Overview of the PPP Framework in Kenya

1. Background of PPPs in Kenya

Established initially under the Public Procurement and Disposal (Public Private Partnership) Regulations, 2009, the Kenyan government has in the recent past been committed to improving and strengthening the PPP framework for private sector participation in the country. Several accomplishments are notable:

a. The adoption of a PPP Policy in 2011 to articulate the government's commitment to PPPs and to provide a basis for the enactment of a PPP Law;

b. The enactment of the PPP Act on 8th February 2013;

c. The gazettement of the National PPP Regulations on 19th December 2014;

d. The development of draft PPP Regulations for the County Governments;¹

e. The gazettement of the Roads Annuity Fund Regulations, 2015;

f. The gazettement of the Public Private Partnership (Project Facilitation Fund) Regulations, 2017;

g. The development of the PPP Disclosure Framework;

h. The development of a PPP Screening Tool, to assess a project's PPP readiness/suitability;

i. The development of a Fiscal Commitment and Contingent Liability (FCCL) Framework for PPP Projects;

j. The development of draft National Toll Fund Regulations;

k. The development of a draft Governance and Operational Manual for the Project Facilitation Fund; and

l. The development of a PPP Manual is at an advanced stage

2. Legal and Regulatory Framework

Since 1996, Kenya has attracted private investments into the country’s economic and social infrastructure sectors including telecommunications, energy, transport, water and sewerage. These investments have demonstrated both the commitments of Government of Kenya (GOK) to PPPs and the interest by private investors, lenders and operators in these sectors. However, these infrastructure investments occurred without a specific policy, legal and regulatory framework for PPPs.

Therefore, the GoK's first step was to strengthen the legal and regulatory framework for carrying out PPPs in Kenya, as part of a wider agenda of increasing private sector investments in infrastructure development. Presently, the legal and regulatory framework for PPPs in Kenya comprises of: the Constitution, legislation (such as the PPP Act, 2013, the Public Procurement and Assets Disposal Act, 2015 and various sector specific legislation), court rulings, regulations, guidelines and tribunal determinations. The extent of the PPP legal and regulatory framework is further broken down in Table 1 below.

Overall, Kenya has a stable PPP legal and regulatory framework that:

¹ The Regulations are still in draft as we are waiting for parliamentary approval of the proposed amendments to the PPP Act, 2013 that touch on PPPs at the County Level
a. Defines the PPP ideology (a long term arrangement, between a public and a private entity to undertake a public function, for which compensation will be paid from a Public Fund, user fees or a combination of both; PPPs are usually output-based and performance-linked);
b. Provides a substantive and procedural law to govern the undertaking of PPPs – and governs both levels of government;
c. Sequences the PPP process, that is, how to initiate, prepare, procure, contract, manage PPP projects;
d. Prescribes regulatory compliance requirements;
e. Establishes WHO does what, when, why;
f. Prescribes HOW projects are to be managed, reported on, and contracts varied; and
g. Establishes a transparent predictable process which drives stability

Figure 1: PPP Legal and Regulatory Framework

The PPP Act, 2013 is a law under chapter 12 of the Constitution, as it deals with Public Finance. As a result, substantial fiduciary obligations are placed on the PPP Committee in the discharge of its oversight mandate with a view of ensuring that the principles and values of Articles 10, 201 and 227 of the Constitution, among others are upheld – being PPP fidelity to national values, responsible and fiscally sustainable public finance and a public procurement system that is transparent, competitive, cost effective and affords and equal opportunity to all.

3. Institutional Framework

To support the delivery of the country’s PPP agenda, a number of institutions have been created, and are operational under the PPP Act of 2013. They include:
   a. PPP Committee;
   b. PPP Petition Committee;
c. PPP Unit; and

d. PPP Nodes within the Ministries, Government Agencies and County Governments.

a) PPP Committee

The PPP Committee is established under section 7 of the Act. It is assisted by its Secretariat (PPPU) and has the responsibility to:

a. Develop and implement PPP policy initiatives;

b. Champion the PPP Agenda;

c. Ensure compliance with the PPP Act 2013;

d. Approve/recommend PPP projects to the Cabinet;

e. Ensure efficient execution of the PPP Agreements;

f. Ensure PPPs are consistent with national priorities;

g. Authorize allocations of the Project Facilitation Fund; and

h. Issue PPP standards, guidelines & procedures, & bid documents.

a) PPP Petition Committee

The PPP Petition Committee, established under section 67 of the PPP Act 2013, is set up as a tribunal to adjudicate on all petitions and complaints submitted by a private party during the process of tendering and entering into a PPP project agreement. To effectively discharge its mandate to function as a dispute resolution body, the day-to-day administrative aspects of the Petition are administrated through a Secretariat.

b) PPP Unit

The PPP Unit, as the resource center for best practice and guardian of the integrity of the PPP process, has a large role to play in identifying problems, and making recommendations to the PPP Committee regarding potential solutions.

In addition, it has the specific responsibility of assisting each Contracting Authority to identify, select, appraise, procure, approve, negotiate and monitor PPP projects throughout their life cycle. Moreover, the PPP Unit is also tasked to improve capacity and skills in the public sector and to manage PPP projects more effectively.

c) Contracting Authorities

The PPP Act of 2013 recognizes Contracting Authorities (CA) as Ministries/Government Departments, County Governments and Statutory Corporations. Their main responsibilities with respect to PPP are to identify, develop, procure, implement and monitor projects. To discharge their responsibilities, procuring entities are required to conduct feasibility studies, prepare bidding documents and seek necessary approvals.

Each CA undertaking a PPP project is required to establish a PPP Node, staffed with officers with the ability to carry out day-to-day management of a PPP project (section 16 and 17 of the PPP Act, 2013). Given that Contracting Authorities presently lack the requisite in-house expertise on PPPs, they may have to appoint Transaction Advisors (TA) to assist them in the development of projects. The Unit is also on hand to support CAs in the identification and development of their priority PPP projects.
4. **Scope and Application of the PPP Program**

The scope of the Government’s PPP program is the creation of new infrastructure, and the expansion & refurbishment of existing assets such as:

- a. Roads and bridges;
- b. Ports;
- c. Airports;
- d. Railways;
- e. Power generation plants and transmission/distribution networks;
- f. Oil and gas i.e. petroleum infrastructure, such as storage depots and distribution pipelines etc.;
- g. Inland container depots and logistics hubs;
- h. Municipal services;
- i. Mining;
- j. Water supply, treatment and distribution systems;
- k. Solid waste management;
- l. Social infrastructure for health care, prisons, education, housing;
- m. Telecoms/ICT

Attached is the PPP Unit Score Card, which outlines the achievements of the PPP Unit to date, as well as the PPP Project pipeline list.

5. **PPP Project Facilitation Fund**

The project Facilitation Fund is a Fund established under section 68 of the PPP Act and has 4 windows:

a. **Window 1: Support to Contracting Authorities for project preparation**

The object of this window is to provide support to contracting authorities during the preparation stage of a project. Funds may be applied for by the contracting authority to meet the costs of:

- i. Land acquisition, compensation, resettlement and environmental remediation.
- ii. Consultancy services related to the public private partnership programme, including undertaking feasibility studies
- iii. Conducting the tender process, including project advertisements, marketing and communications, tender documentation and due diligence.
- iv. Undertaking transaction and associated advisory services
- v. Undertaking other project preparation activities approved by the PPP Committee

Any support provided to a contracting authority for land acquisition costs shall be recoverable and should be refunded by the contracting authority to the Fund within the immediate next budgeting cycle. This includes the cost of land acquisition, compensation, resettlement and environmental remediation. Support provided for the items listed in point (iii) and (iv) may be recoverable, based on guidelines issued and the terms of engagement set out in the Funding Agreement that is entered into between the contracting authority and the Fund.
b. **Window 2: Support to the PPP Unit**

The Fund will also have a window dedicated towards supporting the project related activities for the PPP Unit, who has the mandate under the Act *inter alia* of providing technical, financial and legal expertise to the PPP Committee and Nodes established under the Act, serving as a resource centre on PPP matters, conducting civic education and promoting awareness of PPPs.

This window is therefore available to the Unit to support the following key functions, which are instrumental in helping it fulfil its mandate:

i. Costs relating to consultancy services
ii. Undertaking of capacity building programmes
iii. Purchase of office equipment, systems and associated software
iv. Undertaking research activities
v. Establishment of knowledge management systems and frameworks; and
vi. Meeting recurrent operational and maintenance costs for the Fund Secretariat that is responsible for assisting the Officer Administering the Fund (who is the Director of the PPP Unit) manage the day-to-day operations of the Fund.

c. **Window 3: Viability Gap Funding**

The next option for financial support is the viability gap funding window. Viability Gap Funding refers to money that is provided to infrastructure projects that are economically viable, but fall short of being financially viable. Support under this window may be made by way of loan, grant, equity, or any other financial instrument required to improve the financial viability of a project. Support under this window may be applied to fund:

i. Capital grants made to a project during construction
ii. Recoverable advances made to a contracting authority
iii. Any other permitted recoverable advances; and
iv. Loans, equity or other financial arrangements as may be made available to a project in accordance with the provisions of the PPP project agreement and guidelines governing the operation of the Fund

This window shall only be available to support [project capital costs](#) and [recoverable land acquisition costs](#).

d. **Window 4: Contingent Liability Support**

The Fourth window provides a liquid source to meet short-term liquidity gaps in relation to contingent liabilities arising from the implementation of a PPP project agreement. To operationalize this window, the Officer Administering the Fund shall open a dedicated sub-account within the Fund, known as the Contingent Liability Reserve Account, whose sole purpose will be to ensure/provide ready liquidity to meet contingent liability disbursement requirements of the Fund.

Each contracting authority will be required to pay into the sub-account annually estimates of contingent liability funding requirements in accordance with guidelines issued. This window/sub account will only be available to support projects where the contingent liability;
i. Cannot be handled by the National Treasury under alternative frameworks
ii. Cannot be handled by the National Treasury under the National Government Contingency Fund;
iii. Does not arise from a contracted obligation of a contracting authority under a project agreement for which a budgetary allocation has been made to the contracting authority; and
iv. Materialises out of a national government default, which is not recoverable from a contracting authority, under a project agreement

Contingent liabilities arising out of a contracting authority default under a project agreement shall remain the responsibility of the contracting authority to settle. As a last resort however, the contracting authority, in exceptional circumstances, may apply to the Fund for a recoverable advance in settling such liabilities. Contingent liabilities, which are neither the responsibility of the contracting authority or the private party, and which arise from the implementation of a project agreement, shall be eligible for settlement under the Fund, subject to any guidelines issued.

Contracting authorities, in conjunction with the Debt Management Office, shall be required to submit annually to the Officer Administering the Fund estimates of contingent liabilities arising from their eligible projects and any short term liquidity gaps. Where payments are made to meet materialised contingent liabilities under a project upon the request of a contracting authority, the contracting authority shall refund the monies paid in its immediate subsequent budget cycle.

Section 68 of the Act prescribes the sources of revenue for the Fund as:

i. grants and donations;
ii. levies or tariffs imposed on a project;
iii. Success fees paid by a project company;
iv. Appropriations-in-aid; and
v. Any other source prescribed by the Cabinet Secretary, National Treasury

The monies paid into the Fund shall be used to meet the objectives of the four (4) windows outlined above.

6. Reflections on the PPP Journey 2009 - 2018

The PPP Secretariat was established in 2009 and its functions were supported by way of budgetary support from the National Treasury and this budget line has been sustained throughout the years, albeit in small amounts to support administrative functions and some of the recurrent expenditure of the Unit.

On 12th February 2013, the Infrastructure Finance Public private Partnership Project (IFPPP), a project financed by the International Development Association (IDA) of the World Bank, became active. The overall objective of the IFPPP Project was to provide technical assistance to increase private investment in the Kenyan infrastructure market and to sustain this participation over an extended period of time. The IFPPP Project consisted of the following 4 components:

a. Component 1: Support institutional development and regulatory reform;
b. Component 2: Support preparation of a pipeline of PPP transactions;
Component 3: Support improvement of the Fiscal Commitment and Contingent Liability (FCCL) framework associated with PPP Projects especially infrastructure; and

Component 4: Support program implementation

The project provided a credit of US $ 40 Million to the Government of Kenya, and over its life (2013 – 2017), the credit was used to support the core functions of the PPP Unit, and achieved the following:

a. Supported the development of the legal and regulatory framework in Kenya including:
   i. operationalization of the PPP Unit, PPP Committee, PPP Petition Committee and PPP Nodes at the CA level;
   ii. gazettement of: the PPP Regulations, 2014, the Roads Annuity Fund Regulations, 2015 and the Project Facilitation Fund Regulations, 2017;
   iii. Preparation of draft FCCL framework, the PPP Manual and a draft Governance and Operational Manual for the project Facilitation Fund;
   iv. Preparation of draft regulations for: the PPP Petition Committee, County Governments and the National Toll Fund; and
   v. Preparation of a PPP Disclosure Portal and customisation of the PPP Screening Tool.

b. Generated a pipeline of PPP projects;

c. Undertook PPP feasibility studies for 13 projects, 11 of which have been tabled before the Committee for consideration for approval (one feasibility study is still on going and the other project was found to be unviable as a PPP);

d. Prepared tender documentation for 7 projects, 5 of which have been taken to market;

e. Prepared standardised tender documentation for the Road sector and Student Hostel projects;

f. Prepared templates for: PPP project proposals, recruitment of a Transaction Advisor, undertaking a PPP feasibility Study and preparation and submission of a Privately initiated Investment Proposal;

g. Supported the recruitment of PPP experts, who have been instrumental in the development of the legal and regulatory framework, PPP project development and the PPP negotiation processes; and

h. Undertook PPP capacity building for more than 300 officers at the County and National Government level.

(The detailed achievements under the IFPPP credit are outlined in the attached PPP Unit scorecard)

While the National Treasury budget line is still in existence, the IFPPP Credit has primarily supported these activities. Due to the achievements and overall success of the IFPPP credit, the World Bank, following a request by the National Treasury, was agreeable to extend the credit and has provided an additional US $ 50 Million. This credit, the IFPPP AF, which was approved in 2017, is expected to result in at least 3 PPP projects achieving financial close and mobilization of US $ 1.25 Billion from the private sector, from investments in PPP projects by the close of the project in 2022. To achieve this objective, the credit has been designed to support the following components:

a. Institutional Strengthening (upstream support to PPP Institutions and support to capacity building activities);

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2 The projects that have been taken to market include: the Nairobi – Nakuru – Mau Summit Highway; the 2nd Nyali bridge Project; the student Hostel accommodation projects for: Moi University, SEKU University and Embu University. In addition to the above projects, tender documentation has been prepared for the Nairobi – Mombasa Project and the Nairobi – Thika Project.
b. Project preparation and procurement; and

c. Project Management

Going forward, budget based funding to support the Units programmatic mandate will be essential to ensure that the programme maintains traction, expands its geographical reach and has a greater impact on the economy.

7. PPP Internal Environment: Challenges and Recommendations

Over the years, several lessons can be gleaned from the implementation of the PPP Programme in Kenya. Some of the more notable learning points include the following:

a. **Project timelines**: on average, a project can take between 35 – 50 months to achieve Financial Close. This is due to a combination of factors including: numerous approval requirements, slow decision making by CAs and Government on key project issues, litigation and poor capacity within CAs. There is therefore a need to speed up the PPP processes and shorten the turn around time for a project from one stage to the next;

b. **Management of residual public Risks** such as: availability of funds for land acquisition for project land; approval and adoption of new regulatory frameworks to support project execution; lack of a clear administrative policy on viability gap funding approval requirements; poor or no capacity at the CA level; and lack of a clear policy on the issuance and content of Government Support Measures (GSM) issued for projects. To mitigate against this risk, there is need for: finalisation and adoption of the GSM policy, increase capacity building to CAs, development and adoption of a viability gap funding approval policy as well as better coordination within the various government departments to ensure budgetary support requests are made in good time, eg once the feasibility study is approved and all necessary regulatory frameworks are developed and approved expeditiously.

c. **Standard Documentation**: a lot of time is taken in preparing PPP tender documentation and to reduce the time taken for this activity, part of the funds of the IFPPP AF will be dedicated towards the development of standard tender documentation for the front runner projects within the pipeline. This will shorten the time taken to prepare PPP projects and thus lead to improved efficiencies in the delivery of the PPP programme.

d. **PPP Unit Staff**: The Unit has a broad mandate of not only acting as the technical arm to the PPP Committee, but also supporting each CA in the preparation, development, procurement and implementation of their PPP projects. Presently, the Unit has 9 full time staff and 4 international part time advisors. Given the current extent of the PPP project pipeline of 70 projects, the PPP Unit staff have been stretched in the fulfilment of their mandate. In tandem with the expanding needs of the programme and the move towards greater centralisation of project preparatory roles therefore, there is need to expand the workforce within the PPP Unit, so as to ensure the Unit is able to properly achieve its mandate.

e. **Address inefficiencies in procurement** of Transaction Advisors: part of the delays in the PPP process are as a result of delays in the procurement of transaction advisors, which in some instances has taken up to 18 months. The Unit has undertaken an audit on the key drivers behind the procurement delays and measures have been put in place to ensure procurements do not go beyond 5 months.

f. **Repositioning the Unit** for greater relevance in the delivery and actualization of priority government programmes.

These lessons among others inform the ongoing efforts to revamp the PPP Unit and make it a more high-speed government agency, while at the same time reviewing the project preparatory and development process for greater efficiency and quicker results that are sustainable.