Vance Center Virtual Workshop
P3 Considerations in Kenya

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BACKGROUND TO P3S AND HIGHLIGHTS OF P3 BILL, 2021

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Introduction to P3s in Kenya

- On 01 April 2021, two newly constructed roads launched in Kajiado County: the USD 98 Million 48KM Ngong-Kiserian-Isinya and the 43 KM Kajiado-Imaroro roads.
- The two roads are the first Kenya has developed through a PPP! SPV was a local company.
- In March 2021, the Ministry of Defence invited investors to participate in developing a proposed residential housing facilities for the armed forces under a Build-Lease-Transfer PPP arrangement.
- The USD 3.8 Billion, Nairobi Expressway 27 KM road, is already underway.
- Several other projects (60-70 PPPs) at various stages of development, but mostly pre-procurement.
- However, there is consensus that more could be done.

Introduction to P3s in Kenya cont'd:

- In 2015, it was reported that Kenya had an infrastructure spending gap estimated at USD 2-3 Billion, per year for the next 10 years.
- Like many other African countries which are experiencing rising population growth, Kenya is under pressure to deliver benefits associated with suitable public infrastructure projects.
- However, these efforts hampered by a shortage of funds and steadily increasing debt levels. Difficulty in raising taxes also a challenge.
- A legal framework specifically tailored towards P3s introduced in 2013 to encourage participation by private sector investors to participate in fulfilling the Government's public infrastructure development agenda.
- However, investor appetite/uptake to date has been muted owing to several reasons.
- Will assess how Kenya has done by looking at some of Kenya's prominent PPP projects.

Legal Basis

- A 2013 PPP Act enacted in 2013 and PPP Regulations, in 2014. Other legislative and policy tools in place also including: PPP Project Facilitation Fund Regulations, 2014, The Government of Kenya Policy Statement on Public Private Partnerships, 2012, The Government Support Measures Policy, 2018, The PPP Petition Committee Guidelines amongst others. Other sectoral laws relevant too.
- P3 procurement is mostly done by the national government. However, county governments also can pursue P3 projects and desire is to also decentralized PPPs to County level. About 4 Counties have proposed P3 projects relating to development of solid waste management, water supply, and car park facilities.

PPP Institutions

- PPPs are regulated and mainly approved by the PPP Committee.
- A PPP Directorate (until early 2021, was known as PPP Unit) provides secretariat and technical (expertise) support to the Committee.
- Obligation to procure PPPs is mandate of contracting authorities like parastatals and state corporations. These develop sector strategies from which they identify and prioritize P3 candidates.
- Contracting authorities are required to establish a P3 node and a project appraisal team that work in concert with the PPP Unit to move the projects along.
- The Cabinet and Parliament have final say on approval or rejection of a project. The latter, in projects involving extraction of natural resources.

PPP Institutions (cont.)

- A Petition Committee determines petitions regarding any decision by the PPP Committee, PPP Directorate or a contracting authority.
- A Project Facilitation Fund funds project preparation, tendering process, provides viability gap funding for viable projects which require Government funding, liquidity to address contingent liabilities that materialise, the Directorate's administration costs, and transaction advisors' fees.

Changes Proposed by the PPP Bill, 2021

- The uptake of P3s has been muted. Several reasons have been proffered; including, gaps in the legal framework, few successful projects.
- To improve prospects, some changes to the legal and institutional framework have been proposed via the PPP Bill, 2021.
- PPP Bill seeks to revitalize the Kenya Government’s strategy on P3s by sealing existing gaps to woo investors.
- The Bill is awaiting approval by Parliament. It is expected to be passed into law with or without amendments.
- A summary of the key changes proposed by the Bill:

Changes Proposed by the PPP Bill, 2021

	PPP ACT, 2013	PPP BILL, 2021	OBSERVATIONS
Institutions	PPP Unit acts as Secretariat and Technical arm of the PPP Committee. PPP Unit based within the National Treasury. PPP Node (and Project Appraisal Team) required to be established by a Contracting Authority. The Node recommends potential PPP projects to the Committee through the Unit. The Unit, Committee and Cabinet then create a priority list.	The PPP Unit will be replaced by a PPP Directorate. The Directorate will act as secretariat and technical arm of the PPP Committee. The Directorate's status has been elevated and its mandate widened so that it plays a bigger role in structuring P3 projects and the P3 programme. The Directorate has assumed a bigger oversight role previously exercised by the Debt Management Office. The PPP Node and Project Appraisal teams that sit within a contracting authority have been abolished. Instead, a Project Implementation team with representatives from both the Directorate and the contracting authority will be involved in pushing through a proposed project. The Committee has taken over the power to grant final approval to a P3 project from the Cabinet and, Parliament (in cases of projects for exploitation of natural resources). At County level, the County Assembly's approval is required. The Directorate will be based within the National Treasury, but the DG's rank elevated to just below Permanent Secretary rank.	The overall effect of shaking up the approval process will be to create greater certainty for investors by signaling that GoK is taking the P3 agenda more seriously. The changes should also greatly reduce the time taken in reaching the approval stage. The removal of nodes and appraisal teams should also contribute to a faster channeling of projects through centralization of expertise and reduction of decision-making points. Ring fencing the process from greater political involvement should also be a boon to viable projects that might otherwise have been rejected at Cabinet/Parliament level.
P3 Definition and P3 Arrangements	13 specific types of P3 arrangements prescribed. The Cabinet Secretary empowered to approve any other suitable arrangements.	17 types of P3 arrangements prescribed. New arrangements include; joint ventures, brownfield concession, strategic partnerships, build transfer (design, build, finance and automatic transfer), and annuity-based design, build, finance and operate. The Bill includes a requirement for transfer of the project facility to the contracting authority at the expiry of the project.	This appears to be aimed at making P3s more accessible to investors. Regulations/guidelines might be necessary to provide more clarity on transfer of project facility back to Government.

Changes Proposed by the PPP Bill, 2021 (cont.)

	PPP ACT, 2013	PPP BILL, 2021	OBSERVATIONS
Procurement Methods	Two procurement methods are currently used: competitive bidding and PIIPs.	Direct procurement has been added as a method of procurement of a P3 project. Some improvements made to make clear the competitive bidding process. The P3 approval process now clearer as timelines for evaluation and approval of a project provided including when the critical stage of financial close occurs. Timelines for contesting the process or results of the process also prescribed.	The Directorate retains power to initiate amendment and variation of a project to "re-balance" distribution of benefits in the case of direct procurement. The scope of such amendment/variation not clear and might be a deterrent.
Local Content	No local content requirements.	Bill requires locally available workforce, services and supplies and the systematic development of national capacity and capabilities. A "local content clause" to be included in a project agreement.	Directorate expected to formulate local content guidelines which will provide clarity on implications for investors.
PIIPs	No clear timelines on review and evaluation of PIIPs. Act does not allow for investors who submit PIIPs to recoup reasonable costs incurred to carry out evaluation and feasibility studies. No basis for Project Development Contracts (PDC).	Detailed list of circumstances when a PIIP can be considered now stipulated. Great emphasis placed on ensuring that the PIIP delivers value for money. Clear timelines stipulated: 90 days of proposal's evaluation by the Directorate, 5 days for to prepare and render report to Committee, and 14 days for the Committee to render a decision. Requirement for an investor to pay a non-refundable fee of 0.5% of the estimated project cost or USD 50,000/- whichever is lower included. Investors may recoup the lower of 0.5% of estimated project cost or USD 50,000/- whichever is lower, from the successful bidder. After approval of a PIIP, an investor will now enter into a PDC with a contracting authority.	Visibility on timelines and the opportunity to recoup some portion of costs by investors should increase PIIPs attractiveness to investors. A PDC might provide comfort to PIIP investors as they engage in activities aimed at moving a project to award.
Government Support Measures	Act provides three types of government support measures.	The Bill expands the list of available Government support measures. It also empowers the Cabinet Secretary Treasury to provide any other instrument of support not provided for in the Bill.	This provides clarity to investors on the scope of Government support measures available.

Changes Proposed: Conclusion

- PPP Bill awaits enactment by Parliament, with or without amendments.
- Changes afoot signal a more serious Government attitude towards Kenya's P3 agenda.
- The changes add clarity to the approval process. Delays in processing projects has been cited as major cause of concern by private sector.
- Ultimately, success of P3 agenda depends on the P3 institutions (the Directorate especially) championing the agenda more vigorously by abiding by the law's, constructive engagements with P3 players in the private sector, and most critically, deepening their P3 expertise.

IS KENYA HEADING IN THE RIGHT DIRECTION TOWARDS PPP SUCCESS AND FACTORS THAT NEED TO BE CONSIDERED FOR SUSTAINABLE DEVELOPMENT?

PUNIT VAGDAMA

Overview

- The Government is implementing the Third Medium Term Plan (MTP 2018-2022) of the Kenya Vision 2030 whose theme is Transforming Lives: Advancing socio-economic development through the "Big Four".
- The plan outlines several programmes and projects to be implemented both at the national and county, all aimed at achieving the Africa Agenda 2063 and the Sustainable Development Goals (SDGs).
- The plan defines legal and institutional reforms to be implemented during the period.

Overview (cont.)

- The Government of Kenya and the UN Kenya co-created an innovative multi-stakeholder SDG Partnership Platform, Kenya launched at the UN General Assembly in 2017.
- It brings together Government, development partners, private sector (including blended financing networks), philanthropy, civil society, and academia, through SDG accelerator windows to catalyze SDG partnerships, investments, and financing to support Kenya’s Big-4 Agenda.

Overview (cont.)

- Key government policies to support investment and trade include;
  - Kenya Investment Policy that addresses private investments at the national and county levels.
  - National Export Development and Promotion Strategy that supports export development in Kenya.
  - Trade and Investment Plans by County Governments.
  - PPP Bill, 2021 which is set to enhance participation of the private sector in national development and also strengthen & revitalize the Public Private Partnerships (PPP) Programme

Overview (cont.)

- OseiKyei & Chan’s (2013), clear-defined, implementable Critical Success Factors (CSFs) ranked in order of importance and supposedly universally applicable and which should make P3s inherently effective for sustainable development.
  1. Appropriate risk allocation and sharing
  2. Strong Private Consortiums
  3. Political Support
  4. Public Community/Support
  5. Transparent Procurement

1. Appropriate Risk Allocation Strategies

- Identification and clear definition of all risks from all phases of the PPP process and sharing it between the public and private actors so that the party best suited to manage a particular risk is allocated that risk.
- Governments should refrain from transferring all project risk to the private sector as this could affect future participation of the private sector in P3's.

1. Appropriate Risk Allocation Strategies (cont.)

- Lake Turkana Wind Power (LTWP). In terms of appropriate risk sharing, the construction of the transmission line was the key responsibility of the public authorities but got delayed several times.
- The contractor got bankrupt three years after signing the contract, so eventually KETRACO was selected to take on the responsibility to construct this transmission line.
- The delays in this construction led to postponement of operations for the LTWP and a fine of about 52 million USD to be paid by the Government of Kenya. In part, the fine is going to be paid by higher electricity rates for the end-user (Olsen, 2018), i.e. Kenya’s people.

2. Strong Private Consortiums

- Not ONE but many companies should come together to form a consortium which MUST be equipped with strong technical, operational and managerial capacity to undertake a P3 successfully.
- In developing Countries Governments should assist local companies financially and technically to be able to obtain a role is such a consortium.

2. Strong Private Consortiums (cont.)

- The Project proponent is the LTWP, comprising of Sponsors Aldwych International, Industrial Development Corporation, IFU, KP&P Africa B.V, Norfund and Wind Power Invest A.S. LTWP is responsible for the financing, construction and operation of the wind farm.
- This was a very strong consortium filled with capability which had a large part in the success of the Project.

3. Strong Political Support

- The more support political leaders give the more investors will be attracted to a particular country.
- Many instances have shown in jurisdictions where there is less political support investors will most likely not tender.
- Kenya has introduced the PPP Bill 2021 which is a step in the right direction in terms of the political support laws and this will guide policy and practice.

Lake Turkana Wind Power

- According to the founder of LTWP, it took a long time to establish political support but once the Government of Kenya and the Marsabit County Government saw the opportunities and positive status of having Africa’s biggest wind farm, political support improved and effectively contributed to the overall process of the P3.
- The fact that the financing structure of LTWP withstood the rigor of 17 international lenders and investors’ due diligence also contributed to more political support.

4. Public Community Support

- Acceptance by the public community whether by trade unions, civil societies, NGO's is imperative.
- This should be from the offset as it helps minimize delays such as acquisition for lands for project development. This also positive impact for the community such as engaging the local community but also beneficial to the P3 as shows goodwill and paints a positive picture of the P3.
- However, Government also has a role - Awareness creation and public education and assurance of good quality and services and user fees for the pubic community will aid acceptance of the P3.

Kipeto Wind Power

- The Kipeto Wind Power Project emerged as a potential good practice case study for stakeholder engagement following an informal assessment of the renewable energy sector in Kenya.
- KEP worked with specialist consultants during both the planning and development stages of the project to undertake a series of environmental assessments and impact studies.
- KEP engaged the Community from the offset and understood the needs of the community.
- With support from USAID Power Africa, Kipeto developed and initiated a Biodiversity Action Plan, which is designed around the international best practice outlined in the IFC Environmental and Social Performance standards.

5. Transparent Procurement

- Does not apply to tendering process but also through the delivery of the P3.
- Constant communication amongst parties but also external stakeholders.
- Both Private and Public must be transparent and open to external stakeholders and provide information reports made publicly available.
- Government should take a strong position to clear rumors or doubts within the public domain and the P3 as negative public perception could impede successful implementation.

Conclusion

- There is no one size fits all strategy that guarantees the creation of a successful P3 but It is clear from the above that Kenya is on the right track towards establishing a foundation for mutually beneficial P3’s.
- It is willing to concentrate and improve on the Critical Success Factors and it is this willingness followed by responsive action that will enable it to achieve this success.

KENYA: ANTI-CORRUPTION LEGISLATION & RISKS IN P3S

KANANU MUTEA

Presentation Structure

- An overview of the anti-corruption laws in Kenya
- The background to the Bribery Act
- Key provisions of the Bribery Act
- Common Risk Areas
- Case Examples
- Best Practices

Anti-Corruption Laws in Kenya

- Prevention of Corruption Act
- Anti-Corruption and Economic Crimes Act, 2003
- The Public Officers Ethics Act of 2003
- The Proceeds of Crime and Money Laundering Act of 2009
- Ethics and Anti-Corruption Commission Act, No. 22 of 2011
- The Leadership and Integrity Act of 2012
- Bribery Act, 2017

Further Transparency Legislation in Kenya

- The Companies Act
- The Proceeds of Crime and Anti Money Laundering Act
- Prevention of Organized Crime
- The Banking Act
- Capital Markets Act

Background of the Bribery Act

- United Nations Convention Against Corruption signed 9 December 2003
- Waste of 30 - 40% GDP
- 1/3rd of Kenya’s annual budget
- Redirection of misappropriated funds
- Key provisions of UNCAC that are in Bribery Act, Kenya :
  a. prevention through transparency
  b. criminalization by providing consequence and sanction for unethical behaviour
  c. asset recovery from the countries where proceeds are concealed
  d. international cooperation with the countries that have the proceeds of corrupt practices extradition and other like measures
  e. private sector corruption.

Overview of Bribery Act -Kenya (BA-K)

- Mandatory provisions for public and private sector to have anti-bribery policies in place
- 5 times multiplier of loss or gain as part of the punishment
- Supply Side of bribery
  - Definition of Bribery
  - Contrast this with the expectations under the Public Officers Ethics Act
    - Personal conflict of interest
    - Organizational conflict of interest
    - Similarity of relationship
    - Improper use of office
    - Use of information
      - Gifts on special occasions

Overview of Bribery Act -Kenya (BA-K) (cont.)

- Demand Side
  - Advantage = money, gifts, loans, fee, reward, commission, employment, property, protection from penalty, facilitation payment to expedite or secure performance, release from liability.
- Mere acceptance is criminalized.
- Introduction of Corporate Liability
- Introduction of Strict Liability
- Failure to have procedures is criminalized
  - Directors, senior officers and persons in positions of authority exposed
    - Persons in positions of authority: these are director or senior officer or person purporting to act in such capacity and "senior officer" means director, manager, secretary or another similar officer.
- Duty to Report
- Whistleblower Provisions

Overview of Bribery Act -Kenya (BA-K) (cont.)

Penalties

- imprisonment - up to ten years
- a fine - up to five million shillings
- A mandatory fine:
  - equal to five times the benefit acquired as a result of the bribery or of the loss incurred by another party as a result of the bribery where such benefit or loss is quantifiable.
- Seizure of property.
- Pay back of the amount or value of any advantage received to the Government.
- Bar from participating in any government tendering or procurement.
- Disqualification from directorship/partnership, in Kenya - not less than ten years.
- Disqualification from holding Public or State Office - not more than ten years.

Overview of Bribery Act -Kenya (BA-K) (cont.)

- New corporate (private entities) criminal offence
- Imposes KYC strictures indirectly: bribery by associated persons
  - associated person = one that offers services for another person and includes; agents, intermediaries, subsidiaries, employees
- Requirement for corporate policies
- Impact on both public and private sector bribery
  - “facilitation payments” and “corporate promotional expenditure”.
- Duty to Report
- High Penalties
- Extra-territoriality

Risk Areas in P3’s

Pre-tendering

- Incentive to influence decision making
- Need for information
  - Planned project
  - Preparation of offer
  - Evaluation models
  - Bidding specifications
- Government monopoly
- Competition from private sector
- Politicians vs Administrative Staff
- Assessment of Revenues/Price Manipulation
- Uncertain outcome
- Opportunity cost

Risk Areas in P3's (cont.)

Post tendering

- Incomplete contracts = revision = negotiation.
- Contract formation, monitoring/enforcement.
- Continuing information costs.
- Costs of the creation of institutions for contract supervision.
- Risk of service interruption.
- Uncertainty.
- Longevity in behavior increases risk of opportunistic behavior.

Case Examples

- Renowned corruption cases in Kenya are:
  - Kshs 53 Billion laptop tendering
  - Kshs 314.2 Billion Standard Gauge Railway tendering
  - Kshs 475 Billion Lamu Coal Project
  - Kshs 55.6 Billion JKIA (through KAA) tendering
  - Galana Mwea Irrigation Scheme

Best Practices

- Awareness and ethics
- Control and detection
- Punishment/discouragement

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