

FRILET

Société d'Avocats

7^{ème} assemblée annuelle de l'ICA :

Session 3 : Wednesday May 18, 2011

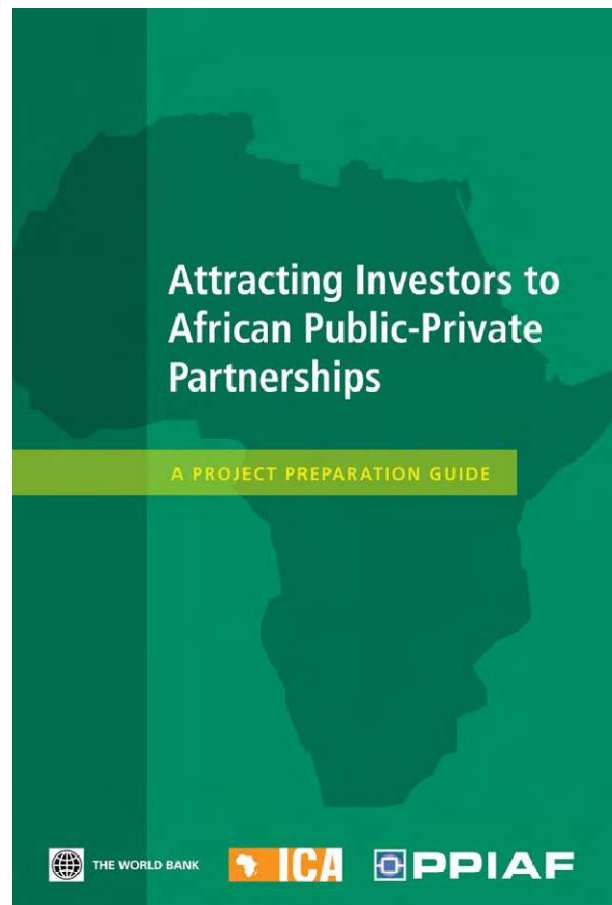
**"LEGAL AND POLITICAL CONDITIONS FOR PRIVATE INVESTMENT:
BUSINESS ENVIRONMENT AND GOVERNANCE, LEGAL SECURITY,
AVAILABILITY OF CREDIBLE SECTORAL REGULATION
MECHANISMS "**

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Abstracts and comments from:

"Attracting investors to African Public-Private Partnerships – a project preparation guide"

Published in 2009 by ICA, World Bank and PPIAF.



1. INTRODUCTION

“Set against the impressive growth rates in a number of African economies recently and the level of potential demand for investment (estimated at US\$38 billion a year), **low demand for infrastructure is unlikely to be the reason for the relatively low levels of PPP activity in Africa.** Equally, if the growth of some sectors such as mobile telephony across the continent is a guide, the ability and willingness of citizens to pay for better-quality infrastructure may not be the constraint.”

“**PPPs require governments to think and behave in new ways that require new skills.**”

“**PPPs are more than a one-off financial transaction with the private sector. They need to be based on firm policy foundations and long-term political commitment.** Private sector partners look for these factors when deciding whether or not to bid for a project.”

“The other **challenge for governments is the fact that resources are usually less readily available for the activities that lay the foundations for a successful PPP than for project-specific procurement activities.** However, without the right policies, institutions, and processes, the transactions that follow often fail.”

⇒ **LEARNING BY DOING IS NOT AN OPTION FOR SUCCESSFUL PPP PROGRAMS.**

⇒ **IN MOST COUNTRIES AND REGIONS, THE PRIORITY IS TO SET A ROBUST INSTITUTIONAL AND LEGAL FRAMEWORK.**

2. THE WORLD OF PPP:

Two main families of PPP triggering different economic and legal regimes.

2.1 Concession PPP:

“In a concession PPP, a public authority grants a private party the right to design, build, finance, and operate an infrastructure asset owned by the public sector. The concession PPP contract is for a fixed period, say 25–30 years, after which responsibility for operation reverts to the public authority. **The private party recoups its investment, operating, and financing costs and its profit by charging members of the public a user fee** (for example, a toll).”

2.2 Availability based PPP (PFI Model):

“The other main form of PPP is similar to a concession PPP, in that it also involves the private party designing, financing, building or rebuilding, and subsequently operating and maintaining the necessary infrastructure. However, **in this case, the public authority** (as opposed to the user) **makes payments to the private party, as, when, and to the extent that a public service** (not an asset) **is made available**. Hence the demand or usage risk remains with the public authority.”

2.3 Choice between the two models:

“Whether to use a concession or an availability-based PPP is both a policy decision and a reflection of who is best placed to pay for the service. **The affordability of PFI-model PPPs is likely to be an issue in Africa because such projects do not involve user payment mechanisms. However, concession PPPs present their own challenges** with regard to demand risk and user affordability. It is important to establish the appropriate level and scope of services, **looking at the opportunities to blend concession and PFI-model.** “

⇒ **CHOICE OF A PARTICULAR PPP SCHEME IS HIGHLY DEPENDENT OF THE UNDERLYING SOCIO-ECONOMIC FACTORS.**

⇒ **STARTING POINT: DEFINITION OF THE SERVICE AND RELATED SOCIO-ECONOMIC SCENARIO FOR THE PROJECT LIFE CYCLE.**

3. PPP INVESTMENT CLIMATE: ISSUES FOR THE PRIVATE SECTOR

3.1 Unclear policy rationale:

“Establishing a clear policy framework helps both the public and the private sectors to understand the core rationale for PPPs and how the public sector will go about making them happen. PPPs are difficult to deliver in an unstable policy environment. When assessing a PPP market, the private sector expects to see a PPP policy that sets out the following:

- The rationale for using PPPs.
- The guidelines that the public sector will use to assess PPP projects in a consistent way.
- The determination of who approves what and when throughout the process of project selection, preparation, and procurement.
- The process of resolving disputes (often set out in legislation).”

“The private sector will also want to know about the process and what is involved, to assess how much it will cost to prepare and submit a bid for projects (such as whether and when detailed designs will have to be developed), how long the bidding process will take, how workable and transparent it will be, how the public authority will manage the partnership in the long term, and, above all, how committed is the government to the project. The more transparent the objectives, targets, and consequences of the PPP, the more effective the partnership will be.”

“Governments should expect to establish a clear evaluation and process map that sets out the following: key decision points along the process, timelines criteria for project selection and eligibility, and principles or criteria for evaluating bids.”

3.2 Unsecure legal framework

“Private sector investors always examine the legal framework and its ability to ensure the effectiveness of long-term PPP contracts. Legislation may be needed to allow a private sector company to charge and collect user fees under a concession PPP. Specific laws may also be required to allow the public sector to contract with private bodies for the delivery of services hitherto provided only by the state.”

“The private sector may be expected to ask the following key questions of either the law or the PPP contract itself:

- Does the public sector have a robust, forward-planning program and allocation process to ensure that payments can be made when due, such as obligations against future budgets?
- Is combined procurement of construction and long-term operation and maintenance permitted (or do these phases have to be procured under separate contracts)?
- What are the investors’ rights (what happens if a contract is terminated early)?
- How will repatriation of profits be treated for overseas investors, and what restrictions, if any, will there be on the use of expatriate personnel?
- What are the lenders’ rights (for example, the lenders’ ability to take security over the contract—lenders do not usually have security over the underlying infrastructure asset, as this ultimately belongs to the public sector—or to take over management of the asset when enforcing their security)?
- How will contract disputes be resolved, and what rights and obligations are required of either party in the event that the project does not go according to plan?
- How will payments be taxed under the project (for example, sales or value added taxes on construction costs or service payments)?
- What forms of government support are likely to be available for certain risks (for example, minimum-traffic guarantees on a toll road)?
- How will changes to the contract be handled, and what compensation mechanisms will be used?
- Are unsolicited proposals permitted, and, if so, how will they be treated? “

4. IMPROVING THE PPP INVESTMENT CLIMATE:

FROM RECOGNIZED BEST PRACTICES TO FRAMEWORK LAWS AND IMPLEMENTING REGULATIONS

“The extent to which these issues are covered in general administrative law or specific contracts of the project depends on the legal system concerned. But with PPP programs developing around the world, there are often benefits to be gained from adopting legal solutions used in markets with successfully operating PPP programs, as the private sector is already familiar with the approaches.”

“There is often a balance to be struck between a fixed legal framework and a flexible one that is able to respond to developments in best practice over time. Investors have a strong preference for certainty, detail, and clarity in the legislative framework, so long as it is a good framework. However, as a note of caution, highly detailed PPP legislation has sometimes been developed from an early stage of a program without input from the experience of actual projects (functioning either domestically or internationally). This legislation has sometimes proved to be unworkable and difficult to change. **It may be preferable to set out *core principles* (based on international best practice) in framework legislation and to use administrative rules to set out more *detailed law* that may respond in a logical and consultative way over time to inevitable changes in policy and the market.”**

⇒ CONTRARY TO COMMON BELIEF, IN EACH PPP FAMILY, PPP PROJECTS HAVE MANY COMMON FEATURES IN TERM OF ECONOMIC APPRAISAL, PREPARATION, PROCUREMENT, AND OPERATION.

⇒ COMMON FEATURES BOILS DOWN INTO COMMON PRINCIPLES WHICH DESERVE TO BE INCLUDED IN SIMPLE AND CLEAR REGULATIONS, STANDARD DOCUMENTS AND STANDARD CLAUSES.