framework in Kenya and also evaluate how the same can be improved and made more effective to ensure successful service delivery to the masses.

1.2 OBJECTIVES OF THE STUDY

The broad objective of the study is to investigate the existing PPP regulatory regime in Kenya and to determine whether the same provides a sound legal basis for effective regulation of PPPs. The specific objectives are as follows:

1. To examine whether the existing regulatory framework guarantees effective implementation of PPPs in Kenya.
2. To make recommendations on how the existing regulatory framework can be improved to guarantee effective implementation of PPPs.

1.3 RESEARCH QUESTIONS

This paper therefore proposes the following questions.

- (a) Is the existing PPP legal framework in Kenya effective in ensuring successful implementation of PPP projects?
- (b) Does the existing PPP legal framework in Kenya require improvements to ensure effective implementation of PPP projects?

1.4 RESEARCH HYPOTHESIS

- (a) The existing PPP legal framework in Kenya is not effective in ensuring successful implementation of PPP projects.
- (b) The existing PPP legal framework in Kenya requires improvements to ensure effective implementation of PPP projects.

1.5 SIGNIFICANCE OF THE STUDY

The provision of public infrastructure and services is a key mandate of the Government. The provisions of these services are a fundamental prerequisite for economic growth and development. However, fiscal constraints experienced by countries have resulted in the need for developing new and innovative strategies to the provision and financing of public infrastructure and services, gradually supplementing the traditional role of government as the primary provider of such infrastructure and services. The enactment of the PPP Act in Kenya reflects the Government's desire to improve the quality, quantity, cost-effectiveness and timely provision of much needed public infrastructure and services in Kenya. The private sector provision of public infrastructure and services has the potential to offer enhanced value for money and enables the Government to use the private sector's delivery and project completion expertise and capability for the benefit of the people.¹⁰

PPPs are therefore a significant economic vehicle if well implemented and regulated. Any loopholes in the regulatory framework may result to significant wastage, bottlenecks in the implementation of the programmes and eventually eroded public confidence in the system. An over regulated regime in the sense of heavy government involvement may be counter-productive as it may put off the potential private sector investors. Conversely, a regime that is under regulated may result to lack of transparency and accountability.

This study is significant as it seeks to not only interrogate the existing PPP regulatory system in Kenya but also propose recommendations on how the system could be improved to ensure effectiveness in the implementation of PPP projects. This would in turn facilitate economic growth and development in the country.

¹⁰ Information available at <http://PPPunit.go.ke/index.php/legal-regulatory-framework> last accessed on 20th January, 2016.

1.6 CONCEPTUAL FRAMEWORK

An ideal PPP arrangement requires a favourable environment to ensure that production costs and public restraints are reduced to a bearable level. This study has identified four essential elements for a conducive operating environment for PPPs: the presence of laws, anticorruption mechanism, credible government and political environment which could be reduced to legal and institutional frameworks for regulating the operation of the PPP arrangements.¹¹

PPPs are a sub-set of the tools of government – institutional arrangements through which public policy is mediated. Their status as instruments of the public interest, yet bodies that actively engage private actors, means that questions of governance are particularly important. The design of appropriate governance mechanisms provides a way in which that public interest can be protected despite the delegation of authority to business concerns. It creates constraints on the agency of private actors, reducing possibilities for self-interested behaviour at the state's expense. And in contradistinction to the first point, governance structures act as a constraint to the state, enabling private actors to realize the innovative potential that PPPs are intended to promote by virtue of not being part of the state's bureaucracy. In other words, they promote opportunities for self-governance of public activity by private actors at arm's length to the state¹².

The tension between these two purposes of PPP governance is evident in the policy and practice of PPPs, although the weight given to one or the other is influenced by the ideological stance of the observer. Those seeing PPPs from a statist position will emphasise the need to ensure that governance protects the public interest, and thus favour rather more in the way of rules and safeguards than

¹¹ Yang, Y., Hou, Y., & Wang, Y. (2013). On the Development of Public Private Partnerships in Transitional Economies; An Explanatory Framework. *The American Society for Public Administration*, 73(2), 301-310. Available at http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2012.02672.x/epdf?r3_referer=wol&tracking_action=preview_click&show_checkout=1&purchase_referrer=www.google.com&purchase_site_license=LICENSE_DENIED last accessed on 21st June, 2016.

¹² Mathur, N. and C. Skelcher (2007), 'Evaluating democratic performance: methodologies for assessing the relationship between network governance and citizens', pp1-2

observers who regard PPPs as a way through which risk can be transferred, innovation released and public benefit enhanced. Every PPP failure brings a call for reform in the regulatory framework; but whether this should be enhanced or reduced regulation is a matter of ideological predisposition.

Governance, then, is inimical to the debate about PPPs. Governance is a widely used and seldom defined term. In the context of this chapter it refers to the rules that prescribe who should make, execute and be accountable for the conduct of a PPP, and in what way that conduct should be exercised, for example through consultation with interested parties, transparency in decision-making, and so on. These rules may be defined a priori by government, an international regulatory agency, or some other legitimate actor. They can also emerge more informally as the day-to-day practices of actors involved with the PPP become institutionalised. The result is a situation where publicly legitimated rules sit alongside those that are determined privately¹³

The existence of enforceable laws is important as it would provide assurance to private partners that their interests shall be safeguarded and at the same time help in curbing opportunistic behaviours. A sound legal system also assists in ensuring the efficient operation of partnerships in accordance with broader policy objectives while the absence of the same breeds insolvable disputes.

The anticorruption mechanisms cover institutions established to curb corruption by instilling transparency in PPP arrangements. Corruption imposes heavy transaction costs especially on the private partners in PPP arrangements. Anticorruption measures would include the improvement of openness, fairness, and transparency in the bidding process; the enforcement of the supervision of operation; and the strengthening of performance, evaluation, and auditing.¹⁴

¹³ Baker, K., J. Justice and C. Skelcher (2009), 'The institutional design of self-governance: insights from public-private partnerships', in E. Sørensen and P. Triantafyllou, p 2

¹⁴ Yakubu N. & Natalia A, A Conceptual Framework for Managing Risks in Public Private Partnership Projects in Housing Estate Development in Nigeria. International Journal of Regional Development, 2016, Vol. 3, No. 1, Macrothink Institute. Available at

Very closely linked to anticorruption is credibility of the participating government. The importance of credibility of the participating government cannot be overemphasized as such credibility is important in attracting private investment. Government credibility is enhanced by factors such as availability of political checks and balances, an independent juridical system, and independent regulation. A successful PPP requires a strong central administration structure to steer and guide policy implementation. This underscores the need for good governance as a prerequisite for successful PPPs.¹⁵ Good governance is participatory, transparent and accountable which features have far great implications in the performance of PPP arrangements.

Political environment is also a key variable for the successful implementation of PPP. Political support is a paramount and necessary requirement for a successful PPP regulation and implementation. Since most of PPP projects are a long term contract during which time major political changes could occur, private partners would always require some sort of immunity from unnecessary political interference. In an event of change in government, the private sector may face the political risks such as contract expropriation or unilateral termination of the contract.¹⁶ Private partners will be more attracted in stable states since the PPP contract not being under the auspices of the commercial law can be discretionarily modified by public authorities against private partners. Private partners would also be more attracted in states where the risks that are supported by the state are those that the private operators have little control of, such as political, financial and usage risk.

A regulatory environment which meets the key principles of good regulation, as set out in the OECD Recommendation on Regulatory Policy and Governance, reduces the costs to business and enhances the chances that PPP projects bring value for money.

<http://webcache.googleusercontent.com/search?q=cache:k9dLRcpEJsAJ:www.macrothink.org/journal/index.php/ijrd/article/view/8144+&cd=7&hl=en&ct=clnk> last accessed on 21st June, 2016.

¹⁵ *ibid.*

¹⁶ *ibid.*

1.7 LITERATURE REVIEW

PPP regulation in Kenya was a subject of literary introspection way before the enactment of the PPP Act, 2013. This echoed the government's appreciation of the significance of PPPs in service delivery. Kenya has been keen on PPPs for several reasons: one, there is increased demand for quality and affordable services from citizens. Second, PPPs would reduce the funding gap for infrastructure estimated at USD 40 Billion over the next 8 years. Third, PPPs provide a new source of investment capital for required infrastructure projects. Fourth, PPPs would reduce government sovereign borrowings and associated risks. Fifth, PPPs would drive the creation of local long term funding market. Sixth, PPP would utilize efficiencies of private sector in running public services. Seventh, PPPs would expand economy and stimulate job creation and finally, PPP would increase quality of public services to the Kenyan citizen.¹⁷ For these reasons, creation of an effective regulatory framework to facilitate implementation of PPPs has been of paramount to concern to commentators and authors who have taken interest on the subject.

David O Ong'olo¹⁸ commenting before the enactment of the PPP Act during the PPP policy formulating stage warns that the encouragement of PPPs ignores a range of concerns including: whether PPPs should be unambiguously preferred to public sector investment and operation of services; the need to evaluate the social and economic impact of the risks and future liabilities created by PPPs; public concerns on the PPPs transfer of costs of paying for investment from present to future generations; about transparency of processes by which PPPs are likely to be effectively established and operated. As already pointed out, Ong'olo was commenting before the enactment of the existing regulatory regime and therefore he did not interrogate the effectiveness of the existing framework. This

¹⁷ Ministry of Finance, Kenya. *Public-Private Partnerships in Kenya*. Available at <http://trademission.kenyagreece.com/wp-content/uploads/Public-Private-Partnership-in-Kenya.pdf>. Last accessed on 21st January, 2016.

¹⁸ David O. Ongolo *Public Private Partnerships (PPP) Practice and Regulatory Policy In Kenya*, Spellman & Walker Co. Ltd, 2006. Available at [file:///C:/Users/Mutua/Downloads/Public%20Private%20Partnerships%20\(1\).pdf](file:///C:/Users/Mutua/Downloads/Public%20Private%20Partnerships%20(1).pdf), last accessed on 22nd January, 2016.

study will examine whether Ong'olo's concerns have been factored in the existing regulatory regime, and if so, to what extent in a bid to measure the effectiveness of the existing regulatory regime.

In a note¹⁹ submitted by Public Private Infrastructure Advisory Faculty, it is noted that regulation is one of the key enablers for private sector participation which ensure that the expectations of the private investor, the government, and the public are equally and sustainably considered. Institutional and legal frameworks are also paramount to effective private participation and are key aspects that the private sector is keen to analyze before partnering with a public body. The note further identifies that a key element for successful PPPs is preparation; only properly prepared projects will bring competition. The project cycle should involve an identification process, a feasibility study, marketing sounding, a tender process, negotiation of the contract, and the management of the contract. PPPs also need to be affordable/bankable, economically viable and involve fair allocation of risks/rewards. This note was given in 2011 before the enactment of the existing regime. It did not touch on the effectiveness of the existing regime as a result. This study shall examine whether the elements covered in the note have been factored in the regulatory framework and how the same could be included to improve its effectiveness.

As to what an effective regulatory system should entail, several commentators have rendered their views on the same. Cuttaree and Mandi- Perrot emphasize the need for a clear, broad, and flexible legal environment in ensuring successful implementation of PPP projects. They state that private partners and long term investors seek the reassurance of a solid legal framework that provides judicial enforcement of contractual rights, clear laws and regulations that assign responsibilities and specify processes for preparing, bidding and approving projects.²⁰ However, Cuttaree and Mandi- Perrot only deal with the

¹⁹Public Private Infrastructure Advisory Faculty, *How to build a successful Public-Private Partnership (PPP): Lessons from the third African PPP Conference in Nairobi*, 2011. Available at <http://www.ppiaf.org/sites/ppiaf.org/files/documents/Building-successful-PPPs-lessons.pdf>. Last accessed on 23rd January, 2016

²⁰ Cuttaree V. & Mandri-Perott C., *Public Private Partnerships in Europe and Asia*. The World Bank (2010).

PPP regulation in Europe. This paper specifically seeks to interrogate the effectiveness of PPP regulation in Kenya. With respect to what Cuttaree and Mandi- Perrot have highlighted, this study shall examine whether these parameters have been taken into account in the existing regulatory framework.

Pongsiri insists the establishment of a transparent and sound regulatory framework as a necessary prerequisite to private sector participation in a PPP. Such regulation provides assurance to the private partner that the regulatory system includes protection from expropriation, arbitration of commercial disputes, respect for contract agreements, and legitimate recovery of costs and profit proportional to risks undertaken. He observes that a favourable legal framework is critical to attracting major players.²¹ Pongsiri also does not comment on PPP regulation in the Kenyan context which this study seeks to do. Accordingly, the study shall examine whether the factors highlighted by Pongsiri have been included in the existing regulation.

It should be noted that not much literature if not none exists that interrogates the effectiveness of the existing PPP regulatory framework in Kenya. This is the literature gap that this paper seeks to address.

1.8 RESEARCH METHODOLOGY

The study shall use the following methods in data collection and analyses:

- i. Using structured questionnaires to interview relevant stakeholders. These stakeholders shall include public players especially officials and officers from the Public Private Partnership Unit (PPPU). The study shall also seek to interview some private players who have an interest or have been involved in PPP projects. The questionnaires shall be structured to specifically get feedback on interest areas including but not limited to the stakeholders' opinion on PPP generally as an alternative means of public procurement, their opinion on what an ideal PPP

²¹ Pongsiri, N. Regulation and Public Private Partnerships. *The International Journal of Public Sector Management*, Vol. 15 No. 6, pp. 487-95. (2002).

regulatory framework should entail and their views on the effectiveness of Kenya's PPP regulatory regime.

- ii. Library research including online resources shall also be employed. The University of Nairobi Library including the online version shall be the researcher's primary source. The researcher shall also take liberty to visit other resourceful sights including the online Government website accessible at <http://www.PPPunit.go.ke/> and the World Bank PPP database accessible at <http://PPP.worldbank.org/public-private-partnership/>.

1.9 CHAPTER BREAKDOWN

a) Chapter One: Introduction to the Study

This Chapter shall provide a general introduction to the study including the background to the study, significance of the study, objectives of the study, research questions, hypothesis, and definitions of salient terms.

b) Chapter Two: Conceptual Framework

This Chapter shall examine concepts that are fundamental to establishing an effective PPP regulatory regime. Principles of effective PPP regulation, the philosophy of PPP, salient features of PPPs and governance as the key concept shall constitute the main feature in this chapter.

c) Chapter Three: Challenges in The Public Private Partnerships Regulatory Framework In Kenya And Impact On Effective Implementation Of Projects

This Chapter shall examine in detail the existing PPP regulatory framework in Kenya. To this end, a comprehensive analysis on the policy, legal and institutional framework shall be undertaken. Challenges inherent in the PPP regulatory framework in Kenya shall then be highlighted.

d) Chapter Four: Comparative Study of PPP Regulation in South Africa, UK and Slovenia.

This Chapter shall conduct a comparative study of PPP regulatory frameworks in the above countries seeking to understand from their experiences how an effective PPP regulatory regime looks like. South Africa is specifically selected as it has rich experience in PPP implementation. South Africa's PPP environment ranks the highest with a solid track record in delivering major projects including Africa's largest PPP: The Gautrain rail project. The country has a strong business infrastructure, a sophisticated financial sector, and comparatively high standards in accounting, regulatory structures and law.²²

While South Africa's regulatory and legal environment is generally of a high standard, some challenges remain. At the regulatory level, municipal legislation is more complex than at the national level, and risk is generally greater for local projects. Some private-sector players consider local content requirements to be too demanding, and there are cumbersome administrative processes. Some investors claim that the procurement process disproportionately favours government, and that it has lost some of its transparency and objectivity.

Perhaps the biggest challenge for South African PPPs is the broader macroeconomics. The country had already started experiencing rapid economic growth in early 2000s as a result of PPPs. However, it has also faced several drawbacks which would be beneficial for Kenya and will therefore form a good illustration to learn from.

The UK has been selected for historically being one of the largest markets for PPPs worldwide. The UK has been at the forefront of the PPP market since the concept was introduced in the 1990s. In many respects the UK is one of the most mature markets for PPPs worldwide, having proactively promoted a

²² An Index and Study by the Economist Intelligence Unit, Evaluating the environment for public-private partnerships in Africa, The 2015 Infrascope, p 38.

PPP programme and refined its effectiveness through guidance and experience to the situation we have today where PPPs have effectively been mainstreamed within the wider infrastructure programme.²³

Unlike South Africa and the UK, Slovenia has been selected for the reason that its framework is comparable to that of Kenya. Slovenia PPP terrain is also fairly recent with the PPP Act having been enacted in 2006. Not so much has been achieved with respect to PPP projects delivery in Slovenia as the model has been mainly used at the local level.

d) Chapter Five: Conclusion and Recommendations

This chapter shall offer the conclusion to the study and suggest recommendations on what ought to be done to ensure that PPP regulatory framework ensures effective implantation of PPP projects.

²³ United Kingdom – England PPP Units and Related Institutional Framework. European PPP Expertise Centre, 2012. Available at http://www.eib.org/attachments/epec/epec_uk_england_PPP_unit_and_related_institutional_framework_en.pdf last accessed on 18th October, 2017.

CHAPTER 2

THE GOVERNANCE OF PPPs

2.1 INTRODUCTION

PPPs have become quite a common phenomenon in the delivery of public services. During the past 25 years, more than 5,000 infrastructure projects in 121 low- and middle-income economies were delivered through PPPs, representing investment commitments of \$1.5 trillion. PPPs have supported the development of crucial infrastructure such as roads, bridges, light and heavy rail, airports, power plants, and energy and water distribution networks.²⁴ This is because the said arrangements avoid the often negative effects of either exclusive public ownership and delivery of services on the one hand, or outright privatization on the other. PPPs combine the best of both worlds by bringing in the private sector resources, expertise, management skills and technology while at the same time roping in the public sector with its regulatory actions and protection of the public interest. This balanced approach is especially welcome in the delivery of public services which touch on every human being's basic needs²⁵

Currently, PPPs are being used as a tool through which government policies are mediated. They are in their very nature a matter of public interest which actively involve the private sector. This essentially means that questions of regulation and governance with respect to PPP are particularly important.

An appropriate regulatory mechanism for PPPs should provide a way in which public interest can be protected despite active involvement of the private player. It should provide for constraints on the agency of private actors, thereby reducing possibilities for self-interested behaviour at the state's expense. In contradistinction, it should act as a check to the state enabling private actors to realise the

²⁴ World Bank 2016

²⁵ Guidebook in Promoting Good Governance in Private- Public Partnerships, p 4

innovative potential that PPPs are intended to promote by virtue of not being part of the state's bureaucracy. It should promote opportunities for self-governance of public activity by private actors at arm's length to the state.²⁶ It should therefore strike a balance between these cross purposes of PPP regulation with the end result that PPP projects are implemented optimally for the benefit of all parties involved.

A delicate balance of both the public and private parties' interests is always required to successfully implement the PPPs. Despite this challenges, PPPs are being extensively used the world over to execute projects.

2.2. PPP CHALLENGES

There are myriads of reasons why many governments are now favouring PPPs and plenty of evidence as well that they indeed improve infrastructure. They however present a severe organizational and institutional challenge for the public sector. They are complex in nature, requiring different types of skills and new enabling institutions and they lead to changes in the status of public sector jobs. To work well they require well-functioning institutions, transparent, efficient procedures and accountable and competent public and private sectors, i.e. 'good governance'.

A vast majority of governments are still at early stages in PPPs where the same has proved to be difficult to implement. The main reason for this is the need to develop institutions, processes, and procedures to deliver PPP projects. The lack of well performing institutions in many countries is reflected in several things such as the protracted length of negotiations between public and private partners, the slowness of reaching closure, the lack of flexibility in risk-sharing, and the cancellation of many projects with all the resultant waste.²⁷

²⁶ C. Skelcher (2010), *Governing partnerships*, Institute of Local Government Studies University of Birmingham UK. 2010. Last accessed on 16th May, 2017. <https://core.ac.uk/download/pdf/1631256.pdf>.

²⁷ <https://www.unecce.org/fileadmin/DAM/ceci/publications/ppp.pdf> pp2-10, accessed on 17th November 2018

The challenge then, that needs addressing is developing the institutions, procedures and processes for effective PPP delivery. This can be defined as building ‘governance’. This process requires putting into place the enabling institutions, procedures and processes surrounding PPPs in order to fully benefit from PPPs. This means also helping governments to play a critical role in the process and involving citizens as well as other stakeholders. Many governments, regional, international organisations and NGOs now recognize the importance of governance for economic development.

The institutions, procedures and processes in which the PPPs operate have always been in existence. The question is whether the same have been adapting to the changing political, social and economic times. The interaction between these institutions, procedures and processes is what contributes to the effective implementation of the PPPs.

Having the above relationship in mind, it is then extremely difficult to separate the concept of governance from the workings of PPPs today. What then is governance?

2.3 GOVERNANCE DEFINED

The use of the term governance gained unprecedented momentum in its usage in the nineteenth and twentieth centuries. Donor agencies, social scientists, philanthropists and civil society began to relate a lot with the term ‘governance’.

Its popularity seemed to stem from the fact that it could be applied to a wide range of issues, relationships and institutions involved in the process of managing public and private affairs. However, as the twenty first century gets under way, there does not seem to be a consensus as to what it means. In a highly dynamic environment, politically, socially, economically, and culturally, these terms mean different things in different contexts.

Various definitions and meanings have been generated and below are some of them;

The concept of governance, according to J Pierre and B. Guy Peters ²⁸is notoriously slippery and it is often used by scientists and practitioners without a common definition shared by all. They go on to say that as a confusing term, governance has become an umbrella concept for a wide variety of phenomena such as policy networks, public management, co-ordination of sector of economy, public-private partnerships, corporate governance and good governance.

In 1993, the World Bank defined governance as the method through which power is exercised in the management of a country's political, economic and social resources for development.

The United Nations Development Programme (UNDP), in its 1997 policy paper,²⁹ defined governance as “the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences”.

According to Jon Pierre, ³⁰“governance refers to sustaining coordination and coherence among a wide variety of actors with different purposes and objectives”. Such actors may include political actors and institutions, interest groups, civil society, non-governmental and transnational organizations. This definition shows a shift in the role of the traditional state while coping with the various challenges posed by the above actors. Some of the roles previously a preserve for the traditional state may be taken over by the above actors. This definition is leans more on the society as the base.

A definition of the term that is more State-centric, is that offered by Peters and Pierre. They concede that “governance relates to changing relationships between State and society and a growing reliance on

²⁸ Pierre J., Peters B. Guy, 2000, *Governance, Politics and the State*, Macmillan Press Ltd, P 14

²⁹ United Nations Development Programme, *Governance for sustainable human development*, UNDP policy document, New York, 1997

³⁰ Pierre, Jon, *Debating Governance: Authority, Steering, and Democracy*, Oxford University Press, 2000

less coercive policy instruments”³¹ they assert that “the State is still the centre of considerable political power”. They perceive governance as “processes in which the State plays a leading role, making priorities and defining objectives”. This is in line with the notion of the role of the State as that of “steering” society and the economy. A similar definition was adopted by A.M Kjar who states that, “governance is the capacity of government to make and implement policy, in other words, to steer society.”³²

According to the academic approach, the generic understanding of governance is the management of resources and policy making by means of exercising authority (power). Thus, it entails all instruments through which different policy stakeholders exercise legal rights with the aim to achieve political, economic, cultural and social objectives. In this sense, the term governance appears to be more and more used in order to denote a complex set of structures and processes (at both the public and private level), which are generally associated with national administration.

Governance has also been generally defined as “the means by which an activity or ensemble of activities is controlled or directed, such that it delivers an acceptable range of outcomes according to some established standard”.³³

Canada’s Institute of Governance³⁴ offers another general definition, asserting that “Governance is the process whereby societies or organizations make important decisions, determine whom they involve and how they render account”.

³¹ Pierre, Jon and Guy B. Peters, *Governance, Politics and the State*, New York, St. Martin’s Press 2000

³² Kjar A.M., *Governance*, Polity Press, UK, 2004

³³ Hirst, Paul, “Democracy and Governance” in Pierre, Jon (ed), *Debating Governance: Authority, Steering, and Democracy*, Oxford University Press, 2000

³⁴ Institute on Governance (Canada), 2002 (see <http://www.iog.ca/>).

The United Nations Economic Commission for Europe has defined governance as the processes in government actions and how things are done, not just what is done. It covers the quality of institutions and their effectiveness in translating policy into successful implementation.³⁵

Institutions are in general understood to be the bodies setting formal rules (property rights, rule of law etc.) while taking into account informal constraints (beliefs, traditions and social norms) that shape human interactions. Legal processes in many jurisdictions are insufficient, overly complex and fail to provide sufficient security and incentives to investors in PPP arrangements.

In the Report of the Commission on Global Governance defines governance as the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.³⁶

Polya Katsamunska defines governance as the institutional capacity of public organizations to provide public and other goods demanded by a country's citizens or the representatives thereof in an effective, transparent, impartial, and accountable manner, subject to resource constraints³⁷.

The above author goes on to add that the concept of governance is also connected with the idea of co-ordination of a sector of economy or with the process through which a government seeks to proactively steer the economy. She further states that this is a dynamic perspective of understanding governance

³⁵ United Nations Economic Commission for Europe, *Guidebook on Promoting Good Governance in Public-Private Partnerships*, 2008, p 26

³⁶ Report of the Commission on Global Governance Our Global Neighbourhood
<http://www.itcilo.it/english/actrav/telearn/global/ilo/globe/gove.htm> accessed on 20th April 2017 at 3.32 p.m.

³⁷ Polya Katsamunska, Economic Alternatives, Issue 2, 2016, *The Concept of Governance and Public Governance Theories*, p 134

which perspective seeks to understand how public and private actors control economic activities and produce desired outcomes.³⁸

The Donor Community approach to governance generally puts emphasis on the role state structures play in ensuring social, economic and policy equity and accountability through open policy processes.

With the various definitions of governance in mind, the author sets out below what an ideal PPP framework should consider in order to ensure effective implementation.

2.4 THE IDEAL PPP FRAMEWORK

This study proposes a number of elements necessary for an ideal PPP regulatory framework that will ensure optimal implementation of PPP projects. These elements include: (1) a frame work that will provide a basic outline on when to choose PPP as a procurement option; (2) the operational framework or process management framework for PPPs; (3) the fiscal management framework; and (4) the institutional framework.

2.4.1 Basic outline on when to choose PPP as a procurement option.

PPPs are not advisable in all cases and should not be seen as a panacea.³⁹ A PPP regulatory framework should therefore provide foundational outlines that will both rule and de-limit the overall use of the PPP as a procurement option. The framework should identify in clear terms the criteria for evaluating the suitability of PPP as a procurement option. This maybe by way of guidelines to be observed when making this determination. The scope of the guidelines may include several considerations including but not limited to, first, whether the proposed project will provide a service or benefit that is best provided by the government in view of the nature and location of the project, the expectations of the public and the political climate in which the public agency operates. The second consideration would

³⁸ *Ibid*, p 136

³⁹ Draft Paper on *Governance in Public Private Partnerships for Infrastructure Development*, presented by United Nations Economic Commission for Europe, Geneva, 2004. Available at <https://www.unece.org/fileadmin/DAM/ie/PPP/documents/botguidegov.pdf>. Last accessed on 16th March, 2017.

be the capital investment required to develop, operate and maintain the project. The importance of this consideration is that PPPs are typically appropriate for large-scale projects that involve significant capital investment that may be beyond the public agency's capacity. Thirdly, it would be worth considering whether the public agency can afford to forgo the revenues it would receive if it operated the project and the impact this would have to its other operations. Fourthly, in the cases where PPPs are being entered into for asset monetization, it would be needful to consider the amount of the upfront payment the public agency will receive and the uses to which these funds will be applied for instance to retire debt, provide services and invest in other infrastructure projects. Fifthly, attention should be given to whether the contracting authority has or will have the funds necessary to operate and maintain the project on an ongoing and long-term basis. Sixth, it would also be important to consider the technical and technological requirements of the project. If these are beyond the expertise of the public agency, it may be better to allocate the design and construction risk to a third party. Seventh, consideration as to whether a private sector party may be a more efficient service provider should also be factored in. Finally, it would also be of paramount importance to consider whether operational controls can be established to monitor the private sector party to ensure that the service is provided properly to the public.⁴⁰

Over and above providing the criteria on when PPPs are to be employed, the regulatory framework should also provide for the scope of its use with respect to projects and sectors. In providing for the scope, the framework should consider the jurisdiction, sector, size, and contract type. By jurisdiction and especially in the Kenyan context, it is here meant that care should be given to the competencies of the National and County Governments in provision of certain services. An even more complex question may arise where the National Government has competence to control the PPP projects and frameworks of County Governments. With respect to scope, this is important when the Government intends to focus

⁴⁰ Information available at [file:///C:/Users/Mutua/Downloads/-CL113000-sitesofinterest_files-PublicPrivatePartnershipsIssuesandConsiderations%20\(2\).pdf](file:///C:/Users/Mutua/Downloads/-CL113000-sitesofinterest_files-PublicPrivatePartnershipsIssuesandConsiderations%20(2).pdf) last accessed on 16th May, 2017.

PPPs on just a few sectors. In this event, the framework may be designed with these sectors in mind. As regards size, the regulatory framework may define a minimum size (or value) for projects to be implemented under the PPP framework. For instance, the relatively high transaction costs of implementing a PPP can make PPPs below a certain size unviable. This may mean that PPP type contracts cannot be used for smaller projects. The framework should however be flexible and made adaptable to change to easily respond to Government's needs and capacity. Finally, with respect to contract type, the scope may define the specific types of contracts that will be considered with respect to PPP engagement. For instance, Government-pays (take or pay) contracts where the government agrees to pay the private party on the basis of the availability and the performance of the service over a period of time or the user-pays or concession contracts which are designed to allow the private sector to lease a government asset, to deliver public services, and to generate an income from supplying the service.⁴¹

Finally, the framework should also define the basic and foundational implementing principles to be considered to determine whether or not PPP should be considered as a procurement option. The implementing principles are the guiding rules or code of conduct under which PPP projects will be implemented. They set out the standards against which those responsible for implementing PPPs should be held accountable. These principles may include value for money, transparency, competition, adequate risk allocation and budgetary responsibility.⁴²

2.4.2 Operational framework or process management framework for PPPs

The regulatory framework should also provide for the steps to be taken in implementing a PPP project successfully. It should define a standard PPP process for implementation of PPP projects. An ideal framework should divide the process into stages and make a requirement for approvals at key points.

⁴¹ Information available at <https://PPP-certification.com/PPP-certification-guide/14-scope-PPP-framework> last accessed on 16th May, 2017.

⁴² Information available at <https://PPPknowledgelab.org/guide/sections/24-implementing-principles> last accessed on 16th May, 2017.

This study proposes a four-stage implementation process thus: Project Initiation (Inception) Phase; Business Case Consideration (Feasibility Study) Phase; Project Procurement Phase; Contract Management (Implementation) Phase.

The principles and guidelines on how these processes should be undertaken must be provided for. The processes must be transparent, predictable, and adequately enforced. The framework should be transparent where rights and responsibilities of the investors, the public player, third parties and the general public are clearly established and enforced preferably by entities independent of the contracting authority. The regulatory framework should also be predictable in the way the investment policy is formulated and changed by the Government. As far as possible, frequent changes and changes on short notice should be avoided. Changes to the legal and regulatory environment should be made through a transparent policy process and with public consultation.

As regards the Project Initiation (Inception) Phase and Business Case Consideration (Feasibility Study) Phase, the framework should ensure that the contracting authority undertaking the same observes the principles of highest value for money and most efficient allocation of risks. Value for money can only be achieved if the regulatory framework provides for measures and mechanism that ensure frank assessment of the government's own investment and service delivery capacities and capabilities, as well as options for external support to government through project development and implementation. On the allocation of risks, the regulatory framework should set up mechanisms that shall not only define risks but also identified and measured. These measures should ensure that risks that can be mitigated by the private partner (for example, operational efficiency) should be borne by the private sector, while risk of a public-interest nature (for example, a change in policy and/or the pursuit of non-commercial objectives) should reside with the public partner.⁴³

⁴³ ASEAN Principles for PPP frameworks available at http://www.asean.org/storage/images/pdf/2014_upload/Attachment-ASEAN%20%20PPP%20Principles.pdf last accessed on 17th May, 2017.

With respect to Procurement Phase, the regulatory framework should be formulated in such a way that it guards against waste and the risk of corruption by ensuring the integrity of the process and by making the necessary procurement skills and powers available to the relevant authorities. Further, measures should be put in place to ensure that public officials should execute their duty to act in the public interest in a manner that is competent, unbiased and diligent with due attention to the regulatory principles and guidelines. The framework should give special consideration to unsolicited proposals⁴⁴ to ensure value for money. Further, the framework should clearly provide when unsolicited proposals should be resorted to and as much as possible make these instances exceptional.⁴⁵

At the Contract Management (Implementation) Phase which is post procurement stage, measures should be put in place to guarantee value for money and management risks. Particular attention should be paid to contractual arrangements and monitoring capacity at later stages of a project so as to ensure that incentives do not deteriorate as the cost of noncompliance falls.⁴⁶

Finally, the regulatory framework should specifically provide for an enforcement mechanism. This should involve a dispute resolution process and contract renegotiation provisions. The dispute resolution process should be structure in such a way that the interest of maintaining long-term contractual relationship between the public and private partners is protected. Consequently, alternative dispute resolution mechanisms, including conciliation or mediation, should be explored first, so as to avoid bringing contractual disputes before domestic courts or arbitration tribunals. In the event that amicable settlement is not reached, appropriate mechanisms for dispute settlement should be provided for. An impartial, independent and efficient judicial judiciary is paramount to this end.

⁴⁴ An unsolicited proposal is a written application for a new or innovative idea submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the government, and is not in response to a request for proposals.

⁴⁵ Ibid note 6.

⁴⁶ Ibid.

2.4.3 Fiscal Management Framework

The regulatory framework should also provide for how fiscal commitments under PPPs are controlled, reported, and budgeted. Since PPP contracts commit governments to substantial payments years into the future, the framework should provide for PPP-specific approaches to public financial management in order to obviate challenges for public financial management which is generally geared to annual appropriations for expenditure. For purposes of accountability, it is also important that the framework makes provision that is PPP specific on accounting and reporting of the fiscal commitments for PPPs. Finally, the framework should introduce targets or rules limiting aggregate exposure of the Government on PPPs to ensure that the costs and risks remain within manageable limits.⁴⁷

2.4.4 Institutional framework for PPPs

In order to foster better administration and oversight of PPPs, the framework should ensure that a clear structure of bodies and organs is set up. These institutions should be entrusted with clear mandates, sufficient resources and clear lines of accountability. The framework should see to it that the institutional roles are competently pursued to secure and maintain: value for money, sound procurement process; fiscal and budgeting issues; auditing of the PPP; rule monitoring and enforcement. These roles can be maintained in a number of institutional set-ups, but it is important that they are kept separate so as not to confuse the key tasks of each actor and to secure lines of accountability.⁴⁸

An ideal framework should at least provide for the following institutions: the contracting authority which is procuring the PPP; an institution responsible to provide technical expertise; an institution responsible for the budgetary role; and, one that plays an audit role.

⁴⁷ Information available at <https://PPP-certification.com/PPP-certification-guide/186-controlling-aggregate-fiscal-exposure-PPPs> last accessed on 17th May, 2017.

⁴⁸ Organisation for Economic Co-operation and Development (OECD) presentation on *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships*, May 2012. Available at <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> last accessed on 19th May, 2017.

The contracting authority is the one that procures the PPP and is responsible for the project, subject to approval, monitoring and advice from the other actors at various stages. This is the institution that should be responsible for preparation, negotiation and administration of the contract and for monitoring and evaluating contract performance during the inception and operation phases of the project.⁴⁹

Another institution is required to provide the technical expertise to the implementation of the PPPs. This is especially so considering given the complexity of PPPs. This institution is there to provide the necessary critical skills and expertise to the contracting authority to ensure that the contracting authorities create, manage and evaluate a PPP effectively. Specifically, this institution should fill gaps in terms of specific skills, a lack of coordination or high transaction costs. It should also make sure that procedural steps are followed throughout. This role requires that the institution has the requisite financial, legal, and economic and project management skills and expertise. Its role must be clear and without conflicts of interest.⁵⁰

The framework should also provide for an institution that plays the budgetary role to ensure affordability and project quality. Specifically, it is the institution responsible for scrutinising each PPP through each phase for value for money, affordability, procedural steps and that the projects remain in line with political agreements. While this institution need not possess the necessary technical knowledge of each project's design, it needs sufficient capacity to evaluate the documentation presented to it. It should also ensure that capital investments are aligned with the government's short and medium term macroeconomic stability targets.⁵¹

The framework should also provide for an audit institution. This institution should audit and assess the PPP ex post with regards to performance, finance and compliance. It should therefore maintain

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

sufficient capacity to give a clear verdict on whether or not the project ultimately represented value for money, suggest possible improvements to the regulatory PPP framework, the procurement processes and make available overall lessons regarding the use of PPPs and investments.⁵²

Finally, in providing for these institutions and in order to encourage private investment, the framework should ensure unnecessary red tape is removed and delays to approval processes are reduced.

The principles that run through in the above are specifically those of transparency, participation and accountability which are in turn used to define the wider concept of governance.

CONCLUSION

The optimum implementation of PPP projects demand for an effective regulatory framework which would ensure a delicate balancing of the interests of various players involved. To this end, an effective framework should ensure that it has clear provisions on the circumstances when PPPs should be considered as a procurement option and should have sound operational, fiscal management and institutional framework.

PPPs offer the potential for mutual benefit by encouraging and realising the possibility for innovation in delivering public sector services effectively. However, to successfully achieve this mutual benefit, each partner relies on the other. As the range of PPPs expands, that reliance grows. The public sector relies on continuing competition, capability, and contestability throughout the private sector to maintain efficiency and an innovative spirit. The private sector relies on continued governance, stewardship and accountability throughout the public sector to ensure that the public's interest is effectively represented, monitored, and, ultimately, satisfied.

⁵² Ibid.

It has been argued and the writer completely concurs, that the lack of processes, procedures and enabling institutions i.e governance is the main barrier to effective implementation of PPPs.

CHAPTER 3

CHALLENGES IN THE PUBLIC PRIVATE PARTNERSHIPS REGULATORY FRAMEWORK IN KENYA AND IMPACT ON EFFECTIVE IMPLEMENTATION OF PROJECTS

3.1 INTRODUCTION

Some countries, often developing and emerging economies, adopt special laws on PPPs, whilst in others PPPs are governed by the legislation on public procurement and related by-laws.

To implement PPPs, a robust system of commercial laws needs to be in place. This means that the regulatory framework needs to be clear, transparent, consistent, predictable and enforceable. This would consequently foster competition, minimise conflict of interest, corruption and unethical behaviour. It would also provide assurance to the private sector on protection from expropriation, arbitration of commercial disputes, respect for contract agreements and legitimate recovery of costs. Private sector interests have to be protected under the existing laws, and government agencies have to facilitate the involvement of the private sector in infrastructure projects or public utilities.⁵³

In this chapter, the study shall interrogate the current PPP regulatory framework in Kenya with a view to identifying the opportunities presented and challenges that exist within it. The study shall examine the policy, legislative and institutional frameworks governing PPPs in Kenya. The writer will attempt to demonstrate that governments can ensure effective implementation of service delivery through PPPs where there is enabling legislation and institutions, and set out the gaps in the Kenyan framework.

This chapter does not attempt to discuss the full range of impediments that face PPPs in Africa or all possible ways to address these challenges; rather, it is a critical analysis of the main challenges that are quite prevalent in Kenyan, and a majority of African PPPs and provides creative solutions to remedy

⁵³ Levinson, David, Garcia, Reinaldo, and Carlson, Kathy (2006), *A Framework for Assessing Public Private Partnerships, in Institutions and Regulatory Reform in Transportation* (ed. Piet Rietveld and Roger Stough) Edward Elgar Publishers (in press) pg 300

them. The next section delves into a brief primer on what other authors have espoused in regard to PPP regulation.

3.2 PPP REGULATORY FRAMEWORK IN KENYA

3.2.1. Policy Framework

PPPs in Kenya are regulated under the PPP Act, 2013⁵⁴ and the PPP Regulations 2014⁵⁵ formulated thereunder pursuant to section 71 of the Act. The Act and the Regulations are based on the Government's Policy Statement on PPP⁵⁶ which recognizes PPP arrangements as offering an opportunity for the country to attract enhanced private sector participation in financing, building and operating infrastructure services and facilities in part fulfilment of Vision 2030 for a country with high quality services and facilities with investment in infrastructure facilities given the highest priority. As per the Policy, the Act was enacted in order to address the gaps and remove any overlaps, conflicts and impediments that existed in the Public Procurement and Disposal (Public Private Partnership) Regulations, 2009 (PPP Regulations 2009), which provided for the institutional and regulatory framework for PPPs in Kenya prior to the enactment of the Act. The PPP Regulations 2009 were made under the Public Procurement and Disposal Act, 2005 (PPDA). The object of PPDA was to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities. The PPP Regulations, therefore, did not fit well within the Act since it did not provide for PPPs in the main, except where it allows for the use of concessions and design competition. Further, the framework dealing with the entire PPP project life cycle was also unclear under the PPP Regulations 2009. These deficiencies, as observed by the Policy, led to uncertainties on the part of investors and to lack of clarity in PPP development.

⁵⁴ Act No. 15 of 2013.

⁵⁵ Available at <http://PPPunit.go.ke/index.php/legal-regulatory-framework>. Last accessed on 21st April, 2017.

⁵⁶ Government of Kenya PPP Policy Statement, Office of the Deputy Prime Minister and Ministry of Finance; Policy Statement On Public Private Partnerships, November, 2011. Available at <http://PPPunit.go.ke/index.php/legal-regulatory-framework#laws>. Last accessed on 21st April, 2017.

The Policy notes as the main objective of the Act the facilitation of the participation of private sector in financing the construction, development, operation, or maintenance of public infrastructure or development projects through concession or contractual arrangements. It further provides that the Act shall establish a set of general principles and rules for PPPs based on best practices with all public entities being expected to comply with these principles and rules, thereby ensuring high degree of consistency in approach across sectors.

The Policy also makes provision for the institutional framework for PPP. It provides that the government shall establish an institutional framework for Implementing PPPs, consisting of the PPP Committee, responsible for developing and implementing PPP policy initiatives; the PPP Unit, domiciled at the State Department responsible for Finance, to act as a national centre for PPP expertise; PPP Nodes in the public entities responsible for the development and management of PPP projects; and a Project Facilitation Fund to provide an avenue for government support to PPP projects.

3.2.2 Legislative Framework

The enactment of the Act and the passing of the Regulations was therefore a key milestone in the facilitation of PPP growth in the country. The Act and the Regulations were intended fill the gaps in the pre-existing regime regulating PPPs specifically constitute in Privatization Act⁵⁷ and the Public Procurement and Disposal Act⁵⁸. The Act provides as its objective the facilitation of the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements and the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects.

⁵⁷ Act No. 2 of 2005

⁵⁸ Act No. 3 of 2005 (repealed by Act No. 33 of 2015)

In a bid to achieve this, the act sets out the process of PPP projects identification, prioritization, conceptualization, preparation, tendering, negotiations, award, approval, implementation, monitoring and evaluation, and finally where applicable, how they are handed over to the government where applicable.⁵⁹

The Regulations provide for the operational details operational details on how PPP projects will be prepared, tendered, approved and implemented; and the roles and responsibilities of the parties involved in the PPP transactions. They expound the provisions of the Act with regard to the above.

3.2.3 Institutional Framework

The Act establishes the following institutions to facilitate and regulate the implementation of PPP projects; PPP Committee⁶⁰, PPP Unit⁶¹ and the PPP Nodes⁶². The PPP Committee is at the apex consists of the Principal Secretary for Finance, Principal Secretary responsible for Government Co-ordination, Principal Secretary for Lands, Principal Secretary responsible for County Government, Attorney General, four persons who are not public officers (appointed by the Cabinet Secretary), and the Director of the PPP Unit.⁶³ Its functions include reviewing the legal, institutional and regulatory framework of PPPs and approve project lists submitted to it by the PPP Unit.⁶⁴ The PPP Unit is a department under the State Department of Finance, the National Treasury. It consists of a director; and such staff as the cabinet secretary, in consultation with the director, considers necessary⁶⁵ and is charged with conducting civic education and making recommendations on the approval or rejection of projects prior to submission to the PPP Committee.⁶⁶

⁵⁹ Parts V, VI, VII and VIII. *Public Private Partnerships Act, Act No. 5 of 2013*.

⁶⁰ Section 4, *ibid*

⁶¹ Section 11, *ibid*

⁶² Section 16, *ibid*

⁶³ Section 34, *ibid*

⁶⁴ Section 7, *ibid*

⁶⁵ Section 12, *ibid*

⁶⁶ Section 14, *ibid*

Finally, the PPP Nodes are committees in the contracting authority which intends to enter a PPP arrangement consisting of the accounting officer of the respective contracting authority and the following personnel: financial, technical, procurement; and legal. Its functions are identifying and screening projects, undertaking the tendering process and monitoring the implementation of the project agreement.⁶⁷

3.3 CHALLENGES IN THE KENYAN PUBLIC PRIVATE PARTNERSHIPS REGULATORY FRAMEWORK

There are challenges which are both inherent and extrinsic to the Act and the Regulations that may affect the regime's full implementation and optimum realisation of PPP projects. These challenges are discussed hereunder:

3.3.1 Lack of adequate legal framework to deal with concessions

The implementation of a PPP project implies the granting of a concession,⁶⁸ or the provision of services with the right to exploit the specific service and the right to collect payment. Concessions are provided for under sections 19 and 59 of and the Second Schedule to the Act. Section 19 of the Act provides that a contracting authority may enter into a public private partnership with a private party in accordance with the Second Schedule or in accordance with such other arrangement as may be approved by the Cabinet Secretary. The Second Schedule provides for PPP arrangements under which concession is one such arrangement where contracting authority issues a contractual licence to the private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee while paying a concession fee to the contracting authority. Section 59 provides that where a concession

⁶⁷ Section 17, *ibid*

⁶⁸ Concession is defined by the PPP Act 2013 to mean a contractual licence formalised by a project agreement, which may be linked to a separate interest or right over real property, entitling a person who is granted the licence to make use of the specified infrastructure or undertake a project and to charge user fees, receive availability payments or both such fees and payments during the term of the concession;

granted under this Act is for the exploitation of natural resources under Article 71 of the Constitution⁶⁹, the project agreement shall be ratified by Parliament in accordance with the relevant written law. Parliament passed the Natural Resources (Classes of Transactions Subject to Ratification) Act,⁷⁰ providing for the transactions needing ratification by parliament. These transactions are provided for in the Schedule to the Act and encompasses specific transactions relating to the wildlife, forestry, crude oil and gas, minerals, water resources and underground water resources.

In Kenya, the concession concept seems ill understood and is grossly unsuccessful because of the above mentioned gaps in the PPP law. An example is that of Kenya Railways and Rift Valley Railways, the concessionaire. Blame has constantly been shifted between the concessionaire and the Kenya Railways as to who is supposed to absorb or fund the cost of track maintenance. This has led to additional loans taken by the state to fund the concession despite it being a common practice that the concessionaire bears the capital and recurrent costs of the project. The end result was that the concessionaire handed back the assets to Kenya Railways who was already in additional debt for the same.

The legal framework fails to provide specific procedures in the award of concessions. The conditions under which local and foreign legal or natural persons may be awarded a concession are also not provided for. The conditions and manner for preparing, proposing and approving project proposals for PPP contracts with or without concession elements, the scope of concessions, the authorities and parties in charge of the concession approval procedure, the termination of concessions, legal protection in the public contract award procedures, protection of the rights of parties participating in the procedure, and other issues relevant to PPP with or without elements of concession have not been legislated. These

⁶⁹ This Article provides that a transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya.

⁷⁰ Act No. 41 of 2016

gaps may compromise protection of public interest, efficiency, transparency, equal and just treatment, free market competition, proportionality, environmental protection and autonomous will of parties to the contract and thereby frustrate implementation of PPPs.

3.3.2 Unsolicited Proposals

In an unsolicited proposal, a private sector entity approaches the government with a proposal to develop a specific infrastructure project without the government first having identified and assessed the suitability of the project. Private sector companies—generally developers, suppliers, or financiers—fund studies to establish the basic project specifications and then approach the relevant procuring authority to receive approval. There are merits in establishing provisions for considering unsolicited project proposals. Often, such proposals are based on innovative project ideas. By allowing unsolicited proposals, governments can benefit from the knowledge and ideas of the private sector and can promote innovation. However, in some cases, economies promote the submission and use of unsolicited proposals precisely because of a lack of experience and capacity in preparing infrastructure projects. As a consequence, the use of unsolicited proposals does not come without challenges.⁷¹

The Kenyan Act refers to them as privately initiated proposals and goes ahead to provide for circumstances under which they may be considered.⁷² These circumstances are (a) when there is urgency for the continuing of project and competitive bidding would be impractical, (b) where the costs relating to the intellectual property in relation to the proposed design of the project is substantial, (c) there exists only one person or firm capable of undertaking the project, and (d) there exists any of the circumstance as the Cabinet Secretary may prescribe. The contracting party is charged with the responsibility of determining and commencing negotiations with a private party, prescribing the criteria

⁷¹ World Bank Report on Public Private Partnerships, 2012, pp 128-156.

⁷² Section 62, *Public Private Partnerships Act, Act No. 5 of 2013*.

against which the outcome of negotiations shall be evaluated and conducting the negotiations and awarding the tender.

Unlike other jurisdictions where the regulatory framework is hostile to these proposals, the Kenyan Act leaves a lot of discretion to the contracting authority to determine whether or not to pursue a PPP project through an unsolicited proposal. The Act does not however propose a clear competitive analysis and bidding mechanisms to expose these proposals to in order to ensure that there is value for money. The Act simply states that once the proposal has been forwarded, the relevant ministry should prepare a Request for Proposal to be sounded to the market and in case of no response, enter into a contract with the private investor.

This creates a gap for opportunistic sorts of proposals which may not necessarily take into account the priority, risk and cost effectiveness of the project. This may set in a habit of arbitrary accepting and evaluating such proposals in a way that may undermine the development of a long term and sustainable approach to PPP procurement. It also interferes with the list of priority projects that is usually prepared at the beginning of every financial year by the PPP Committee as the committee has to keep re-evaluating the list of PPP projects thus opening up the procurement process and subsequent negotiation of contracts to lots of delay.

Much of the controversy about unsolicited proposals stems from the government granting exclusive development rights to private investors without a transparent tendering process. The lack of a transparent, competitive process often leads to corruption as mentioned above and, thus, the development of projects of questionable quality. Moreover, it could lead to complaints if other parties feel that a private company is unfairly benefiting from a PPP, which will in turn lead to a loss of future trust and support for PPPs in an economy.

3.3.3 Procedural clarity on the basic steps in establishing and implementing PPP projects

The role of conceptualizing, identifying and prioritizing potential projects is that of the Contracting Authority.⁷³ However, there are no specific guidelines under the Act as to how this basic phase of the PPP projects ought to be done. There should be specific guidelines on the methodology for socioeconomic impact, affordability, risk identification, bankability, and comparative assessments (PPP versus traditional procurement) of a potential PPP project. Additionally, the procurement needs to be detailed with the information at each stage made available to the key stakeholders for verification, input and approval. Where necessary, re-evaluation may be resorted to in order to confirm risk appetite and transparency of the laid out procedures. Collectively, these detailed steps will increase the likelihood of a good understanding of the project, joint execution by all stakeholders and monitoring and evaluation of the same.

As a result, good governance of PPP projects is likely to be compromised. This would most likely lead to considerable uncertainty on the issues of efficiency, accountability, transparency, decency and fairness in the implementation of the PPP projects. Further, this gap in the legislation would do little in helping generate private sector interest and public acceptance of PPPs.

Further, the complexity of PPPs urges the view that the roles of conceptualizing, identifying and prioritizing of potential projects being left with the Contracting Authority is ill advised. The time and effort in the preparation and implementing PPP projects are extraordinarily demanding. The capacity of the Contracting Authorities to not only undertake these duties but to do so efficiently is a real point of concern. Failure to have a standardised, proper and specific governance approach on PPP project implementation is a major drawback of the Act.

⁷³ Section 31, *ibid.*

3.3.4 Recourse procedures and dispute resolution mechanisms

Dispute resolution mechanisms and recourse procedures are intended to prevent or ultimately reduce the need for renegotiation or substantial amendments to the project agreement by allowing changes to be made and disputes resolved within the framework provided by the contract. Considering the high risks often taken by the investors, financiers and contractors, these parties will be more encouraged to participate in projects in regulatory frameworks where they have confidence that any disputes arising out of the PPP contractual obligations will be resolved fairly, justly, timely and in a consistent predictable manner.

The Act provides for a traditional dispute resolution mechanism for PPPs. It provides that upon the approval of the Committee, it may be agreed to resolve disputes arising under the project agreement through arbitration, or any other non-judicial means of dispute resolution agreed upon in the project agreement.⁷⁴

This means that the conventional court system is the set mode of dispute resolution under the Act subject to an agreement to refer the dispute to arbitration or any other non-judicial means with the approval of the Committee. Since PPPs are complex in their very nature, any dispute associated with them is also bound to be complex. This is because PPPs are often cross-sectoral and will usually involve technical, legal and financial aspects which must all be considered. The conventional court system usually dogged with lengthy procedural trappings and backlog of cases should not be the preferred mode for dispute resolution for PPPs. This given the contractual timeline that is often stipulated in the contract and synchronised with other projects in the larger economy.

A good example would be the LAPSSET (Lamu Port, South Sudan, Ethiopia Transport) Corridor project which is Eastern Africa's largest and most ambitious infrastructure project bringing together

⁷⁴ Section 63, *ibid*

Kenya, Ethiopia and South Sudan. This mega project consists of seven key infrastructure projects starting with a new 32 Berth port at Lamu (Kenya); Interregional Highways from Lamu to Isiolo, Isiolo to Juba (South Sudan), Isiolo to Addis Ababa (Ethiopia), and Lamu to Garsen (Kenya), Crude Oil Pipeline from Lamu to Isiolo, Isiolo to Juba; Product Oil Pipeline from Lamu to Isiolo, Isiolo to Addis Ababa; Interregional Standard Gauge Railway lines from Lamu to Isiolo, Isiolo to Juba, Isiolo to Addis Ababa, and Nairobi to Isiolo; 3 International Airports: one each at Lamu, Isiolo, and Lake Turkana; 3 Resort Cities: one each at Lamu, Isiolo and Lake Turkana; and the multipurpose High Grand Falls Dam along the Tana River. The said projects are interconnected by having the completion of one being a condition precedent for the start of another. If one project stalls, this means that the entire program is bound to delay.

The system encompassed in the Act does not guarantee an effective dispute resolution mechanism, both in terms of speed and quality. It does not assume relevance for PPPs taking into account the long-term and high investments involved, political and social sensitivity often attached to the projects. The courts actually lack technical expertise to settle these disputes in a time bound manner. With the current set up, the perceived risks and costs of delay in resolution of disputes can be fatal to the successful implementation of PPPs.

3.3.5 Lack of an appropriate insurance regime

In order to be viable, PPP projects must carefully allocate all relevant risks to specific parties and must determine if a project is financially and commercially viable for the project's given risk allocation structure. The principle that Government will follow in allocating the risks of a PPP project will be to optimize, rather than maximize, the transfer of project risks to the private party. Government will seek to allocate risks to the party that is best able to manage controllable risks; or best able to insure

uncontrollable but insurable risks; or best able to bear the financial consequences of uncontrollable and uninsurable risks.⁷⁵

There is no proper insurance regime put in place for PPPs in Kenya. While insurance is an area that is often left to the ends of negotiations and each project will require specific insurance coverage based on the risks inherent to a particular project, issues to do with availability of cover, levels of cover and deductibles will, however, have an impact on the risks being taken by the investor and ought to be provided for.

3.3.6 Lack of inclusivity of all stakeholders

The Act does not provide for a consultative environment with all the relevant stakeholders. The Act only provides for an approval process involving the Contracting Authority, the PPP Unit and the Committee.⁷⁶ Given the complexity, possible controversy, and long-term scope of PPP projects, lack of a consultative PPP regime is a real threat to projects' sustainability and their likelihood of success.

An almost painful illustration is that of Lake Turkana Wind Power Project in Turkana County. The project is Africa's single largest wind farm. It is situated in Loiyangalani district, Marsabit County. It comprises of 365 turbines each with a capacity of 850KW and a high voltage substation that is to be connected to the national grid. The project is expected to increase the national electricity supply by 310MW. Land, being a sensitive issue in the county has played a major role in the stalling of the project as residents of Laisamis constituency accused the Lake Turkana Wind Power Project Limited for acquiring 150,000 acres of their ancestral land without regard to due process. They went on to institute a case against the project company in court citing absence of public participation in the acquisition of the disputed land. To date, the project that was instituted sometime in 2013 has not been

⁷⁵ https://pppunit.go.ke/wp-content/uploads/2017/11/PPP_Policy_Statement1.pdf, p 9

⁷⁶ Sections 32, 33, 35 & 47, *ibid*.

delivered. This underscores the importance of public participation which also serves to mitigate disputes that can forestall project delivery.⁷⁷

Unsurprisingly, land-related issues are the biggest source of community grievances against development projects. For these reasons, community engagement is critical to ensure accuracy and transparency in the land acquisition component of a project, to ensure fairness in compensation and/or other benefits shared with affected communities, and to understand and manage community grievances.

Developers and communities need to engage one another in a meaningful, timely, and productive way to avoid leading otherwise good projects to get delayed or derailed altogether. For a community, goals may include appropriate mitigation for project impacts, compensation for land use, cultural protection, and/ or other forms of benefit sharing. Of course, all parties stand to gain from the additional infrastructure such as increased access to electricity and the resulting economic boost. Achieving these goals in a way that brings positive outcomes for all parties requires meaningful, consistent, and empowering community engagement.⁷⁸

Engagement of relevant stakeholders by including the civil society, affected communities, end-users and labour groups on aspects such as service delivery, pricing, employment, environmental and social consequences should be provided for. As a consequence, this will greatly improve ownership of the PPP project by the community for whom it is intended in the long run.

⁷⁷<http://www.koassociates.co.ke/wp-content/uploads/2017/12/PPPs.pdf> pp 1-2, accessed on 17th November 2018

⁷⁸https://www.usaid.gov/sites/default/files/documents/1860/FINAL_Guide_to_Community_Engagement_-_Jan_17_2018_508-compressed.pdf pp2-6 accessed on 17th November 2018

3.3.7 Lack of incentive provisions

The current legal framework does not contain specific provisions for incentives for the investors in PPP projects. PPP investments tend to be large-scale and long-term and thus involve high risks for investors.

Such incentives would include consistent grants of revenue guarantees, allocation of public land on which to develop the projects on, tax rebates, provisions enabling capital grants and other forms of financial support and limitation of foreign exchange fluctuations. Such incentives are key in attracting and retaining quality PPP projects in the country. Investors will want to be assured of government support and a bankable commercial arrangement for which to do their business in.

As a consequence, the lack of an incentive regime providing for guarantees, development areas or free areas, investment protection and investment promotion institutional framework may discourage investor participation due to the high risks involved.

3.3.8 Lack of adequate transparency measures in procurement

There is a lack of adequate transparency measures in the procurement process especially on the process and outcome of bids. While the Act provides for discretionary preliminary bidders meeting⁷⁹ and a competitive dialogue⁸⁰ between the contracting authority and the bidders, there is no mechanism for informing unsuccessful bidders on the process and outcome (not merely the result), and an opportunity for complaints and appeals to be made. This may lead to a situation where information regarding the successful bid becomes available after an award has been made. This may erode investor confidence especially if a dispute on the award is taken to court which may lead to stalling of the project.

⁷⁹ Section 41, *ibid*

⁸⁰ Section 45, *ibid*

During the procurement process, the procuring authorities need to define how and to what extent they will interact with bidders as they prepare their proposals. Rules governing the process and permissible topics for interaction with bidders should be exclusively set out in the tender documents, thus safeguarding the transparency and fairness of the procurement process. Interactions between bidders and the procuring authority can range from a mere exchange of information to an interactive dialogue and in-person meetings and conferences.

Transparency in the PPP process will help achieve better value for money by strengthening governance and improving the management of fiscal cost, by producing more sustainable contracts, by reducing the risks of renegotiation, and by resulting in a better understanding of the impact on service delivery. It is therefore advisable to establish procedures that ensure the dissemination of the tender notice, disclosure of the outcome of the procurement process, and publication of contract information.⁸¹ Wide publicity about the key decisions of the PPP procurement process ensures openness and fairness and enhances competition. Furthermore, PPP contracts often include provisions that have a direct impact on parties other than the procuring authority and the selected bidder, who have a legitimate interest in being informed about the essential elements of the contract.

3.3.9 Lack of flexibility on financial Government support

In so far as financial support by the Government is concerned, the Act establishes Public Private Partnership Project Facilitation Fund whose application is clearly provided for.⁸² There is however no clarification on the forms of this support. As it is, there is little room for flexibility for innovative financing of PPP which may hamper the optimum implementation of the PPP projects.

⁸¹ UNCITRAL 2001, section 119.

⁸² Section 68, *ibid*

3.3.10 Lack of definition of guiding principles

The Policy provides that the PPP Act shall provide for general principles to guide in the governance of PPPs. However, the PPP Act has not defined the guiding principles explicitly to guide in the implementation of PPPs. This is a major omission as lack of definition of the guiding principles such equality, transparency, proportionality, balance, competition, procedural autonomy, subsidiary liability and cooperation may compromise the quality of the PPP implementation.

3.4 OPPORTUNITIES PRESENTED BY THE EXISTING REGULATORY FRAMEWORK

The enactment of the Act and the Regulations has considerably improved the PPP implementation climate in the country. Several positive changes have been presented by the Act and Regulations as discussed below.

Most significantly, investor confidence and probable conclusion of projects have been boosted by several measures provided for under the Act, thus: risk mitigation factors including provision of guarantee and letters of comfort by the Government;⁸³ inflation and interest rate indexation;⁸⁴ performance monitoring mechanisms;⁸⁵ direct agreement and step-in rights to lenders;⁸⁶ compensation for termination, extra-ordinary events, direct impact of change of laws and political event;⁸⁷ establishment of a Viability Gap Fund to support economically viable projects which may not be financially viable without Government support;⁸⁸ a clear, transparent, fair and competitive process for PPPs, covering project identification, selection, prioritization, preparation, appraisal, procurement , approvals and procurement of project advisors; a clear institutional framework for development and approval of PPP; Government will prepare bankable projects before going to the market; and use of

⁸³ Section 27. Ibid

⁸⁴ Section 62 & Third Schedule Par. 10. ibid

⁸⁵ Section 43 (1) (c), ibid

⁸⁶ Section 62 & Third Schedule Par. 2. Ibid

⁸⁷ Section 62 & Third Schedule Par. 14. & 15 Ibid

⁸⁸ Section 68

Privately Initiated Investment Proposals (unsolicited) method of procurement when there is urgent need for continuity and where there is intellectual /innovation.⁸⁹

Provisions enabling capital grants and other forms of financial support should be incorporated. Provisions relating to a one time or deferred capital grant, interest free, low interest loans, subordinated loans, operation and maintenance support grants, and interest subsidies will go a long way in making this projects commercially viable for private investors.

A legal basis for grant of revenue guarantees for high risk PPPs should also be included. These provisions may take the form of the Government guaranteeing up to a certain specified percentage of the projected revenues.

Additionally, the PPP framework should establish mechanisms to limit the investor's risk from foreign exchange fluctuations since revenues generated from the PPP projects are primarily in local currency while a large part of debt servicing and other payments are often made in foreign currency. For instance, a provision to the effect that where foreign exchange fluctuations exceed a certain defined limit, say, twenty per cent, a part of losses due to such fluctuations be offset through modifications of tariff rates, government subsidies or adjustment of the concession period.

Provisions for tax incentives should also be provided for where PPP projects meeting a certain criterion may be qualified to for various tax incentives including: exemption from registration tax on the acquisition of real estate, reduction of or exemption from various appropriation charges, recognition of a certain percentage of the investment as a reserve to be treated as an expense for the purpose of computing corporate taxes and protection against reduction of tariffs.

⁸⁹ A Review of The Public Private Partnerships Act No 15 of 2013, a publishing of a Strategic Legal Solutions Group Limited. Available at <https://stralexgroup.blogspot.co.ke/2013/09/a-review-of-public-private-partnerships.html>. Last accessed on 21st April, 2017.

Another provision relating to loan guarantees may also be incorporated. These are guarantees given by the government to lenders that if a borrower defaults, the government will repay the amount guaranteed, subject to the terms and conditions of an agreement. Since the guarantee reduces the lender's risk, the borrower should be able to obtain funds at a lower interest rate or negotiate a loan that might not otherwise be obtainable. As loan guarantees do not involve immediate cash spending by the government, they can be a more attractive tool to the government than direct loans or grants, particularly in periods of fiscal restraint.

3.5 CONCLUSION

Kenya has made significant strides in the area of PPP regulation since the enactment of the Act and the passing of the Regulations. The institutional framework in the area has been clearly defined. Guidance has also been given on the implementation of various stages of PPP projects life cycle. Nevertheless, the highlighted challenges may still compromise the optimal implementation of PPP project. For Kenya to maximumly reap the full benefits of PPPs, its legal framework ought to be assessed in light of the foregoing challenges. In order to suggest possible solutions to these challenges, the next chapter shall carry out a comparative analysis of PPP regulation in selected jurisdictions for purposes of drawing best practices.

CHAPTER 4

COMPARATIVE STUDY OF PPP REGULATION: THE CASES OF SOUTH AFRICA, UNITED KINGDOM (UK) AND SLOVENIA

4.1. INTRODUCTION

This Chapter shall provide an overview of the PPP regulatory frameworks in South Africa, UK, and Slovenia with a view of comparing them with the Kenyan system discussed in the previous chapter. The Regulatory frameworks for each of these countries shall be first laid out in detail before an analysis of how these frameworks compare with that of Kenya is undertaken.

The PPP legal frameworks for these countries have been selected for study for various reasons. In the case of South Africa, the country boasts of a solid track record in PPP project delivery across various sectors which can be attributed to a fairly sound regulatory framework.⁹⁰

The UK has historically been one of the largest markets for PPPs worldwide. The UK has been at the forefront of the PPP market since the concept was introduced in the 1990s. In many respects the UK is one of the most mature markets for PPPs worldwide, having proactively promoted a PPP programme and refined its effectiveness through guidance and experience to the situation we have today where PPPs have effectively been mainstreamed within the wider infrastructure programme.⁹¹

Unlike South Africa and the UK, Slovenia has been selected for the reason that its framework is comparable to that of Kenya. Slovenia PPP terrain is also fairly recent with the PPP Act having been enacted in 2006. Not so much has been achieved with respect to PPP projects delivery in Slovenia as the model has been mainly used at the local level.

⁹⁰ Information available at <https://www.gov.za/about-government/government-system/structure-and-functions-south-african-government> last accessed on 11th October, 2017.

⁹¹ United Kingdom – England PPP Units and Related Institutional Framework. European PPP Expertise Centre, 2012. Available at http://www.eib.org/attachments/epec/epec_uk_england_ppp_unit_and_related_institutional_framework_en.pdf last accessed on 18th October, 2017.

4.2. SOUTH AFRICA

South Africa is a constitutional democracy with a three-tier system of government consisting of National, Provincial and Local (Municipal) levels and an independent judiciary. These levels of government all have legislative and executive authority in their own spheres, and are defined in the Constitution as "distinctive, interdependent and interrelated".⁹² The country is divided into nine provinces which have their own executive and legislative branches. The local government consists of municipalities governed by municipal councils.

The choice to study the South African PPP regulatory system is informed by the country's strong track record in the adoption of the PPP model of public service delivery. PPPs in South Africa have delivered major projects across a number of sectors. Examples of PPP projects that have since been concluded include: the Gautrain light rail concession concluded in 2006 for US \$3,483.00 Million (railway); the Mozambique - South Africa Gas Pipeline concluded in 2003 for US \$1,200.00 Million (natural gas); Xina Solar One CSP concluded in 2015 for US \$900.00 Million (electricity); and, N3 Toll Road concluded in 1999 for US \$794.70 Million (roads). In total, as at November 2016, 86 PPP projects with a total investment of US \$20,680.00 Million had been successfully completed since 1990. A total of 78 other projects with a total investment of US \$20,680.00 Million are still under construction or operation.⁹³ This presents a solid track record in PPP implementation and is undoubtedly a strong complement to the governing regulatory framework.

This track record is even more impressive considering the fact that South Africa's PPP regulatory framework does not have a long history. Regulation of PPPs in South Africa can be traced back to April 1997 when the then cabinet approved the appointment of an interdepartmental task team to

⁹² . Supra Note 1.

⁹³ Information available at <https://PPPknowledgelab.org/countries/south-africa> last accessed on 9th October, 2017.

develop policy, legislation and institutional reforms to enable the use of PPPs.⁹⁴ To facilitate this work, several pioneering PPPs were carried out by the South African Roads Agency, Department of Public Works and Correctional Services, South African National Parks, and two municipalities. The lessons learned from these preliminary projects helped in the development of a Strategic Framework for PPPs in 1999.⁹⁵

Consequently, a Public Finance Management Act (PFMA)⁹⁶ was enacted in 1999. The broad objective of the Act was to create a good governance structure for the procurement of goods and services by the public sector. Section 76 of the Act provided for the formulation of regulations or instructions applicable to all institutions to which the Act applied concerning among other things, the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.⁹⁷

Pursuant to this provision, the Treasury Regulation 16 was enacted in the year 2000 as the central legislation governing PPPs for national and provincial governments. In 2004, the National Treasury issued the National Treasury PPP Practice Note Number 02 of 2004 ‘South African Regulations for PPPs’ (PPP Manual) to facilitate the application of the PFMA and Regulation 16.

Municipalities are however not subject to the PFMA or to Treasury Regulation 16. PPPs for municipal government are governed by the Municipal Systems Act, 2000 (MSA), and the Municipal Finance Management Act, 2003 (MFMA). The central legislation governing municipal PPPs is in chapter 11 Part 2 of the MFMA. Pursuant to the provisions of these two Acts⁹⁸, the National Treasury in

⁹⁴ Burger, P. 2006. *The Dedicated PPP Unit Of The South African National Treasury*. pp.6. Information at <https://www.oecd.org/mena/governance/37147218.pdf> last accessed on 9th October, 2017.

⁹⁵ Information available at https://library.PPPknowledgeLab.org/documents/4236?ref_site=kl last accessed on 12th October, 2017

⁹⁶ Act No. 1 of 1999.

⁹⁷ Section 76 (4) (c) & (g)

⁹⁸ Section 168(1) (d) of the MFMA provides that the Minister for Finance may, with the concurrence of the Minister for Provincial and Local Government, issue regulations and guidelines regulating the financial commitments of municipalities

conjunction with the Department of Provincial and Local Government (DPLG) issued the Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations), which address the PPP provisions in both the MSA and the MFMA, and other matters in the MFMA related to the procurement of multi-year PPP agreements.⁹⁹

A PPP Unit set up in the year 2000 following the approval of the Strategic Framework for PPPs in 1999 constitutes the institutional framework governing PPPs in South Africa. Its key role is the procurement and management of PPPs in South Africa.

4.2.1. PPP REGULATORY FRAMEWORK FOR NATIONAL AND PROVINCIAL LEVELS OF GOVERNMENT

As already pointed out, regulation of PPPs at the national and provincial levels of government is provided for under the PFMA and Treasury Regulation 16 to the PFMA. The following section gives a brief overview of the same.

4.2.1.1. The PFMA

This Act forms the underlying legislation of PPP regulation in South Africa. Its focus on financial management is on outputs and responsibilities aimed at improving financial management in the public sector. The Act makes the heads of departments of national and provincial departments and the CEOs or boards of specified¹⁰⁰ public entities responsible for its implementation. These officers are directly accountable to Parliament or the provincial legislature for the effective and efficient management of

and municipal entities in terms of public private partnerships (PPPs). Section 86A of the (MSA) as read together with section 120 (1) and (2), provide that the Minister for Provincial and Local Government may issue guidelines for municipalities when assessing options for the provision of a municipal service, the different categories of municipal services and the different categories of service providers.

⁹⁹ Municipal Service Delivery And PPP Guidelines. Pp. 21. Available at <http://unpan1.un.org/intradoc/groups/public/documents/cpsi/unpan034159.pdf> last accessed on 13th October, 2017.

¹⁰⁰ Specified under Schedule 3 to the Act.

their budgets to achieve their public mandates.¹⁰¹ These officials therefore need to constantly evaluate value-for-money choices.

Consequently, if a PPP is opted for as a mechanism for the delivery of a public service, it will require investigation as to whether it provides value for money. PPPs in their very nature entail targeted public spending, leveraging private sector finance and efficiencies, and allocating risks to the party best able to manage them. As a mechanism of delivery therefore, a PPP is firmly in line with the intent of the PFMA.¹⁰² It is in view of this that the provisions of the Act as may affect PPPs were operationalized with the Treasury enacting the Treasury Regulation 16 pursuant to section 76 of the Act.

4.2.1.2. Treasury Regulation 16 to the PFMA, 1999

Enacted pursuant to section 76 of the Act, Regulation 16 provides precise and detailed instructions for PPPs. The Regulation defines PPPs and set out the phases and tests they will have to go through.

To enable its application, the National Treasury's PPP Manual and Standardised PPP Provisions (PPP Manual) is issued pursuant to the PFMA and Treasury Regulation 16. They are issued for national and provincial departments, constitutional institutions, and public entities affected by the PFMA and the Treasury Regulation 16. PPP Manual are issued as a PPP Practice Note, in terms of section 76(4) (g) of the PFMA. These PPP practice notes, which will be updated from time to time, constitute instructions in terms of section 76 of the PFMA, aimed at facilitating the application of the PFMA and its regulations.

The regulations apply to: all national and provincial government departments; all constitutional institutions listed in schedule 1 to the PFMA; and, all national and provincial public entities listed in

¹⁰¹ South Africa National Treasury, PPP Manual, Module 1: South African Regulation for PPPs. Available at <https://www.gtac.gov.za/Publications/630-Module%2001.pdf> last accessed on 12th October, 2017.

¹⁰² Ibid.

schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity.¹⁰³ The regulations do not however apply to entities listed in schedule 2 to the PFMA nor to Municipalities.

A PPP is defined as a contract between a public sector institution and a private party, in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project.¹⁰⁴ The Regulation caters for various types of PPPs. It allows such projects to be developed with a range of different characteristics, combining private party risk in various ways for designing, financing, building, operating, infrastructure and services, and for owning and transferring assets.¹⁰⁵

As regards PPP financing, the Regulation does not prescribe any structure with the assumption being that the mode of financing will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal. Nevertheless, all PPPs governed by the Regulation are governed by a three pronged test: whether the institution can afford the deal; whether the PPP is a value for money solution and whether substantial technical, operational and financial risk shall be transferred to the private party.¹⁰⁶

PPP agreements¹⁰⁷ can only be entered into by the accounting officer or the accounting authority of the institution. The Regulation provides six distinctive stages of PPP project cycle. These stages are: project inception, feasibility study, procurement, management, delivery and exit. The Regulation requires that the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage. Further, the Regulations require that that specific treasury approvals are given at various phases of the project cycle.

¹⁰³ Regulation 1.2.1.

¹⁰⁴ Supra Note 10 at Pp. 4.

¹⁰⁵ Ibid at Pp. 5.

¹⁰⁶ Ibid at Pp. 6.

¹⁰⁷ “PPP agreement” means a written contract recording the terms of a PPP concluded between an institution and a private party. See Regulation 16.1.

At the project inception stage, the accounting officer or the accounting authority must in writing register the PPP with the relevant treasury¹⁰⁸ and inform the relevant treasury of the expertise within that institution to proceed with a PPP. The accounting officer or authority may appoint a project officer from within or outside the institution and a transaction advisor if the relevant treasury so requests.¹⁰⁹

A feasibility study must be conducted by the accounting officer or authority to determine whether the proposed PPP is in the best interests of an institution. The parameters to be met by the study are specified under regulation 16.4.1.(a) – (f). The relevant treasury’s approval pursuant to the feasibility study is mandatory before the project can move to the procurement phase.

The next stage is procurement. The regulation sets out clear procurement steps that must be followed by institutions, and prescribes distinct treasury approvals that must be obtained in this phase. The procurement procedure must be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. All bidders at each stage of a procurement process must have an equal chance of competing for the contract; and no action taken by government may prejudice their competitiveness.¹¹⁰ The relevant treasury’s approval will be required prior to the issuance of the procurement documentation including the draft PPP Agreement and prior to appointing the preferred bidder after evaluation of bids. In order to obtain this latter approval, the institution must submit a report for approval by the relevant treasury, demonstrating how the criteria of affordability, value for money and substantial technical, operational and financial risk transfer were applied in the evaluation of the bids, demonstrating how these criteria were satisfied in the preferred bid.¹¹¹

¹⁰⁸ “Relevant treasury” means the National Treasury unless delegated in terms in section 10(1)(b) of the PFMA. National Treasury currently has the responsibility for regulating PPPs in terms of Treasury Regulation 16 to the PFMA. These powers may be delegated to provincial treasuries, thus the regulation refers throughout to ‘the relevant treasury’.

¹⁰⁹ Regulation 16.3.1.

¹¹⁰ Supra Note 10 at Pp. 9.

¹¹¹ Regulation 16.5.4.

Upon conclusion of the procurement stage, the relevant treasury's approval must be obtained before the accounting officer or authority concludes a PPP agreement.¹¹² This approval is meant to assess: (i) whether the PPP agreement meets the requirements of affordability, value for money and substantial technical, operational and financial risk transfer as had been approved at the procurement stage; (ii) that the management plan presented by the institution explains the capacity of the institution, and its proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP; and (iii) that a satisfactory due diligence including a legal due diligence has been completed in respect of the accounting officer or accounting authority and the proposed private party in relation to matters of their respective competence and capacity to enter into the PPP agreement.¹¹³

As regards the management phase, the accounting officer or accounting authority of the institution is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on, and must maintain such mechanisms and procedures as approved by the relevant treasury for: measuring the outputs of the PPP agreement; monitoring the implementation of the PPP agreement and performances under the PPP agreement; liaising with the private party; resolving disputes and differences with the private party; generally overseeing the day-to-day management of the PPP agreement; and, reporting on the PPP agreement in the institution's annual report.¹¹⁴

The Regulation provides for the amendment of the PPP Agreements.¹¹⁵ The relevant treasury's approval is required for any material amendment. This approval will only be granted if the said amendments will ensure that the PPP Agreement will continue to provide for: value for money;

¹¹² Regulation 16.6.1.

¹¹³ Ibid at par. (a), (b) and (c).

¹¹⁴ Regulation 16.7.1.

¹¹⁵ Regulation 16.8.

affordability; and substantial technical, operational and financial risk transfer to the private party. The treasury has however a raft of conditions that must be met by the institution before being exempted.¹¹⁶

A PPP Agreement entered into by an institution is binding to the state only if they were entered into by the accounting officer or accounting authority of that institution and if all treasury approvals required under the Regulation were been granted by the relevant.¹¹⁷

The Regulation also provides for exemption from compliance with any or all of its provisions. This exemption may be granted upon appropriate terms and conditions by the relevant treasury upon written from an institution. This exemption may be in relation to a specific PPP or a general one in terms of which the institution is exempt.¹¹⁸

4.2.2. PPP REGULATORY FRAMEWORK FOR MUNICIPAL GOVERNMENTS

PPP regulation for municipal governments are provided for under the MFMA, MSA and the Municipal Service Delivery and PPP Guidelines of 2007.

4.2.2.1. MFMA

Chapter 11 Part 2 of the MFMA forms the basis of PPP regulation for municipalities. It provides that a municipality may enter into a public-private partnership agreement if it shows that the agreement will: provide value for money to the municipality; be affordable for the municipality; and, transfer appropriate technical, operational and financial risk to the private party.¹¹⁹ It is further provided that in the event that the PPP involves provision of municipal service, Chapter 8 of the MSA must be complied with.¹²⁰ It is mandatory that a feasibility study be conducted before a PPP is concluded.¹²¹

¹¹⁶ Supra note 10 at Pp. 12 and 13.

¹¹⁷ Regulation 16.9.

¹¹⁸ Regulation 16.10.

¹¹⁹ Section 120 (1).

¹²⁰ Section 120 (3).

¹²¹ Section 120 (4). It makes further provisions on what the study should focus on for instance the strategic and operational benefits of the public-private partnership and the nature of the private party's involvement.

Once the feasibility study is concluded, the accounting officer of the municipality is to submit the report to the municipality's council for a decision as to whether the municipality should continue with the PPP. Sixty days prior to the meeting of the council, the accounting officer must make public the particulars of the PPP and the feasibility study report for purposes of public participation.¹²² Further, the accounting officer must seek the views of the National Treasury; the National Department responsible for Local Government; if the PPP involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department; and, any other national or provincial organ of state as may be prescribed.¹²³

The provisions of the Act relating to supply chain management are applicable to PPP procurement.¹²⁴ Each municipality is required to have and implement a supply chain management policy which must be fair, equitable, transparent, competitive and cost effective and comply with a prescribed regulatory framework for municipal supply chain management.¹²⁵ The Policy should cover areas with regard to the procurement processes that may be used, when a particular procurement process must be used, procedure and mechanism for each process, transparent prequalification process, competitive bidding processes, bid documentation, evaluation of tenders, participation of stakeholders and public, preventive measures to combat corruption and other malpractices, contract management and dispute settlement.¹²⁶

The Act also allows for unsolicited proposals but in a very controlled way. The municipality is not obliged to consider these bids received outside its normal bidding process. If these bids are to be considered, then they should be handled in strict compliance with a prescribed framework. This

¹²² Section 120 (6).

¹²³ Section 120 (7).

¹²⁴ Supply chain management are covered under Part 1 of Chapter 11 of the Act.

¹²⁵ Section 111 and 112.

¹²⁶ Section 112.

framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.¹²⁷

4.2.2.2. MSA

The Act provides for different ways through which a municipality may provide a municipal service in its area or a part of its area including an external mechanism or any other institution, entity or person legally competent to operate a business activity.¹²⁸ This envisages engaging a private entity in a PPP set up.

In the event that the municipality decides on an external mechanism of service delivery, it is required to give notice to the local community of its intention to explore the provision of the municipal service through this mechanism. The appropriate mechanism is to be assessed based on the direct and indirect costs and benefits associated with the project, the capacity and potential future capacity of prospective service providers to furnish the skills, expertise and resources necessary for the provision of the service, the views of the local community, the likely impact on development, job creation and employment patterns in the municipality and the views of organised labour.¹²⁹

Once a particular mechanism has been settled upon, a feasibility study must be undertaken along the parameters provided for in the Act.¹³⁰ After conducting a feasibility study, the municipality must then conduct a selection process of the service provider which must be fair, equitable, transparent, cost-effective and competitive, and as may be provided for in other applicable national legislation. Further, the process comply with Chapter 11 of the MFMA.¹³¹ Once a prospective bidder has been selected, the

¹²⁷ Section 113.

¹²⁸ Section 76 (b) (v).

¹²⁹ Section 78 (3).

¹³⁰ Ibid at Par. (c).

¹³¹ Section 83.

municipality is then to negotiate an agreement with said bidder in strict adherence to the bid documents. The copies of the agreement are to be made available for public inspection.¹³²

4.2.2.3. Municipal PPP Regulations

Section 168(1)(d) of the MFMA provides that the Minister of Finance may, with the concurrence of the Minister for Provincial and Local Government, issue regulations and guidelines regulating the financial commitments of municipalities and municipal entities in terms of public private partnerships (PPPs). Section 86A of the Municipal Systems Act (2000) (MSA), read together with section 120 (1) and (2) of that act, provide that the Minister for Provincial and Local Government may issue guidelines for municipalities when assessing options for the provision of a municipal service, the different categories of municipal services and the different categories of service providers.¹³³

Accordingly, with effect from 1 April 2005, the Minister of Finance, in agreement with the Minister for Provincial and Local Government, issued the Municipal Public-Private Regulations¹³⁴. This Regulation addresses the PPP provisions in both the MSA and the MFMA, and other matters in the MFMA related to the procurement of multi-year PPP agreements. The regulations define the elements of a municipal PPP, and set out the stages and approvals it will have to go through.¹³⁵

A PPP is a contract between a municipality and a private party in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project. The regulation defines a PPP as a contract between a municipality and a private party in which the private party assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project. The Regulation caters for a wide range of PPPs.

¹³² Section 84.

¹³³ Supra Note 8.

¹³⁴ Local Government: Municipal Finance Management Act: Municipal Public-Private Partnership Regulations (Municipal Public-Private Regulations) 2007.

¹³⁵ Supra Note 8 at Pp. 2.

The Regulation do not provide for the financing structure for PPPs with the underlying assumption being that that these will vary widely from project to project and sector to sector, and will be closely linked to the funding sources that can be secured for each deal. However, affordability limits, value-for-money considerations and the risk profile of the project will determine a PPP project's financing structure and sources of funding.¹³⁶

The Regulation divides the PPP cycle into four phases: project inception, feasibility study, procurement and contract management. The PPP project cycle enables the three regulatory tests of affordability, value for money and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement. Additionally, the views and recommendations of the national treasury and the relevant provincial treasury should be sought at various stages.

At the project inception stage, the accounting officer of the municipality must notify the national treasury and the relevant provincial treasury in writing of the municipality's intention together with the information on the capacity of the municipality to comply with section 120 (1) of the MFMA. In addition, and in the event that he has been requested to do so by the national or the relevant provincial treasury, appoint a competent person as a transaction advisor to assist in the preparation and procurement of PPP agreement. These provisions are made applicable under section 78 (2) of the MSA in the event of provision of municipal service through an external mechanism to be appointed in terms of a PPP agreement.¹³⁷

A feasibility study must then be conducted in terms of section 120 (4) of the MFMA and further matters to be covered by the study are provided for in the Regulation.¹³⁸ A feasibility study under this

¹³⁶ Supra Note 8. at Pp. 7.

¹³⁷ Regulation 2.

¹³⁸ Regulation 3 (1).

provision of the MFMA need not be conducted in the event that the project is a municipal service with respect to which a feasibility study has already been conducted under the MSA.

At the procurement stage, the accounting officer must ensure compliance with Part 1¹³⁹ of Chapter 11 of the MFMA. In so doing, the accounting officer must solicit the views and recommendations of the national and the relevant provincial treasury on the proposed bid documentation thirty days before bids are publicly invited and on the evaluation of the received bids and of any preferred bidder at least thirty days before any award is made.

An award of the PPP Agreement must be subject to compliance with section 120 (6)¹⁴⁰ and section 33¹⁴¹ of MFMA.¹⁴² Further views and recommendations of the national and the relevant provincial treasuries must be sought on the proposed terms of the draft PPP agreement, the municipality's plan for effective management of the agreement and the preferred bidder's competencies and capacity to comply with its obligations under the agreement.¹⁴³ The accounting officer of a municipality is the officer authorised to sign the agreement on behalf of the municipality.¹⁴⁴

4.2.3. UNSOLICITED PROPOSALS/ BIDS

It is noteworthy that the South African regulatory framework is hostile towards unsolicited proposals/ bids. Treasury Regulation 16 and the Municipal PPP Regulations make no provision with respect to

¹³⁹ Provisions relating to supply chain management system.

¹⁴⁰ This section stipulates that once the feasibility study is concluded, the accounting officer of the municipality is to submit the report to the municipality's council for a decision as to whether the municipality should continue with the PPP. Sixty days prior to the meeting of the council, the accounting officer must make public the particulars of the PPP and the feasibility study report for purposes of public participation.

¹⁴¹ This section provides for what needs to be done when a municipality enters into a contract that will have future budgetary implications.

¹⁴² Regulation 4 (2).

¹⁴³ Regulation 4 (3).

¹⁴⁴ Regulation 6 (1).

unsolicited bids. Module 1 of the PPP Manual states that the National treasury had considered this mode of procurement as difficult to manage, threatened to violate constitutional protections of fair administrative process and competitive procurement, and that internationally, had not proven to deliver faster or secure better value for money in PPPs.¹⁴⁵ Nevertheless, the treasury issued Practice Note 11 of 2008/2009 to the PFMA¹⁴⁶ on unsolicited proposals to provide guidelines for institutions dealing with such proposals. These guidelines only govern national and provincial levels of government.

An unsolicited proposal is defined as any proposal/concept received by an institution outside its normal procurement process that is not an unsolicited bid (a submission that must be innovative, unique and provided by a sole supplier).¹⁴⁷ Institutions are not obligated to consider unsolicited proposals. However, in the event that they do, the proposal must contain comprehensive and relevant project feasibility study that has established a clear business case. Additionally, the product or service should involve an innovative design or an innovative approach to project development and management or the product or service presents a new and cost-effective method of service delivery.¹⁴⁸

The Practice Note further provides for unacceptable unsolicited proposals. These include those that: relate to known institutional requirements that can, within reasonable and practicable limits, be acquired by conventional competitive bidding methods; relate to products or services which are generally available; do not fall within the institution's powers and functions; do not comply substantially with the basic requirements provided for in the Practice Note; has not been submitted by a

¹⁴⁵ Supra Note 10 at Pp. 11.

¹⁴⁶ Available at

http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/Practice%20note%20SCM%2011%20of%202008_9.pdf last accessed on 13th October, 2017.

¹⁴⁷ Paragraph 1.1.

¹⁴⁸ Paragraph 2.1.

duly authorised representative of the proponent; or contravenes the provisions of any law.¹⁴⁹ PPP compliant unsolicited proposals must comply with Treasury Regulation 16 to the PFMA.¹⁵⁰

A bid process must be conducted upon concluding the unsolicited proposal agreement. First, the institution must prepare a Request for Qualification (RFQ) to test the market for the existence of other private entities capable of providing the product or service. If there is no response to the RFQ, the institution should prepare a draft contract for the provision of the product or service. If there is one or more response to the RFQ, the institution should prepare a Request for Proposals (RFP) then conduct a competitive bidding process in terms of the institution's supply chain management system among the firms qualified in the RFQ and the proponent. The institution should reimburse the proponent in case the proponent is not awarded the contract at the conclusion of the competitive bidding process.¹⁵¹

With respect to municipal governments, Section 113 of the MFMA provides that a municipality is not obliged to consider an unsolicited bid received outside its normal bidding process. If, however, a municipality decides to consider an unsolicited bid, it may do so only within a prescribed framework. This framework is provided for under Regulation 37 of the Municipal Supply Chain Management Regulations, 2005.¹⁵² The regulation provides that a municipality can only consider an unsolicited bid if: the product or service offered in terms of the bid is a demonstrably or proven unique innovative concept; the product or service will be exceptionally beneficial to, or have exceptional cost advantages for, the municipality; the person who made the bid is the sole provider of the product or service; and, the reasons for not going through the normal bidding processes are found to be sound by the accounting officer.

¹⁴⁹ Paragraph 3.

¹⁵⁰ Paragraph 4.2.2.

¹⁵¹ Paragraph 5.1.

¹⁵² Available at https://static.l2b.co.za/Forms/The_Municipal_Supply_Chain_Management_Regulation_of_2005.pdf last accessed on 13th October, 2017.

If the bid complies with these requirements and the municipality wishes to proceed with the proposal, it must: make its reasons public as to why the bid should not be open to other competitors; give an explanation of the potential benefits for the municipality were it to accept the unsolicited bid; and, an invitation to the public or other potential suppliers to submit their comments within 30 days of the notice. Once the municipality has received the written comments, it must submit the comments together with any responses from the unsolicited bidder, to the national treasury and the relevant provincial treasury for comment. An adjudication committee of the national treasury and the relevant provincial treasury shall consider the unsolicited bid and may award the bid or make a recommendation to the accounting officer, depending on its delegations. This meeting of the adjudication committee should be open to the public.

4.2.4. INSTITUTIONAL FRAMEWORK

As can be deduced from the foregoing discussion, the institutional regulatory framework for PPPs in South Africa are the national and relevant provincial treasuries. The national treasury has been given the duty under the PFMA to formulate regulations and issue practice notes and guidelines for the implementation of public service delivery mechanisms including PPPs.¹⁵³ Consequently, the treasury has formulated the Treasury Regulations 16 to the PFMA that constitute the legal framework for PPP regulation at the national and provincial levels.

In order to effectively perform its functions, the PPP Unit of South Africa was established in mid-2000 consisting of five professional staff drawn from both the public and private sectors. This was following the endorsement of a Strategic Framework for PPPs by the cabinet in December 1999 and enactment of the PFMA which was largely influenced by the lessons drawn from pioneering PPP projects conducted

¹⁵³ Section 168 of the PMFA.

from 1997 to 2000¹⁵⁴ and the international experience. The PPP Unit was established under the Government Technical Advisory Centre (GTAC) which is an agency of the National Treasury, established to support public finance management through professional advisory services, programme and project management and transaction support.¹⁵⁵ Currently, the PPP Unit consist of seventeen professional staff drawn from at least fourteen sectors who are allocated projects depending upon individual sector expertise and interest.¹⁵⁶

The main function of the South African PPP unit is to ensure that all PPP agreements comply with the legal requirements of affordability, value for money and sufficient risk transfer. To fulfil the abovementioned function, the PPP Unity has two broad tasks: to provide technical assistance to government departments, provinces and municipalities who want to set up and manage PPPs, and to provide national treasury approvals and recommendations during the phases of PPP implementation cycle.¹⁵⁷

4.3. UNITED KINGDOM

4.3.1. HISTORICAL BACKGROUND OF PPPS IN THE UK

The history of PPP in the UK can be traced back to 1989. Prior to 1989, UK governments were constrained in their ability to use private capital in the financing of public sector projects due to formal rules that set out strict conditions under which private finance could be used. These rules were withdrawn in 1989 and the private sector was encouraged to bring forward schemes for privately financed projects.¹⁵⁸

¹⁵⁴ This projects were undertaken by the South Africa National Roads Agency for the N3 and N4 toll roads; by the Departments of Public Works and Correctional Services for two maximum security prisons; by two municipalities for water services; and by South Africa National Parks for tourism concessions.

¹⁵⁵ Information available at <https://www.gtac.gov.za/> last accessed on 14th October, 2017.

¹⁵⁶ Information available at <http://www.PPP.gov.za/Pages/About.aspx> last accessed on 13th October, 2017.

¹⁵⁷ Supra Note 3.

¹⁵⁸ Supra Note 2.

In 1992, the HM Treasury¹⁵⁹ increased the scope for private financing of capital projects through joint ventures and leasing agreements with the private sector where risk was clearly transferred and was branded as the Private Finance Initiative (PFI).¹⁶⁰ Subsequently in 1993, the Private Finance Panel (PFP) was formed to: encourage greater participation in PFI by both the public and private sector; generate and encourage new ideas; identify new areas of public sector activity where the private sector could get involved; and seek solutions to problems that might slowdown progress.¹⁶¹ The PFP was mainly staffed by the private sector but with the full backing of the executive through the HM Treasury. The HM Treasury adopted the universal rule which provided that it would not approve capital projects unless private finance options had been explored.

Some changes were introduced in 1997 with the formation of the PFI Taskforce. The universal testing rule introduced in 1992 was done away with. Further changes were introduced in 1999 when the Partnerships UK (PUK), a permanent organisation was formed to replace the PFI Taskforce. These changes led to an increase in the PF1 projects post 1997. As at 2012, over 550 PFI projects worth over GBP 46 billion (EUR 56 billion) have been signed in England and successful operational projects operate in a wide range of sectors.¹⁶²

4.3.2. PPP REGULATORY FRAMEWORK IN THE UK

The UK embraces a common law legal system governed by legislation and case law. The application of legislation is by way of judicial precedent making this system clear, consistent and flexible which is important to investors.

The UK does not have a PPP specific legislation. There is however sufficient flexibility and certainty within the statutory and common law framework to recognise, permit and govern PPPs. The power of

¹⁵⁹ Her Majesty's Treasury.

¹⁶⁰ Supra Note 2.

¹⁶¹ Ibid

¹⁶² Ibid.

public institutions to engage in PPPs arrangements are derived from a public body's constitutional documents or from specific legislation.¹⁶³ For instance, local authorities derive their mandate to engage in PPP arrangements from the Local Government (Contracts) Act 1997. Section 1 of the Act provides that a local authority can enter into a contract with another person for the provision of assets or services, or both, for the purposes of, or in connection with, the discharge of the function by the local authority. Other than legislations, secondary regulations¹⁶⁴ are also used to ensure PPPs are not adversely affected by general changes in the law.

For instance, PPPs are shielded by secondary regulations from the application of the Housing Grants Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and Construction Act 2009 which entrenched “pay when certified” law¹⁶⁵ in the construction contracts by ensuring that subcontractors were paid promptly across the economy arguing that the existing PFI/PPP standard contracts were already designed to offer significant protection to subcontractors without recourse to legislation. To have done otherwise would have risked bankrupting a project-financed special purpose vehicle (SPV) and therefore undermined the PFI/PPP model.¹⁶⁶

In view of the common law nature of regulation that exists in the UK, the study shall now focus on how the following specific elements of PPPs are regulated: Procurement, contracting and financial structure.

¹⁶³ Ibid.

¹⁶⁴ In the United Kingdom, secondary legislation is law made by an executive authority under powers delegated from by an enactment of primary legislation, which grants the executive agency power to implement and administer the requirements of that primary legislation

¹⁶⁵ Pay when paid and pay when certified clauses developed within the construction industry to deal with the risk of the ultimate employer failing to make payment to the main contractor for works undertaken, and essentially providing that, should this happen, neither the main contractor nor its sub-contractors would be paid. Pay when paid or pay when certified clauses make payment of the sub-contractor, by the main contractor, conditional upon payment by the employer and/or certification under the main contract in respect of the sub-contract work.

¹⁶⁶ Supra Note 2.

4.3.2.1. Procurement

Procurement of PPP/PFI projects is governed by Public Contracts Regulations 2015, (PCR). This regulation has standardised procurement procedures ensuring that the key principles of fairness, transparency and competition are preserved. Procurement processes are structured with clear stages. All bidders are notified of the timetable and provided with the same information. Evaluation criteria must be published. The process for challenging any aspect of the tendering process is clearly defined.¹⁶⁷

Tender notices must be published in the Official Journal of the European Union (OJEU) and follow the standard form required by EU law. Upon receipt of the bids, the selection procedure shall either be open,¹⁶⁸ restricted,¹⁶⁹ competitive procedure with negotiation,¹⁷⁰ competitive dialogue,¹⁷¹ innovation partnership,¹⁷² and negotiated procedure without prior publication.¹⁷³

The open procedure include a pre-qualification stage and allows any interested party to submit a tender for the contract.¹⁷⁴ The restricted procedure allows any interested party to request to participate in the contract tender but only those invited by the public body following a pre-qualification stage may submit a tender.¹⁷⁵ Under the competitive procedure with negotiation, contracting authorities may award a contract following evaluation of the bidders' initial tenders. However, they may also conduct the procedure in successive stages and carry out negotiations on the initial and any subsequent tenders.¹⁷⁶ Under the competitive dialogue procedure, a contracting authority enters into a dialogue

¹⁶⁷ Ibid.

¹⁶⁸ Regulation 27.

¹⁶⁹ Regulation 28.

¹⁷⁰ Regulation 29.

¹⁷¹ Regulation 30.

¹⁷² Regulation 31.

¹⁷³ Regulation 32.

¹⁷⁴ Available at [https://uk.practicallaw.thomsonreuters.com/6-3851377?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/6-3851377?transitionType=Default&contextData=(sc.Default)) last accessed on 22nd October, 2017.

¹⁷⁵ Available at [https://uk.practicallaw.thomsonreuters.com/8-385-1376?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-385-1376?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) last accessed on 22nd October, 2017.

¹⁷⁶ Available at [https://uk.practicallaw.thomsonreuters.com/7-603-2746?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/7-603-2746?transitionType=Default&contextData=(sc.Default)) last accessed on 22nd October, 2017.

with bidders about its requirements before inviting them to submit a final tender.¹⁷⁷ The innovation partnership procedure is to be used for projects aimed at establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and costs.¹⁷⁸

The selection of a successful tender bid is based on the following criteria: suitability to pursue a professional activity; economic and financial standing; and technical and professional ability. With regard to suitability to pursue a professional activity, contracting authorities may require economic operators to be enrolled in one of the professional or trade registers kept in their Member State of establishment. With regard to economic and financial standing, contracting authorities may impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract. In particular, contracting authorities may require that economic operators: have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract; provide information on their annual accounts showing the ratios, for example, between assets and liabilities; and have an appropriate level of professional risk indemnity insurance. With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.¹⁷⁹

4.3.2.2. Contracting

The PCR 2015 provide that the contracting authorities shall base the award of public contracts on the most economically advantageous tender assessed from the point of view of the contracting authority.

¹⁷⁷ Available at [https://uk.practicallaw.thomsonreuters.com/0-385-1375?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/0-385-1375?transitionType=Default&contextData=(sc.Default)) last accessed on 22nd October, 2017.

¹⁷⁸ Available at [https://uk.practicallaw.thomsonreuters.com/9-603-2806?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-603-2806?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) last accessed on 22nd October, 2017.

¹⁷⁹ Regulation 58, PCR, 2015.

The award criteria shall ensure the possibility of effective competition; and be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.¹⁸⁰

As far as contract management is concerned, PPP contracts used in PFI projects in England is based on the Standardisation of PFI Contract (SoPC)¹⁸¹ which is a standard form contract developed by Partnerships UK and HM Treasury. Application of SoPC is mandatory for all PFI projects in England and Wales. Derogations from SoPC are only made in exceptional circumstances on project-specific grounds and must be approved, either by a sector-specific body or by Infrastructure UK (IUK). The SoPC also make provision for key issues in that arise in PPP projects, in order to promote the achievement of commercially balanced contracts and deliver best value for money.¹⁸²

The PCR 2015 provide that contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations.¹⁸³ The contract or framework agreements may be modified or amended without a new procurement procedure.¹⁸⁴

Regulation 73 provides that contracting authorities shall ensure that every public contract which they award contains provisions enabling the contracting authority to terminate the contract these specific circumstances: where the contract has been subject to a substantial modification which would have required a new procurement procedure; where the contractor has, at the time of contract award, been in

¹⁸⁰ Regulation 67.

¹⁸¹ The current version (version 4) was issued in March 2007.

¹⁸² Supra note 2.

¹⁸³ Regulation 70.

¹⁸⁴ Regulation 72.

one of the situations¹⁸⁵ that should have disqualified the award of the contract; and, the contract should not have been awarded to the contractor in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive that has been declared by the Court of Justice of the European Union in a procedure under Article 258 of Treaty on the Functioning of the European Union.

4.3.3. INSTITUTIONAL FRAMEWORK

The institution that is responsible for PPP regulation in the UK is the IUK which was officially set up in 2009 as a unit within HM Treasury that later absorbed the PUK in 2010. IUK is part of the Enterprise and Growth Unit (EGU) within HM Treasury, which is responsible for growth-related policy and expenditure. IUK's mandate is to focus on the UK's long-term infrastructure priorities and facilitate private sector investment over the longer term, whether it is procured through PPPs or not. IUK also plays a central role in managing policy issues that arise in connection with PPPs, disseminating best practice and enforcing guidance.¹⁸⁶

As far as staffing is concerned, the IUK is led by a Chief Executive appointed by HM Treasury. The Chief Executive is supported by a Non-Executive Chair, who presides over IUK's Advisory Council. The Advisory Council is made up of Permanent Secretaries from the key infrastructure departments as well as senior representatives from the private sector. The Chief Executive reports to the Permanent Secretary of HM Treasury, who is the accounting officer for IUK and is accountable to Parliament for the day-to-day activities of IUK. The Chief Executive is supported by a senior management team comprised of senior civil servants and commercial experts. The senior management team is divided

¹⁸⁵ These situations are provided for under Regulation 57 (1)

¹⁸⁶ Supra Note 2.

into four teams, only parts of which have day-to-day contact with PPP issues. They include the PPP Policy team; assurance team; infrastructure delivery team; and infrastructure financing team.¹⁸⁷

The policy team oversees the strategic direction of PPP policy and provides advice to Ministers in this context and on specific PFI and PPP policy issues. It is also responsible for drafting and publishing key policy on PFI and for collecting and publishing data on PFI projects. The Assurance team leads IUK's work in ensuring that infrastructure projects across a range of sectors have the appropriate level of commercial assurance documents and guidance. The team also works closely with the PPP Policy team on PPP/PFI matters and is responsible for the assurance of PFI contracts, such as managing any requests for derogations sought from the standard contracts established for PFI. The Infrastructure Delivery team is charged with supporting the planning, prioritisation, enabling and effective delivery of infrastructure across sectors in the UK, whether involving PPPs or not. This area of IUK was originally established during the credit crisis to provide support for PFI projects which had struggled to reach financial close. It no longer has the capability to lend to projects but now looks at sector specific issues, not just in the PPP context.¹⁸⁸

4.4. REPUBLIC OF SLOVENIA

The Republic of Slovenia is a nation state located in Southern Central Europe. It is a parliamentary republic that operates under a parliamentary system of government where the executive branch derives its legitimacy from and is accountable to the legislature. Slovenia is a unitary state with only two tiers of administration – central government and municipalities. The country is broken down into 211

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

municipalities, which deal with issues of local importance and those allocated to them by statute. Eleven of them are urban municipalities.¹⁸⁹

Implementation of PPP projects is still a novelty in Slovenia. This can be attributed to lack of PPP tradition and political support prior to 2006. Only a few PPP projects were implemented in the 1990s an example being Maribor Wastewater Treatment Plant. There was however no strategic guidance on PPPs prior to 2006.¹⁹⁰

Like Kenya which has a PPP legislation, the PPP legal framework in Slovenia was ushered in with the enactment of the PPP Act, 2006¹⁹¹. The enactment of this Act was prompted by several factors including the country's accession to the EU in 2004, lack of public finance and the increased demand for public services. The Act forms the regulatory framework for PPPs in Slovenia.

The Act entrenches the principle of subsidiarity making its provisions subject those of other legislations. The Act needs to be consulted in combination with other sector laws and general laws to ascertain exactly which rules should apply in any particular situation.¹⁹² Article 3 of the Act entrenches this principle of subsidiarity by providing that the Act shall only apply with regard to those issues that are not regulated otherwise by a special act or regulation issued on the basis thereof for individual forms of PPP.

The following section shall give an outlook of the PPP regulatory framework as provided for under the Act.

¹⁸⁹ Country report on the legal framework on Public-Private Partnership (PPP): Slovenia, Version 1. Interreg Central Europe. Available at <http://www.interreg-central.eu/Content.Node/RESTAURA/D.T1.2.1-Country-report-Slovenia-V1.pdf> last accessed on 24th October, 2017.

¹⁹⁰ Ibid.

¹⁹¹ Zakon o javno-zasebnem partnerstvu, shortly ZJZP

¹⁹² Supra Note 100.

4.4.1. PPP ACT, 2006: Definition of PPPs and scope

PPPs are defined under the Act as a relationship involving private investment in public projects and/or public co-finance of private projects that are in the public interest, which relationship is formed between public and private partners in connection with the construction, maintenance and operation of public infrastructure or other projects that are in the public interest, and in connection with the associated provision of commercial and other public services or activities provided in a way and under the conditions applicable to commercial public services, or of other activities the provisions of which is in the public interest, or other investment of private or private and public funds in the construction of structures and facilities that are in part or entirely in the public interest, or in activities the provision of which is in the public interest.¹⁹³

PPPs under the Act can take the form of contractual partnerships or institutional/ equity partnerships. Contractual partnerships may be in the form of concession or public procurement partnerships. It is important to note that concessions were also legally possible before the Act came into force. Concessions were provided for in the Public Utilities Act which came into force in 1993 and the Institutes Act, 1991. On this legal basis, it was possible to grant a concession to an institute (not a public institute) for performing of public services.¹⁹⁴

Institutional or equity partnerships can be established either: by founding a new legal entity; through the sale of an interest by the public partner in a public company or other entity of public or private law; by purchasing an interest in an entity of public or private law, recapitalisation; or, another manner in comparative terms legally and actually similar and comparable to the aforementioned forms and through the transfer of the exercising of rights and obligations proceeding from the public-private

¹⁹³ Article 2.

¹⁹⁴ European Bank, 2011. Assessment of the Quality of the PPP Legislation and of the Effectiveness of Its Implementation. Available at

partnership to such person.¹⁹⁵ The process of forming a public-private partnership can begin under the Act either by initiative of the public or private sector.¹⁹⁶

With a view of promoting PPPs, the Act makes it mandatory for an awarding authority to undertake a feasibility study of any proposed project to assess the possibility and advantage or inconvenience of using PPP.¹⁹⁷

4.4.2. Basic Principles of PPPs

The Act provides for and expounds the basic principles of equality, transparency, proportionality, competition, balance, procedural autonomy, subsidiary liability and cooperation in establishing and operating PPPs as follows.¹⁹⁸

The principle of equality enjoins the contracting authority to ensure that no distinction is made between candidates at any element or stage of the procedure of establishing and operating a PPP. Further, the public entity is also required not to create circumstances that entail local, objective or personal discrimination against candidates, discrimination stemming from classification of the activities performed by the candidate, or any another form of discrimination. Another component of this principle is that the public partner may not deal differently with candidates that are in the same or essentially similar legal and actual position, nor may it deal equally with candidates that are in essentially different legal or actual positions.

Under the principle of transparency, the public partner is required to ensure objectivity in seeking of candidates by ensuring the highest possible degree of public information in proportion to the purpose,

¹⁹⁵ Article 1.

[file:///C:/Users/Vincent%20Juma/Downloads/8%202012%20Assessment%20of%20the%20quality%20of%20the%20PPP%20legislation%20and%20effectiveness%20of%20its%20implementation%20\(4\).pdf](file:///C:/Users/Vincent%20Juma/Downloads/8%202012%20Assessment%20of%20the%20quality%20of%20the%20PPP%20legislation%20and%20effectiveness%20of%20its%20implementation%20(4).pdf) last accessed on 24th October, 2017.

¹⁹⁶ Supra Note 100.

¹⁹⁷ Article 8.

¹⁹⁸ Articles 12, 13, 14, 15, 16, 17 and 18.

nature, subject and value (scope) of the PPP project. To this end, the Act provides that all tender notices and other procedural documents in the process of establishing PPPs must be published on the worldwide web. Further, the public partner should ensure that candidates have access to the same information for preparing applications and for participating in the establishment procedure, as well as to information on the conditions and criteria for candidate selection. Selection of PPP private contractors must also be done in a transparent manner following the laid down procedure.

The principle of proportionality provides that in the procedure of establishment of a PPP, the public partner may only employ those measures to achieve the objective provided by law or by a regulation issued on the basis thereof that: objectively lead to the stated objective; restrict or adversely affect to the least degree the private partner, or represent the mildest measure for achieving the stated objective; and, in their scope and consequences are comparable to the significance of the stated objective.

The principle of balance states that there shall be a balance of rights, obligations and legal benefits between the public and private partners in a PPP. It also provides that risk must be spread within the public-private partnership such that it is borne by the party that can most easily control it and in any event, the private contractor must bear at least a part of the commercial risk.

The principle of competition provides that in the procedure of establishing a PPP, the public partner may not restrict competition among candidates. In creating and operating a PPP, the public partner shall act in compliance with the regulations on protecting or preventing the restriction of competition.

The principle of the procedural autonomy dictates that the parties to a PPP may freely arrange the contractual relationship of the PPP, in compliance with the act regulating obligational relationships including a provision that disputes may be resolved by way of arbitration.

Under the principle of subsidiary liability, PPP projects must be carried out without interruption or disturbance, and equally for all users and other participants, and also in compliance with pre-determined conditions and standards set out in detail in the public-private partnership contract. The public partner bears subsidiary liability for damages caused to the users of services or other persons by the private contractor in operating a PPP.

Finally, the principle of cooperation provides that the public partner shall assist the private contractor in securing the necessary material and other rights and the various permits which the contractor alone cannot obtain, in compliance with regulations and the PPP contract.

4.4.2.1. Procurement.

The Act provides for a competitive tender process. It provides that irrespective of the form of selection instrument, a public-private partnership contractor shall be selected, unless otherwise provided by law, on the basis of a public tender, notice of which must also be published on the Internet.¹⁹⁹ In the event that a bid is rejected, the Act provides that the reasons for the same shall be made public.²⁰⁰

Upon the conclusion of the evaluation of the bids, the contracting authority is required to draw up reports and indicate which applications fulfil the tender requirements. Additionally, the contracting authority is required to rank these applications such that it is clear which of the applications are most successful in meeting the criteria set and what subsequent ranking they achieve in terms of meeting the criteria.²⁰¹ Article 70.3 provides for the publication of a notice of the award of the project, identifying the private party and including a summary of the essential terms of the project agreement. The Act also provides for final negotiations after the contract has been awarded to ensure that transparency, equal treatment and competition are preserved.²⁰² The public entity can terminate negotiations with the

¹⁹⁹ Article 42.

²⁰⁰ Article 53.5.

²⁰¹ Article 50.

²⁰² Article 54.2.

invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate.²⁰³

Other than the competitive tender process, the Act also makes provision and procedure for PPP award without competitive procedure.²⁰⁴ This is especially so with an award in public interest.

4.4.2.2 Unsolicited proposals

The Act also provides for unsolicited proposals. As a rule, the public partner shall issue once a year a call to potential promoters to submit applications regarding their interest in operating a PPP in areas where the conditions might be met for public co-financing of a private project or where there exists an interest in private investment in public projects.²⁰⁵

4.4.2.3. Resolving of disputes

The Act provides the parties to a public-private partnership may agree that disputes directly related to their relationship and which are not within the exclusive jurisdiction of a court in Slovenia, may be resolved through an agreed arbitration service.²⁰⁶

4.4.3. INSTITUTIONAL FRAMEWORK

Department for Public Private Partnership, an organisational unit within the Ministry of Finance, is the institution responsible for regulation of PPPs in Slovenia. Its tasks are to develop, monitor and cooperate in implementing PPPs in Slovenia, to draw up manuals for operating public-private partnerships, to formulate expert proposals for amendments to regulations and the adoption of other measures that might help in improving practices and eliminating problems in this area, and to perform

²⁰³ Article 60.

²⁰⁴ Articles 57, 58, 83 and 84.

²⁰⁵ Article 32.

²⁰⁶ Article 140.

other tasks provided by the PPP Act. Its staff is composed of civil servants from the Ministry of Finance.²⁰⁷

4.5. COMPARATIVE ANALYSIS OF PPP REGULATORY FRAMEWORKS DISCUSSED ABOVE WITH THE KENYAN FRAMEWORK

There is a wide variation as to how the featured countries and Kenya have set up their regulatory framework for PPPs. Whereas Kenya and Slovenia have adopted specific PPP laws and regulations to govern PPPs, South Africa amended the existing regulatory framework to allow PPPs by introducing PPPs in their general procurement laws and regulations. UK on the other hand is a common law system and its PPP laws are found in various legislations and judicial precedent. Nevertheless, at a minimum, all the featured countries' regulatory frameworks have established the use of PPP as an admissible mechanism for the provision of public infrastructure and services. All of the four countries clearly establish the applicable procedures as well as the rights and obligations of the parties in a PPP.

4.5.1. Institutional Framework

Regardless of how the four countries have set up their regulatory regimes, they all have an institutional framework for regulating PPPs. The composition and the functions of these institutions have been clearly provided for. Kenya, South Africa and the UK have their institutions comprising of players from both the private sector and the public sector. In Slovenia however, the Department of PPP is only composed of civil servants from the Ministry of Finance. It is also important contrast in the roles of the PPP Unit. While the role of the Kenyan PPP Unit, Slovenian Department of PPP is limited to guidance, the South African Unit plays a gatekeeping role in giving approvals at the various stages of the project cycle. The IUK on the other hand has specialised departments dealing with different aspects of PPPs and can be said to provide both guidance and gatekeeping functions.

²⁰⁷ Article 20.

4.5.2. Intervention of the Ministry of Finance or equivalent

PPPs always entail commitments for the public sector. The intervention of the Ministry of Finance or the equivalent is therefore key to ensure fiscal affordability of PPPs as well as the adequate consideration of the government budget constraints, priorities, and overall fiscal situation.²⁰⁸

In Kenya, the national treasury is only involved in certain stages. First, the Cabinet Secretary approves a national priority list of projects based on recommendations by the PPP Committee and PPP Unit.²⁰⁹ Second, the PPP Unit should submit the feasibility report to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project.²¹⁰ Finally, following negotiations with successful bidders, the project report setting out the negotiated terms should be sent by the PPP Unit to the Debt Management Office for confirmation of its initial approval issued at feasibility stage, based on final contract and preferred bidder submission.²¹¹

The South African regulatory system on the other hand sees a heavier involvement of the national treasury in terms of treasury approvals. As soon as a possible PPP is identified, that PPP must be registered with the national or the relevant provincial treasury. The procuring authority cannot proceed with the procurement phase of the PPP without prior written approval from the treasury on the feasibility study.²¹² The procuring authority must also obtain an approval from the treasury before issuing the procurement documentation, appointing a preferred bidder and after the evaluation of bids.²¹³ Finally, treasury approval²¹⁴ is required once the procurement procedure ends but before signing the contract.²¹⁵

²⁰⁸ Supra Note 67.

²⁰⁹ Section 24 (2) of the PPP Act.

²¹⁰ Section 35 (3) of the PPP Act.

²¹¹ Section 53 (4) of the PPP Act.

²¹² This is referred to as the Treasury Approval I.

²¹³ Treasury Approval: IIA and IIB

²¹⁴ Treasury Approval III

²¹⁵ Treasury Regulation 16.3 to 16.6.

The HM Treasury in the UK can be said to be that of an overseer. Its involvement comes in setting PPP Policy, publishing key policy, guidance and statistics on PPP/PFI and to provides advice to Departments undertaking or wishing to undertake PPP/PFI projects. Its underlying focus is on ensuring that public sector asset and service investment programmes maintain momentum, are value for money, sustain market confidence and deliver improved operational performance of projects.²¹⁶

In Slovenia, much responsibility for PPP is placed on the contracting authority. The involvement of the Ministry of Finance is on policy making and supervisory and synonymous to that of the Department of PPP.

4.5.3. PPP preparation phase

This phase encompasses different elements from project appraisal to drafting the PPP contract. It begins with project identification and should ideally involve assessment and prioritization of PPPs within a unified framework of public investment management. An adequate planning and prioritization of public investment, including those projects to be implemented as PPPs, supports an optimal use of public resources and a greater socioeconomic impact of public infrastructure and services.²¹⁷

Unlike in South Africa, UK and Slovenia where the regulatory framework do not expressly require the government to assess and prioritize PPP projects, in Kenya procuring authorities are required to submit lists of PPP projects they intend to undertake in line with their development programs. The lists are the assessed and approved, hierarchically, by the PPP Unit, the PPP Committee, and the National Cabinet.²¹⁸

Upon identification of a proposed PPP project, all frameworks have a mandatory project appraisal process based on common criteria of feasibility and economic viability of the project including its

²¹⁶ Available at http://webarchive.nationalarchives.gov.uk/20130102171708/http://www.hm-treasury.gov.uk/infrastructure_public_private_partnerships.htm last accessed on 24th October, 2017.

²¹⁷ Supra Note 67

²¹⁸ Section 23 and 24 of the PPP Act.

financial viability or bankability, value for money of the PPP, fiscal responsibility, and commercial viability. All the featured frameworks have specific regulatory mentions related to market testing or commercial assessment.

4.5.4. PPP procurement

Given the financial magnitude of PPP projects and the extent of public resources potentially committed, the procurement process of a PPP should be transparent and fair, and promote competition.²¹⁹ In Kenya, the PPP Act provides for the creation of the prequalification committee for the purpose of prequalifying bidders²²⁰ and a proposal evaluation team for the purpose of evaluating bids submitted to it by bidders.²²¹ Similarly in South Africa, the Treasury Regulation 16 provides that the corresponding institution's supply chain management policy will specify the composition of its bid evaluation committee and the technical skills required for each specific procurement.²²²

The bid evaluation committee or the equivalent requires substantial technical expertise due to complexity of PPPs, and since the committee evaluates the bid and applies the award criteria.²²³ The South African framework is silent on the composition of the bid evaluation committee. In Kenya however, the composition of the bid evaluation committee is regulated in detail in where the law requires the presence of members from different public agencies, including the attorney general's office. However, a set of required technical skills or expertise is not provided.²²⁴

Early project development involves a significant investment of resources on the part of private sector firms in terms of feasibility studies, license agreements among others that are only recoverable if their bid is ultimately successful. As a result, many private may be deterred from participating in any

²¹⁹ Supra Note 67.

²²⁰ Section 39.

²²¹ Section 47 of the Act.

²²² Regulation 16.2.

²²³ Supra Note 67.

²²⁴ Supra Note 85.

potential PPP project leading to very limited or even one proposal. This curtails competitive bidding which may raise concerns about the value provided by the bidder. In this case, the procuring authorities are faced with two options: they may either re-tender, or conduct comprehensive due diligence before selecting the sole bidder.²²⁵

In South Africa, the regulatory framework provides measures to ensure competitive bidding. More specifically, it requires the procuring authorities to: ascertain the likely reasons for the limited interest, and revisit the request for qualifications and the feasibility study to see what assumptions could be revised to increase market interest; if any changes to assumptions in the feasibility study are made, secure a revised Treasury Approval; and carry out a second pre-qualification exercise. If the feasibility study is not revised, the procuring authority will have to “carry out the pre-qualification exercise again, with a wider circulation to attract a suitable number of bidders, or continue with the limited number of pre-qualified bidders, but with a revised procurement plan that uses the public sector comparator prepared in the feasibility study as an active ‘competitor’ for the bids.”²²⁶ This issue is not expressly addressed in the Kenyan system.

The UK framework provides for several selection procedures once the bids have been received. These include the open, restricted, competitive procedure with negotiation, competitive dialogue, innovation partnership, and negotiated procedure without prior publication. The Slovenian system only recognise competitive and non-competitive modes of procurement.

Transparency and disclosure during procurement improves governance, management of fiscal cost and investor confidence. At this phase, three aspects are critical: publication of the award notice, publication of the full PPP contract, and notification of the procurement process results to unsuccessful

²²⁵ Supra note 67.

²²⁶ PPP Manual (Module 5 - PPP Procurement).

bidders including the grounds for selection.²²⁷ Both regimes provide for the publication of the award notices but do not require the publication of the full PPP contract. In Kenya however the publication of the PPP award is expressly required to include a notice to inform readers about: the nature of the project; the scope of the project; the successful bidder; the project cost at net present value; the project value and tariff; and, the duration of the project.

Regarding the communication of the results to the unsuccessful bidders, the Kenyan, the Slovenian and the UK framework state that the non-selected bidders should be notified of the outcome, but do not require that the grounds for selection be included. This is not expressly provided for in South Africa.

4.5.5. Unsolicited proposals

Unsolicited proposals allow governments to benefit from the knowledge and ideas of the private sector but can also create new challenges. One of the important issues arising from unsolicited proposals is that because they originate in the private sector, they are outside of the public sector investment planning framework. It is thus necessary to establish a clear process to assess unsolicited proposals, ensuring consistency with public sector priorities and needs, especially when requiring public commitments.²²⁸ The South African regulatory framework states that PPP unsolicited proposals should follow the same procedure and comply with the same requirements as if originated in the public sector²²⁹, although the National Treasury does not encourage their use. In Kenya, the framework does not expressly require ensuring consistency of the unsolicited proposal with the existing government planning/priorities. In Slovenia, the public entities are enjoined to invite unsolicited proposals once a year. The framework does not however provide for specifics of how these proposals should be addressed.

²²⁷ Supra Note 67.

²²⁸ World Bank Reference Guide (2014). Available at http://PPP.worldbank.org/public-private-partnership/sites/PPP.worldbank.org/files/documents/PPIAF_UnsolicitedProposals_EN.pdf last accessed on 14th October, 2017.

²²⁹ Practice Note 11 of 2008/2009: Unsolicited Proposals

4.5.6. PPP Contract Management

Management of PPP contracts is a crucial aspect considering their long term nature. It involves setting up appropriate institutional structures for interaction with the private partner, monitoring and evaluating milestones, and dealing with changing circumstances that affect the PPP contract. Renegotiation of these contracts may therefore be unavoidable. The regulatory framework plays a role in controlling parties' expectations to renegotiate by establishing certain conditions and limits.²³⁰ All the featured frameworks expressly requires the approval of the procuring authorities and for the contract amendment to meet certain common requirements including the amendment continuing to provide value for money, affordability and transfer the appropriate level of risk to the private party.

4.6. CONCLUSION

In this chapter, it has been seen how PPPs are regulated in South Africa, UK and Slovenia. The UK and South Africa do not have a specific PPP law but have comprehensive regulations, guidelines and practice notes that govern the area. On the other hand, Slovenia has a specific PPP law that constitute the regulatory frameworks for PPPs. All these frameworks adhere to the common principles of value for money, affordability and optimal allocation of risks which must be applied at every stage of PPP cycle.

A comparison of the all then featured PPP regulatory frameworks and that of Kenya show similarities and differences in several aspects. This chapter has therefore offered a valuable indication as to where the Kenyan system lies in comparison to that of other countries. None of the systems is perfect and adjustments may be necessary to ensure faster and successful implementation of PPPs. The next chapter shall make recommendations on how the Kenyan system may be improved to this end.

²³⁰ Supra note 67.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS TO THE STUDY

5.1. INTRODUCTION

In this Chapter, the writer shall do an overview of the study to show that the hypothesis that the existing legal framework governing PPPs in Kenya is not effective and requires improvement to ensure effective implementation of PPPs in Kenya has been confirmed. Key areas of the study shall be highlighted in a brief recap of the preceding chapters. To cap off the study, the writer shall then make recommendations as to how the Kenyan PPP regulatory framework can be improved based on the comparative study conducted in Chapter Four.

5.2. RECOMMENDATIONS

5.2.1. PROVISIONS REGARDING CONCESSIONS

It was observed that the Kenyan PPP regulatory framework barely made provision for regulation of PPPs with concession elements. PPP with concession elements involve the state grants a franchise the right to finance, build, own, operate, and maintain a public infrastructure for a given period, and to charge users for that service.²³¹ Concessions are normally stand stand-alone, single-purpose entities that are expected to finance themselves eventually, if not initially, without recourse to their shareholders.²³²

Considering the nature of concessions, there is need for their regulation through a defined legal framework to give comfort to potential investors. Issues such as lack of clarity of risks involved, unclear government objectives and commitment, unpredictable government approval processes, insufficient transparency that may lead to increased transactional costs and a lack of mechanism to provide for a long term debt may ruin investor confidence and adversely affect the successful

²³¹ Information available at <http://schwarzlaw.ca/the-need-for-concession-laws-in-developing-countries/> last accessed on 15th March, 2018.

²³² Ibid.

implementation of PPPs with investor elements. A clear concession law that addresses these issues with respect to PPPs is therefore crucial.

Ideally, such a law must address the following aspects. First, there is need for a concession policy or strategic statement on private sector participation developed on the level of a government approved document. This will signal the commitment of the government to develop a stable and attractive investment environment. This will harness confidence of the private sector to participate in the partnership.

Second, the legal framework should clearly provide for the roles of and responsibilities of all parties. As a starting point, the State's granting authority must be clearly defined. This may involve the law identifying the public authorities that are authorized to award concessions and enter into agreements for the implementation of PPPs with concession elements. It would also be useful for the law to identify the sectors in respect of which concessions may be granted. The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.²³³

Third, institutional mechanisms must be provided for to co-ordinate and or supervise the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of PPPs with concession elements in accordance with statutory or regulatory provisions. It is highly recommended that the law puts in place measures that will ensure independent

²³³ UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. Available at <https://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf> last accessed on 15th March, 2018.

regulatory bodies with a level of autonomy to ensure that their decisions are taken without political interference or inappropriate pressures from private sector operators and public service providers.

Fourth, the law must also establish transparent procedures in the process of preparation, procurement and implementation of concessions whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based. Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.²³⁴

Fifth, the law should set forth the exceptional circumstances under which the contracting authority may be authorized to award a concession without using competitive procedures. Clear procedures on making such awards must also be provided for. To ensure clarity and transparency, the law should make provisions that will ensure that the contracting authority adequately publicizes its intention to award a concession without competitive bidding. A mechanism that will ensure that the public authority engages as many potential concessionaires as possible should also be put in place.

Sixth, provisions for unsolicited proposals with respect to PPPs with concession elements should also be provided for. It will be important to specifically provide that such proposals do not relate to a project for which selection procedures have been initiated or announced by the contracting authority. The law should provide for procedures for determining the admissibility of unsolicited proposals and handling unsolicited proposals with and without proprietary concepts or technology.

²³⁴ Ibid.

5.2.2. UNSOLICITED PROPOSALS

The study also noted that the Kenyan framework accords the contracting authorities a lot of discretion in the award of unsolicited proposals without providing competitive analysis and bidding mechanisms to expose these proposals to in order to ensure that there is value for money. Section 61 of the Act vests in the contracting authority the power to consider a privately initiated investment proposal for a project and procure the construction or development of a project or the performance of a service. The conditions required to be met before such proposals are met and the criteria against which such proposals are to be measured are assessed solely by the contracting authority without any supervisory mechanism. This may result to a lack of clarity, predictability, transparency, and accountability in how these proposals are handled which may hinder their full exploitation.

It is therefore recommended that the framework should incorporate a clear, standardized and defined process for handling unsolicited proposals. A clear process of assessment of the proposals should be provided for. The law should also provide what should be considered as unacceptable unsolicited proposal. For instance, Treasury Regulation 16 in South Africa at regulation 3 thereof provides for what should be considered as unacceptable unsolicited proposals. These include proposals: relating to known institutional requirements that can, within reasonable and practicable limits, be acquired by conventional competitive bidding methods; relating to products or services which are generally available; do not fall within the institution's powers and functions; are presented by the authorized representative of the proponent; or, contravene the provisions of the law.

To further enhance transparency, it is recommended that an independent body set up specifically for that purpose or perhaps the PPP Unit, should be supplied with a report on its decision to either accept or reject an unsolicited proposal for purposes of evaluation. This report may also be shared with the proponent who may raise any dissatisfaction with the contracting authority's decision.

5.2.3. DISPUTE RESOLUTION MECHANISM

The research observed that the conventional court system is the main avenue for dispute resolution for PPPs in Kenya in the event that parties do not agree to go to arbitration. Considering the complex nature of some of the PPP arrangements and the heavy investments associated with PPPs, the resolution and recourse mechanism for PPP related disputes should be efficient and credible to ensure that the disputes are settled in a timely manner. The conventional court systems can be ill described in the foregoing terms.

It is therefore preferable that a dispute resolution body is set up for purposes of determining disputes that arise from PPP projects. Since PPP projects may cut across sectors, it is proposed that the dispute resolution body consists of at least three permanent members who have proven knowledge and experience on matters PPPs. It is preferred that these members are appointed on contract basis renewable upon expiry. One of the members would act as the Chairperson and the other his deputy. It is recommended that the chairman has a legal training background, preferably a person who is qualified for appointment as a High Court judge. The PPP Committee upon the recommendation of the PPP Unit should be tasked with the appointment of these members.

Since PPPs are cross sectoral, it is further recommended that mechanism be put in place to enable the dispute resolution body engage technical experts on a case to case basis to assist it in understanding and determining the dispute before if such a need arises. This may be done in conjunction with the relevant professional bodies upon the approval of the PPP Unit.

An appeal procedure should also be put in place. There are two possible options. The first option is to have parties appeal the decisions of the dispute resolution body to the High Court in the conventional system. In such an appeal, the law should provide that the court will only be required to review the evidence and the law. Further, it is recommended that this appeals be exempted from the trappings of

appeal procedure of the conventional court system. For instance, the researcher recommends that instead of requiring parties to file a record of appeal which may be time consuming and expensive, the file from the dispute resolution body should be forwarded to the court instead. It is also recommended that parties file their written arguments at the time of filing the appeal and should only appear in court for purposes of highlighting those arguments after which the court is to render its determination.

A provision should also be made for the dispute resolution body to review its decision especially in the event of an apparent error on record or if new evidence is discovered after it has rendered its decision.

It should also be provided for that if parties have agreed in the project agreement to resolve their dispute by any other alternative dispute resolution mechanism, any disputes should first be subjected to the said mechanism. The dispute resolution body should only be resorted to if the said mechanism fail to resolve the disputes.

Finally, the researcher proposes that a timeline be put in place for determination of disputes before the dispute resolution body. Strict timelines for petitioning the body, filing documents, hearing the dispute and rendering decision should be provided for.

5.2.4. PPPs INSURANCE

It was observed that the area of insurance is often left to the ends of negotiations and it is no wonder that the Kenyan PPP regulatory framework makes no mention of the same. Nevertheless, issues to do with availability of insurance, levels of cover and deductibles will have an impact on the risks being taken by the authority, the private player and the lenders and should therefore be provided for.

As a prerequisite to entering into PPP projects, it should be clearly provided that parties need to consider what risks need to be insured and that such insurance be first obtained. Another critical aspect

especially where lenders are involved would be a mechanism to ensure that such insurance covers will continue for the term of the loans even though insurance can only be taken out on an annual basis. This will encourage willingness of the private sector and lenders to participate in PPPs.

5.2.5. INCENTIVES AND GOVERNMENT FINANCIAL SUPPORT

The study noted that the PPP legal framework did not provide adequate incentives for private investors and that the governments financial support mechanism provided for in the PPP Act, 2013 was not flexible enough to answer to the dynamic nature of PPP projects. PPP investments tend to be large-scale and long-term and thus involve high risks for investors and unless certain incentives and assurances are provided, many potential private investors may shun them as an investment option. It is therefore that the PPP regulatory framework lays down the basis for provision of such incentives to encourage participation by the private sector.

Incentive provisions may take several forms. Firstly, for projects that require large tracks of land, any delay or problems in land acquisition could be a major source of risk to investors. For this reason, the PPP laws should be harmonized with the existing land laws to either provide for use of public land or acquisition of private land by the contracting authority on behalf of the investor. Finally, with these types of projects, the researcher recommends that acquisition of land should be made mandatory prior to invitation of bids.

Secondly, provisions enabling capital grants and other forms of financial support should also be incorporated. Provisions relating to a one time or deferred capital grant, interest free, low interest loans, subordinated loans, operation and maintenance support grants, and interest subsidies will go a long way in making this projects commercially viable for private investors.

Thirdly, a legal basis for grant of revenue guarantees for high risk PPPs should also be provided for. This provisions may take the form of the Government guaranteeing up to a certain specified percentage of the projected revenues.

Fourthly, the PPP framework should establish mechanisms to limit the investor's risk from foreign exchange fluctuations since revenues generated from the PPP projects are primarily in local currency while a large part of debt servicing and other payments are often made in foreign currency. For instance, a provision to the effect that where foreign exchange fluctuations exceed a certain defined limit, say, twenty per cent, a part of losses due to such fluctuations be offset through modifications of tariff rates, government subsidies or adjustment of the concession period.

Fifthly, provisions for tax incentives may be provided for where PPP projects meeting a certain criterion may be qualified to for various tax incentives including: exemption from registration tax on the acquisition of real estate, reduction of or exemption from various appropriation charges, recognition of a certain percentage of the investment as a reserve to be treated as an expense for the purpose of computing corporate taxes and protection against reduction of tariffs.

Sixthly, provisions relating to loan guarantees may also be incorporated. These are guarantees given by the government to lenders that if a borrower defaults, the government will repay the amount guaranteed, subject to the terms and conditions of an agreement. Since the guarantee reduces the lender's risk, the borrower should be able to obtain funds at a lower interest rate or negotiate a loan that might not otherwise be obtainable. As loan guarantees do not involve immediate cash spending by the government, they can be a more attractive tool to the government than direct loans or grants, particularly in periods of fiscal restraint.²³⁵

²³⁵ Information available at http://www.unescap.org/ttdw/PPP/PPP_primer/351_types_of_government_support_and_incentives.htm last accessed on 16th March, 2018.

Lastly, provisions on force majeure should also be considered where the government may buy out a PPP project in the event of prolonged force majeure.

5.2.6. PUBLIC PARTICIPATION

The study noted that the PPP legal framework does not have adequate provisions to allow for public participation in the various phases of PPP projects implementation. It was observed, that the major actors in the approval processes were the PPP Unit and PPP committee with little to no engagement with the public. As such, the public interest is often sacrificed in public officials' trade off with rapid project implementation which, the study posits, is one of the reasons for PPP failure.

The purpose of the, PPPs is to contribute to the benefit of the broader community. Consequently, in order to have a successful PPP with genuine partnership where all parties including the general public collaborate and benefit, there should be an open communication with the affected portion of the public. In order to gain input on project objectives, there is a need for an ongoing meaningful consultation with stakeholders, including the general public, throughout the PPPs' process. Data disclosure and public engagement are the two important parts of this process to obtain public legitimacy.²³⁶

It is therefore the study's recommendation that the PPP legal framework be reviewed to the extent that the affected communities are involved in the implementation of the projects at every phase. Further, provisions that will ensure predictable decision making process, open access to key documents and data, fair opportunities for stakeholders to provide input to the plan, and a transparent and accountable system of integrating stakeholders contributions into the final decisions should be incorporated.

²³⁶ Mehrnaz Khaleghi Kerahroodi. Meaningful Community Engagement in Public-Private Partnerships: A Case Study of Manhattan's Downtown Redevelopment Project. 2012. Available at <http://krex.k-state.edu/dspace/bitstream/handle/2097/20590/MehrazKhaleghiKerahroodi2016.pdf;sequence=1> last accessed on 16th March, 2018.

To enable the effective participation of the public in the PPPs process, the study proposes that the regulatory framework stratifies the PPP process as follows to enable continued participation by the public. The first stage is the mobilisation and development of business case where the public together with other stakeholders are engaged for purposes of determining the public concerns, estimating the technical and financial feasibility of the project and generating innovative ideas. The second stage would be the technical assessment stage where engagement will be for purposes of agreeing on the most feasible and beneficial option and work out some preliminary details of the project. The next stage will be the policy and funding approval stage for purposes of monitoring the public perception for purposes of establishing policies that ensure social interests are duly taken care of. The procurement and selection stage follows where public input is critical to ensure that there is transparency in the award and therefore legitimacy. The next is the service commencement stage where the public is crucial for monitoring the services being provided for purposes of guaranteeing the services provided meet expectations. The last stage is the payment and contract arrangement where complaints and feedback from the public is required for purposes imposing sanctions and penalties to nonperforming service providers.

These measures will ensure less controversies, transparency and legitimacy of the PPPs and hence their eventual success.

5.2.7. ADEQUATE TRANSPARENCY MEASURES

The study observed that the PPP regulatory framework does not provide for adequate mechanism to ensure transparency in the procurement process especially with regards to the bidding process. While the PPP Act provides for discretionary preliminary bidders meeting²³⁷ and a competitive dialogue²³⁸

²³⁷ Section 41, *ibid*

²³⁸ Section 45, *ibid*

between the contracting authority and the bidders, there is no mechanism for informing unsuccessful bidders on the process and outcome (not merely the result), and an opportunity for complaints and appeals to be made.

The study therefore recommends that provisions be made to ensure that the procurement process is conducted in a fair, open and transparent manner. To promote transparency, the study proposes that the procurement process should be made open to public scrutiny. This may be made possible through subjecting the process to the scrutiny of national parliament, external audit bodies and the media.

The study also proposes an independent oversight of the tender process. Provision may be made for the appointment of a probity practitioner to ensure that a transparent and robust process is followed at all times. The probity practitioner is independent of the project team and is responsible for monitoring the bidding process and for assessing and reporting on whether the process has been conducted to the required standards.²³⁹ Probity practitioners should have an accounting or a legal practitioner appointed on a project to project basis. They are able to receive any complaints or concerns raised by bidders during the process so that the issue can be dealt with at that time rather than exposing the project to a challenge later when an award is made. They attend all of the critical stages of the evaluation process, such as the opening of the bids and the meetings of the evaluation committee, and at the conclusion of the evaluation they confirm that it has taken place in accordance with the applicable requirements.²⁴⁰

Another provision is to make it mandatory for the auditor general to conduct an ex-post audit reviews of the conduct of PPP tender processes.

Another measure that should be put in place to protect the integrity of tender process is to place the onus on bidders to avoid corrupt practices and to ensure that, if a bidder engages in corrupt practices,

²³⁹ Information available at <https://PPP-certification.com/PPP-certification-guide/14-oversight-integrity-tender-process> last accessed on 17th March, 2018.

²⁴⁰ Ibid.

the terms of the tender process allow the procuring authority to take remedial action. This remedial action could take any of the following forms: cancelling the bidder's appointment as preferred bidder or contractor, calling any bid bond and suing for damages to recover from the bidder the costs of the procuring agency as a result of the corrupt conduct, including the costs of re-running the procurement process if necessary.

5.2.8. DEFINING GUIDING PRINCIPLES

It was observed that even though the Kenyan Policy provides that the PPP Act shall provide for general principles to guide in the governance of PPPs. The Act however does not define these governance principles. It is important for the legal framework to define the guiding principles for several reasons. First, the principles will aid the respective contractual authority and the PPP Unit be prudent fiscal actors. It falls on these two players to ensure that the PPP is affordable, that it represents adequate value for money, and that any fiscal risks, such as contingent liabilities, are limited. Second, since there are demand from several sectors for investment, these principles if defined will assist prudent assessment of these sectors against these sectors to determine projects that are pursued are those that yield the highest return on investment for society as a whole. Finally, these principles will assist decision makers in balancing the risks taken by the private sector and those retained by the public sector.

It is therefore recommended that the Act defines the principles that will guide the implementation of PPP projects. These principles should cover several aspects. The first should be the decision making process. To guide this process, it should be provided that the decision to invest should be based on a whole government perspective and be separate from how the project is to be financed. It is important that the projects that go ahead have been prioritised at the political level. It is only after the government approves a project should the question arise as to the manner of financing and managing it. Thus, only

once government decides that a project should receive priority and is affordable in terms of the budget, should government consider whether traditional procurement or a PPP constitutes the best way to secure the intended value for money of the project.²⁴¹

The other area to be addressed by the principles is the budgetary process. To this end, it should be provided that a project should be affordable and transparently treated in the budget process regardless of which level of government it applies to. Affordability should be clearly defined. An PPP project is affordable if the expenditure and contingent liabilities it entails for the government can be accommodated within current levels of government expenditure and revenue and if it can also be assumed that such levels will be and can be sustained into the future. Budget documentation must disclose all information regarding the present and future costs and liabilities of PPPs in a transparent way. The information should include what and when the government will pay, and full details of guarantees and contingent liabilities.²⁴²

The principles should also provide that the before opting for PPP, an investigation be undertaken to ensure that the project will yield value for money. The value for money pre-test should contain these elements: what are the comparative costs of PPP with other procurement options? Can the risks of the project be clearly defined, identified and measured? Can the right types of risk be transferred to the private partner to ensure value for money? Does the project involve any transfer of risks onto other stakeholders, including workers and local communities? Is the risk appetite of the private partner sufficiently robust to explore a PPP? What is the potential level of competition for the market and what is the potential level of competition in the market? How large are the benefits from combining the construction and the operating phases of a project in one contract? What is the risk of project failure

²⁴¹ Information available at <http://www.oecd.org/gov/budgeting/48144872.pdf> last accessed on 17th March, 2018.

²⁴² Ibid.

associated with similar PPPs? What are the costs to the public authority associated with such failures? And, can the risks, cost and quality trade-offs be managed by the public sector?

After the fundamental assessment of comparative costs, a key element in the decision to use PPPs is the transfer of risk from the government to the private partner. The principles should therefore provide that risks be identified, priced and either retained by the public sector or transferred to the private partner through an appropriate payment mechanism and specific contract terms. Risk should be allocated where it can be best managed. Emphasis should be made here that risk should not be transferred to the private partner at any price for the sake of transferring risk alone or to achieve a desirable accounting treatment. The key question is whether the risks of the project can be clearly defined, identified and measured. If risk cannot be defined, identified or measured, there is room for conflict over the contract, particularly when the risk realizes. In addition, potential private partners might also be unwilling, for an acceptable price, to take on risks that are not clearly defined, identified and measured.²⁴³

The other area that need to be addressed by the principles is the involvement the user in the design and monitoring of PPP to increase value for money. While clearly defining outputs in the contract is key, involving end-users in defining and monitoring service quality can be instrumental in achieving better alignment of service specification with user expectations and exert pressure on service providers to meet service standards. Public independent oversight of PPP implementation can also promote better outcomes for the society as a whole through greater accountability and social control.²⁴⁴

Finally, the principles should provide competition and integrity in the procurement process. Competition helps ensure the effective transfer of risk, that optimal solutions are developed by the private sector and that keenest pricing is tendered. Enhancing integrity necessitates recognizing the

²⁴³ Ibid.

²⁴⁴ Ibid.

risks inherent throughout the entire procurement cycle, developing appropriate management responses to these risks, and monitoring the impact of mitigating actions.

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