

Draft PPP Policy Outline

This note is the seventh in a series of notes on developing a comprehensive policy, legal, and institution framework for public-private partnership (PPP) programs. This series is extracted from a PPIAF-funded analysis of Uganda's enabling environment for PPPs, which was prepared by Castalia Limited in December 2008.

This note provides an outline of a proposed PPP policy, which covers the following topics: definition and scope; objectives of the PPP program; principles of PPP agreements; risk allocation in PPP projects; establishment of a PPP unit; PPP procedures; and auditing the PPP program.

Introduction

This section should introduce the rationale for the policy—to improve the outcomes of investment in infrastructure—as well as the content.

Definitions and Scope

Defines PPPs and the scope of the PPP program as follows:

PPPs are an alternative way of financing, procuring, and managing infrastructure projects to traditional government procurement. This section outlines:

- The definition of PPPs and the scope of this PPP policy
- The sectors which are covered by this PPP policy

Meaning of PPP

Defines PPPs as follows:

A PPP is a long-term contract between a government entity and a private company for providing or contributing to the provision of a public service. A PPP under this policy could take a variety of contractual forms, such as build-transfer-operate (BTO), build-operate-transfer (BOT), concession, or lease. There is no single preferred contract type for PPP. However, the agreements developed under this policy share the following attributes:

- A long-term agreement between a government entity and a private company, under which the private company provides, or contributes to the provision of, a public service
- The agreement is based on a set of well-specified, measurable outputs that define the required service availability and quality
- The private company receives a revenue stream—which may be from government budget allocations, from user charges, or a combination of the two—which depends on the availability and quality of the service provided
- Risk allocation between the government and the private party is clear, enforceable, and covers foreseeable project risks to the extent possible
- Each party may make a financial contribution to the project
 - The private company must generally make an investment in the venture, even if it is limited, for example to working capital

- In addition to budget allocations for contracted payments, the government may make further contributions, such as providing, or enabling access to land, contributing existing assets, or providing debt or equity finance
- At the end of the contract, the associated assets revert to government ownership.

Scope of the PPP Policy

Defines the scope of this policy, as follows:

This PPP Policy—and the responsibilities, procedures and rules outlined herein—applies to the procurement by a government entity of any project that fits the definition of a PPP in the previous section, and in addition has the following characteristics:

- A capital investment requirement of greater than the local currency equivalent of USD 5 million
- A contract duration of longer than 5 years.

The PPP Unit can provide guidance on the applicability of this policy to a proposed project.

Priority PPP Sectors

Sets the sectors in which the government intends to use PPPs, as follows:

The government intends to use PPPs for projects that provide infrastructure and infrastructure services. PPPs may be used to provide national public infrastructure and infrastructure services, and also to contribute to government infrastructure and accommodation. This includes the following sectors, from among which the PPP Unit may define short term priority sub-sectors:

National Infrastructure—the fixed assets, networks, and facilities needed for the operation of the society and economy

- Power
- Water and sanitation
- Transport fixed assets—roads, bridges, railroads, ports, airports—and public systems such as bus networks, rail rolling stock, and ferries
- Telecommunication networks—local loop, exchanges, and backbone
- Business support assets such as industrial parks or irrigation systems
- Urban services such as street lighting and solid waste disposal.

Government Infrastructure—the fixed assets, networks, and facilities needed for the operation of government

- Government accommodation—physical buildings from which government services are provided, such as offices, prison buildings, hospital buildings, and school buildings
- Government networks such as telephone or IT hardware—where these systems are not subject to rapid technological change.

The government entities responsible for investment planning in these sectors should take into consideration the scope for using PPPs to achieve their policy objectives. The PPP Unit, described below, can provide support in assessing the potential for PPPs.

Objectives

Outlines the government's objectives in pursuing PPPs and in creating a PPP framework, as follows:

The government will develop PPPs in infrastructure with the following objectives in mind:

- To increase the financing available for infrastructure by making use of private sector investment resources
- To improve value for money in infrastructure projects by creating incentives for best-practice design, timely completion, and efficient operation by sharing project risk with the private sector
- To encourage innovation in the provision of infrastructure
- To improve the sustainability of infrastructure and infrastructure services
- To improve accountability in public expenditure.

The government should put a PPP framework in place to promote using PPPs to develop infrastructure where this is consistent with the objectives listed above. That is, to ensure PPP projects are developed which address policy priorities, and which have potential to be sustainable PPPs that represent value for money to the government or users. This PPP framework also aims to improve the execution of PPP projects, by ensuring:

- PPPs are well-structured, with risks allocated appropriately
- PPPs are procured competitively, with appropriate information provided to bidders at each stage of procurement
- PPPs are developed and implemented efficiently—for example, by reducing the complexity of coordination between government agencies, and by achieving the appropriate balance between in-house expertise and external advisory capacity.

Principles of PPP Agreements

Defines the principles by which PPP contracts will be structured, procured, managed, and reported as follows:

Principles of PPP project design

In designing PPPs to deliver the objectives outlined above, the government will adhere to the following principles:

- Project specifications should focus on the end result—delivery of facilities or services at specified standards—rather than the inputs or means of delivery
- Government payments to the private party, where required, will be based on the delivery of facilities or services consistent with performance standards that are clearly defined in the PPP contract
- User charges, where applied, will be specified in the PPP contract or subject to credible regulation
- Where the services provided are paid for by user charges, the project cost may also be subsidized by Government, where such subsidies are consistent with the Government's policy

priorities. Payment of subsidies will be based on the delivery of facilities or services consistent with performance standards that are clearly defined in the PPP contract

- The government may provide equity or debt finance to the project company—not exceeding 50% of the total equity or total debt respectively—where the government expects that such an investment increases the value for money of the project
- The government may provide land or existing assets to the project company—this may be subject to payment of concession or lease fees to the government
- Where land is to be acquired by the project company, the government may support this process by providing appropriate way-leaves
- Project risk allocation will be clearly documented in the contract, and designed to deliver the best value for money from the project. Risk allocation principles are outlined in the following section of this policy.

Principles of procedures for procuring and managing PPPs

PPPs are a form of public procurement, so are subject to the principles of public procurement outlined in the relevant acts and legislation. PPP procurement principles should be as follows:

- Procurement processes should promote transparency, fairness, and accountability
- Procurement processes should maximize competition and seek to achieve value for money
- Open bidding should be used and contracts should be awarded according to bid evaluation criteria published in advance in tender documents
- Procurement must be non-discriminatory with respect to any criterion—to include race, religion or gender—not related to qualification. Participation may be limited on the basis of nationality in certain circumstances, and with the prior approval of the relevant authority

PPPs generally involve some form of public expenditure—whether direct or contingent through provision of guarantees—and so should be managed consistently with the principles of the relevant acts of legislation for a country.

Risk Allocation in PPP Projects

Defines the principles by which PPP project risks will be allocated, as follows:

A key principle of PPP projects is that project risk allocation should be clearly documented in the contract and designed to deliver the best value for money from the project. This does not mean transferring all risk to the private party, but allocating risk between the government and private parties appropriately.

To deliver value for money, project risks will be allocated so that each party bears the risks they are best-placed to manage. This means risks will be allocated to the party best able to:

- Influence the risk factor, where possible
- Influence the sensitivity of total project value to the risk factor—that is, to anticipate or respond to risk factor, if it cannot be influenced directly
- Absorb the risk, where it can neither be influenced nor its impact controlled.

The party to which a risk is allocated will have control over decisions related to the risk factor.

The risks the government may bear or share, according to these principles, will vary from project to project. They may include, but are not limited to:

- **Regulatory risk**—the risk that changes in law or regulations affecting the sector in which the PPP takes place will impact project value. Tariff risk is the most common regulatory risk—the risk that the entity responsible for setting tariffs will not uphold the level of tariffs needed for cost recovery
- **Demand risk**—the risk that demand for the service is less than expected
- **Land acquisition risk**—the risk that the project developer will not be able to acquire the land necessary to develop the PPP
- **Land quality or environment risk**—the risk that the quality of land or other environmental factors which are difficult to measure or predict—such as lake water levels—is different than expected, impacting the value of the project company
- **Foreign exchange risk**—where project inflows are in a different currency to outflows, variability in the exchange rate will affect project value
- **Uninsurable force majeure risk**—the risk that non project-specific events beyond the control of either party will occur. Some force majeure risks, such as earthquakes or floods, are insurable while others, such as acts of terrorism or war, cannot typically be insured.

Where appropriate, the government will accept these risks through specific contractual agreements, such as take-or-pay contracts or guarantees. The government will not accept general project risk by providing loan guarantees to private sponsors of PPP projects.

PPP Unit

Introduces the PPP Unit and outlines its authority, reporting structure and mandate:

- *A PPP Unit [has been] established as the government's centre of expertise in PPP*
- *Outlines the PPP Unit's location and reporting structure within the Ministry of Finance*
- *Outlines the PPP Unit's mandate, as follows:*

The PPP Unit is mandated to support the development and implementation of good-quality PPPs which deliver the government's objectives as outlined above. This mandate includes three broad roles:

- **Providing technical support** to line ministries in identifying and developing PPP projects:
 - Helping line ministries and government entities identify PPP options—working with planning teams within each agency to identify where PPPs could be used to meet policy objectives and to prioritize these projects
 - Helping line ministries develop PPP projects, prepare for and conduct the transaction—the PPP Unit will form part of the team assigned to developing an approved project, preparing the transaction documents, and, subject to approval, conducting the PPP transaction
- **Assessing and certifying PPP projects**—the certification of the PPP Unit is required before investment is made in developing a PPP project. This certification will be based on the project's accordance with the principles outlined in this policy and specific requirements to be developed in more detail by the PPP Unit
- **Developing and promoting this PPP policy** and the use of PPPs within the country:
 - Periodically reviewing and proposing revisions to this PPP policy

- Supporting relevant entities in developing sector-level PPP policies interpreting the principles outlined in this PPP policy
- Developing guidelines on the procedures and requirements for developing and implementing PPPs in Uganda
- Preparing standard documentation for PPP agreements
- Promoting PPPs within and outside government—disseminating this PPP policy and educating stakeholders on the principles and benefits of the government’s PPP program.

The PPP Unit’s role in the process of identifying, developing, procuring and monitoring PPPs is described in more detail in the section below outlining PPP procedures.

PPP Procedures

Defines the procedures for identifying, developing, procuring and monitoring PPPs. These procedures include the following steps:

- *Identify PPP project—line ministries with support of the PPP Unit*
- *Develop business case—line ministries with support of external consultants. The required content of the business case should be defined fully by the PPP Unit in subsequent policy documents*
- *Initially assess and approve business case—subject to PPP Unit certification, forwarded a development committee for approval to continue to project development stage*
- *Develop PPP and prepare bid documents—project team comprising line ministry, PPP Unit and other sector body representatives as well as external consultants*
- *Assess PPP and approve procurement—subject to approval the relevant committee, forwarded by Accounting Officer to Cabinet and Parliament*
- *Procure PPP—project team, following a procurement process outlined in this policy and defined more fully by PPP Unit in subsequent policy documents*
- *Monitor and enforce compliance with the PPP—line ministry; information provided periodically to PPP Unit to monitor overall performance of PPP program*
- *Record and report PPP contractual information, performance and contingent liability stock—line ministry, Ministry of Finance, and PPP Unit*

Defines procedures for developing unsolicited proposals from private proponents, including:

- *Process for presenting PPP proposal to relevant government entities*
- *Rewards available to company that initially proposed project that is successfully procured on a competitive basis, and requirements to be eligible for those rewards*

Summarizes responsibilities of each government entity in developing and procuring PPPs.

Audit of PPP Program

Defines the responsibility of the Auditor General to carry out value for money audits of the PPP program, and sets the timetable for these audits, as follows:

In line with his responsibilities outlined in the relevant national legislation, the Auditor General will periodically carry out a value for money audit of the PPP program. This audit will take place every three years to evaluate whether the resources invested in the PPP program—such as in staffing the PPP Unit and in project development costs—are achieving the stated aim of improving the effectiveness of investment in infrastructure assets and services. External advisors will be contracted to provide appropriate expertise in assessing PPP project quality.