

KENYAN EXPERIENCE ON PPPs

MINISTRY OF TRANSPORT

THE CASE FOR PPPs

- Like many other developing countries, Kenya faces significant financing gaps in infrastructure and utilities to attain country's Vision-2030. For example electricity and power generation vis-à-vis power consumption has a spare capacity of only 4%. Transport has financing gap of US\$0.14billion per annum.
- Reduction of demand for Government resources to enable it to finance certain functions such as security, education and health.
- Inability of state corporations to mobilize adequate resources to fulfill their national mandates.
- Diminishing external resources in form of loans and grants which the Government had accessed earlier to finance infrastructure services – donors mainly supporting privatized utilities due to perceived operational efficiencies from private sector operations which enhance project sustainability.
- Lessons from other countries which have succeeded to improve infrastructure services through public private partnerships
- Existence of PPPs which allow for private sector investments in strategic operations without sale of assets.
- With private sector managing maintenance and support services such as cleaning and security services, the Government professionals can concentrate on frontline service delivery.

LEGAL FOUNDATIONS FOR PPPs IN KENYA

There are two pieces of legislation that provide some foundation for PPP arrangements.

The Privatization Act 2005 which defines privatization as a transaction that result in a transfer, other than a public entity of;

- (a) Assets of a public entity including the shares in a state corporation
- (b) Operational control of assets of a public entity
- (c) Operations previously performed by a public entity.

The second is the Public Procurement & Disposal (PPDA) Act 2005 which defines public private partnership as an agreement between procuring entity and a private party under which:

- (a) the private party undertakes to perform a public function or provide a service on behalf of a procuring entity
- (b) the private party receives a benefit for performing this function, either by way of (i) compensation from a public fund (ii) charges or fees (iii) combination of compensation and charges.

Section 64(4) of the PPD Act states that the Public Procurement Oversight Authority shall issue detailed guidelines for concessioning or PPPs.

KEY PROVISIONS OF THE GUIDELINES ON PPPs

The Government appointed a Steering Committee of 13 members whose functions among others are:

- (i) Establishing PPP standards, guidelines and procedures
- (ii) Serving as a resource centre for best PPP practices in Kenya
- (iii) Providing final approval/disapproval for PPP projects, after ensuring that there has been quality analysis of the PPP project to aid decision making and testing the PPP project for affordability, risk allocation and value for money.

A procuring entity may enter into a PPP whereby a private party performs part of a procuring entity's service delivery or administrative functions and assumes the associated risks, provided that in doing so the procedures strictly adhere to the guidelines.

In return the private party may receive a fee according to predefined performance criteria, which may be from service tariffs or user charges or from government budget.

The guidelines identifies the following PPP arrangements which can be entered into; A service contract, a concession, a lease, a BOT, a BOO or any other scheme as may be prescribed by the PPP steering committee.

The guidelines also provide for unsolicited bids.

PPP IN THE TRANSPORT SECTOR

In December 2006, the Governments of Kenya and Ugandan jointly concessioned the Kenya-Uganda railways. Since then the operational performance has not improved with the concessioning due to absence of a strong rail operator.

The concessionaire has effectively defaulted on payments of concession fees, agreed investments and improvements in cargo haulage.

The two governments have given notice of terminating the concession.

The Government took a decision to replace the current driving license with second Generation Driving License.

The Government settled for BOT scheme for a period of five years. There will revenue sharing in the concession period. Upon expiry of the concession the production of drivers' license will revert to the Government.

Firms were invited to bid and 4 firms submitted bids. A firm has been qualified and is awaiting necessary sanctioning before signing of the contract.

The Government advertised the tolling of a section of the Northern corridor in year 2007. The concessionaire was to add an extra lane a distance of 107km, maintain the section then charge a toll to recoup his investments. The response was not encouraging as only one firm returned the bids. It should be noted that the then there was no PPP framework in place. Negotiations with the party that responded are going on guided by the now established PPP framework.

LESSONS LEARNED

- Adequate capacity needs to be in place in Ministries for structuring of deals and negotiating deals to protect the public sector interest.
- Public and political acceptance of benefits of public private partnerships is needed.
- PPPs are not a panacea. They represent a claim on public resources that needs to be understood and assessed by the Government. They are often complex and long term and mistakes can be costly.
- Treatment of unsolicited bids is now clear under the released guidelines on PPPs.