



INITIATIVE FOR SOCIAL AND ECONOMIC RIGHTS

POSITION PAPER ON THE DRAFT PUBLIC – PRIVATE PARTNESHIPS (PPP) GUIDELINES OF 2019.

1. Background

This paper comes in response to the Ministry of Finance, Planning and Economic Development's invitation for comments on the draft Public Private Partnerships (PPP) Guidelines of 2019. In a bid to enrich the Guidelines with a human rights based perspective, a section of civil society organisations, coordinated by the Initiative for Social and Economic Rights, developed this position paper. These organisations include; the Centre for Economic Social Cultural Rights in Africa (CESCRA); Africa Freedom of Information Centre (AFIC); and the Southern and Eastern Africa Trade Information and Negotiations Institute.

2. Introduction

The principle legislation governing Public Private Partnerships in Uganda is the Public Private Partnerships (PPP) Act which was established in 2015. The PPP Act establishes the legal and institutional framework for the implementation of PPP projects. Under the auspices of the Act, the PPP Regulations of 2019 were also developed; with the latest being the draft Guidelines on PPPs (hereinafter referred to as '*the Guidelines*') which seek to augment the procedural framework and lay a comprehensive set of assessment tools that aid the implementation of PPP projects. The Guidelines, and their attendant annexes, form the subject of this paper.

From the onset, it is important to note the objectives of the Guidelines which are;

- 1. Provide contracting authorities and the PPP Unit with a rigorous procedural framework and with a comprehensive set of assessment tools enabling them i) to identify the projects where the use of PPP can deliver benefits and ii) to effectively achieve these benefits through a sound preparation and implementation process.*
- 2. The Guidelines are also to be used by private companies that are considering participating in a PPP project as investor, developer, operator, lender or as advisor to any of the parties.*

The Guidelines are therefore to act as an aid to all relevant stakeholders in the implementation of any PPP project.

In reviewing the Guidelines, reference was made to the principles that govern the implementation of PPPs as enumerated in Section 3 of the PPP Act entailing protection of the rights and interests of the users, ensuring value for money, transparency and accountability. Insight is also drawn from global perspectives regarding good governance in PPPs¹ which include the following;

- a) Participation: the degree of involvement of all stakeholders
- b) Decency: the degree to which the formation and stewardship of the rules is undertaken without harming or causing grievance to people
- c) Transparency: the degree of clarity and openness with which decisions are made
- d) Accountability: the extent to which political actors are responsible to society for what they say and do
- e) Fairness: the degree to which rules apply equally to everyone in society
- f) Efficiency: the extent to which limited human and financial resources are applied without waste, delay or corruption or without prejudicing future generations.

That the development of PPP Guidelines is a commendable step in ensuring better governance in the implementation of PPPs goes without saying. However, the Guidelines, in their present form, lack in some key respects as will be elaborated upon below.

3. Key Concerns.

i. Lack of a detailed Social Impact Assessment Criteria.

Social impact assessment has been defined as efforts to assess or estimate, in advance, the social consequences that are likely to follow from specific policy actions and specific Government actions². The term 'social impacts' on the other hand, has been defined to '*mean the consequences to human populations of any public or private actions that alter the ways in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of society.*'³

¹ United Nations Economic Commission for Europe, Guidebook on Promoting Good Governance in Public Private Partnerships, pgs. 13, 14 & 16 at <https://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>

² Guidelines and Principles for Social Impact Assessment prepared by the Interorganizational Committee on Guidelines and Principles for Social Impact Assessment at pg. 7, See at https://www.iaia.org/pdf/IAIAMemberDocuments/Publications/Guidelines_Principles/SIA%20Guide.PDF

³ Ibid

Annex F to the draft Guidelines⁴ notes Social Impact Assessment as being part of the feasibility study in the initial stages of a PPP project conceptualization. However, besides acknowledging that such an assessment ought to be conducted, no specific and detailed scope/criteria is laid down. At best, note is made of acceptable social impacts that definitively entail '*resettlement, impact on livelihoods, poverty, indigenous people, gender etc.*'⁵ Social impact assessment however goes beyond land these indicators and should be more elaborate on what each indicator entails.

Recommendation: A substantive and detailed criterion for the components of social impact assessment must be developed (preferably have an Annex to the Guidelines) and it must be alive to the specific project requirements and peculiar circumstances of each project.

ii. Absence of Citizen Participation through the Parliament.

Participation of citizens, either individually or through their representatives, in the affairs of Government is a guaranteed right under *Article 38 (1)* of the 1995 Constitution of Uganda. More so, the fact that PPPs fundamentally entail the performance of a public function⁶ and/or the use of public assets/resources by a private party, there arises more reason to have the participation of citizens in the process of developing PPPs through their elected representatives - the Parliament. However, the Guidelines do not envisage the representative participatory role of Parliament in the PPP cycle.

The need to have Parliament involvement is most urgent in the initial stages of the PPP cycle, specifically after the feasibility study has been conducted and there is a feasibility study report. At this point, Parliamentary approval, after considering the feasibility study report, should be sought given that all core indicators upon which the suitability of implementation of a PPP project can be substantively measured have been considered⁷ and Government can thereafter decide on whether to instigate the procurement process or not.

Secondly, there are instances where the Contracting Authority may have to finance a project⁸ that occasions multi - year expenditure commitments or contingent liabilities on Government's part. The legal stand in such a scenario is that the Government shall not

⁴ National Public – Private Partnerships Guidelines, Annex F – Feasibility Study Guidelines at Pg. 7

⁵ Ibid, pgs. 6, 15 & 16

⁶ National Public- Private Partnerships Guidelines, Annex A – Key PPP Concepts at pg. 9; It is stated that '*The objective of a PPP is the performance of a public function.*'

⁷ Ibid, pg. 6 on conditions that must be satisfied for a PPP project to be feasible and optimal.

⁸ Section 23 (4) of the Public Private Partnerships Act, 2015

be bound by such financial commitment or contingent liability unless it is authorized by Parliament⁹. The place of Parliament in the PPP cycle is therefore clearly spelt out in such circumstances. However, Parliament's involvement in these circumstances is not reflected in the PPP cycle.

Recommendation: There should be participation of citizens through the Parliament at the Feasibility Study level. The Feasibility Study Report should be submitted to Parliament for approval. Similarly, Parliament's authorization should be reflected in the PPP cycle for instances where the contracting authority is to bind the Government to any future financial commitments or contingent liabilities.

4. Other Concerns

Hereunder, comments are made based on individual sections/provisions of the Guidelines that could be made better or less ambiguous.

i) Purpose of the Guidelines¹⁰ (Clause1.1)

It is important to note that generalizing that *'experience around the world has shown that PPPs can deliver public infrastructure faster and with a better quality to price ratio than conventional public procurement projects'* is not of itself true. Rather, have a balanced acknowledgement of the impact and risks that can be imposed by PPPs as has been documented in other global experiences such as the Queen Mamohato Memorial Hospital in Lesotho. This way, you can thereafter justify the need to keenly and actively pursue PPPs with a measured mindset.

ii) Inception¹¹ (Clause 3.1.3 (b))

In instances where a project is abandoned for implementation as a PPP, it is stated that it will be pursued in a *non- PPP mode*. Here, it would be better to put in detail what falls under the *non-PPP mode(s)*.

iii) Appointment of a Transaction Advisor¹² (Clause 5.2.1)

⁹ Section 23 (1) & (2) of the Public Finance Management Act, 2015. See also Section 13 (2) of the Public Private Partnerships Act, 2015 which states that *'An Accounting Officer shall not enter into an agreement that in any way binds the contracting authority to a future financial commitment or which results in a contingent liability, except where the future financial commitment or contingent liability is authorized by Parliament in the budget of the contracting authority.'*

¹⁰ National Public – Private Partnerships Guidelines, Main Document at pg. 10

¹¹ Ibid, pg. 29

¹² Ibid, pg. 42

It is noted that there can be circumstances where a Transaction Advisor may not have been appointed in the initial stages but rather a feasibility study consultant is.

Advisably, the circumstances under which a Transaction Advisor may be dispensed with should be elaborated. What kind of PPP projects may warrant the alternative appointment of a feasibility study consultant? Is it allowable in instances of low cost PPP projects? There needs to be clear indication of the circumstances lest the requisite appointments be left to the vagaries of unfettered discretion.

iv) Ambiguities in Annex L on Disclosure

Although the mechanisms put in place to ensure transparency, inclusivity and accountability are laudable, they, in part, fall short on clarity and meaningful duty allocation.

Under clause 2.5 (Methods of Disclosure) of Annex L, it is stated that *'the PPP Unit will make efforts to disseminate summarized and simplified project information in local languages using offline methods such as posters.'* This provision is commendable in as far as it seeks to foster inclusiveness by use of local languages. It however falls short by using non-mandatory terms of *'will make efforts to disseminate.'* Couching this obligation in such fluid terms is likely to give lee way for exercise of discretion and/or blatant disregard. It is therefore recommended that the duty be couched in mandatory terms of *'the PPP Unit will disseminate...'* By so doing, a firmer obligation is imposed upon the Unit.

Similarly, clause 2.6 of Annex L designates the contracting authority and the PPP Unit as the entities responsible for disclosing any information regarding a PPP project. However, although responsibility is given on one hand, punitive action in case of omission by the authorities is not prescribed. Failure to tag an attendant punitive measure in case the said information is not disclosed is to leave the responsibility unguarded and will most likely not be proactively acted upon. It therefore follows that when there is a duty to provide information (not limited to clause 2.6), a provision on a penalty in case of omission must be added.

In conclusion, the development of the draft PPP Guidelines comes rather timely at a point when harmonizing sectoral practices and understanding of PPP implementation is much needed. The efforts made by the PPP Unit are therefore most appreciated. The comments given above are made in the hope that the Guidelines can be made better in the discussed aspects.

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Africa Freedom of Information Centre - AFIC

Promoting Access to Information in Africa

SEATINI

Strengthening Africa in World Trade

**Southern And Eastern Africa Trade
Information and Negotiations Institute**

SEATINI UGANDA



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