

INFRASTRUCTURE FUNDING – PUBLIC PRIVATE PARTNERSHIP

by

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Introduction

The purpose of this paper is to highlight some of the salient features of the Public Private Partnership [PPP] Policies, which are embodied in the Public Private Partnerships Act 2006. The first section of this paper will address the evolution of the PPP concept. I then propose to look into the detail of the policy and the legal framework of the concept. In the concluding remarks, I will discuss the processing and implementation of the PPP policies.

Evolution of the Public Private Partnership Concept

Over the years, Governments around the globe have been exploring new and innovative ways of funding infrastructure projects and related services. The funding of infrastructure projects has always been predominantly perceived to be the responsibility of Government. This is not true. The trend in the last decade indicates that the private sector can, through appropriate arrangement with the State, fund the development of certain projects. In most jurisdictions, this concept has achieved success whilst in others, there have been mixed results.

The paradigm shift of funding infrastructure projects from public to public-private partnership is driven by the following factors:

- The escalating disparity is widening between the funding requirements of infrastructure projects and financial resources available to Government;
- Growing perception that market economy have certain strengths and advantages in specific circumstances which State controlled systems cannot match;
- The economic case for exclusive state control or ownership of infrastructure projects has become more difficult to sustain when contrasted with the efficiencies that private sector can offer;
- Economies have become increasingly interlocked and globalised, providing major capital-intensive projects with much greater access to capital and funding sources. Technological advances have undermined natural monopolies; and
- Industrial competitiveness in the globalised economy is heavily dependent on the availability of high quality infrastructure.

Consequently, these changes have revolutionised the techniques and concepts applied to the implementation of infrastructure projects and their funding. At the heart of this development is the Public Private Partnership concept.

Public Private Partnership Policy Framework

Cabinet, in its attempt to adapt to the changing environment of infrastructure funding and investments, endorsed the following (Cabinet Decision of 19 July 2005):

1. Public Private Partnership is a good solution to the Government's continual search for better value for money and better ways of delivering public infrastructure and related services;
2. The Minister for Public Enterprises and Public Sector Reform be tasked with preparing a PPP policy that will be used as the basis of formulating an enabling legislation; and
3. As part of the preparation of PPP policy all relevant stakeholders to be consulted, particularly the Ministries of Finance and National Planning, Works and Energy, Attorney General's Office and Office of the Prime Minister.

In implementing the above Cabinet Decision, the Ministry put in place consultation and communication strategies. It requires in-depth consultation with major

key stakeholders such as the Ministries and Government Departments, Government Entities, and Industry Players commenting on the PPP policy framework. Stakeholders' responses have been incorporated in the policy as well as in the PPP Act 2006.

What is a public private partnership?

Public private partnership is a term that cannot be precisely defined. It embraces a range of structures and concepts, which involves the sharing of risks and responsibilities between the public and private sector. (Dr. Srinivas Sampath, "*Partnerships for Infrastructure Development and Service Delivery: Defining the Nature and Scope*", a paper presented in Nadi, during the PPP Seminar, 2006). In the policy, PPP is defined as:

"an arrangement between the public and the private sector with clear agreement on shared objectives for the delivery of public infrastructure and/or public services by the private sector that would otherwise have been provided through traditional public sector procurement..."

Projects constituted under PPP must meet the following objectives:

- better value for money and optimal allocation of risks, for example, by exploiting private sector competencies [managerial, technical, financial and innovation] over the project's lifetime and by promoting cross-fertilization of skills between the public and private sector partners.
- shared responsibility for the provision of the infrastructure or services with a significant level of risk being taken by the private sector, for example, in infrastructure projects linking design and construction with one or all of the finance, operate and maintain elements.

It is imperative to maintain a distinction between a PPP arrangement under which the private sector partner supplies public infrastructure and related services on behalf of the State for a contracted period of time and at the disposal of State.

Goals and Benefits of Public Private Partnerships

Identification of the goals of PPP and the prospective benefits from individual projects provide more certainty,

in particular, for those (e.g. local communities) whom PPP projects are expected to serve. These goals and benefits include the following:

- (i) Speedy, efficient and cost-effective delivery of projects;
- (ii) Value for money for the taxpayer, *inter alia*, through optimal risk transfer and risk management;
- (iii) Efficiencies from integrating design and construction of public infrastructure with financing, operation and maintenance/upgrading;
- (iv) Creation of added value through synergies between public sector and private sector, in particular, through the integration and cross-transfer of public and private sector skills, knowledge and expertise;
- (v) Alleviation of capacity constraints and bottlenecks in the economy through higher productivity of labour and capital resources in the delivery of projects;
- (vi) Competition and greater construction capacity (including the participation of overseas firms – especially in joint ventures and partnering arrangements);
- (vii) Accountability for the provision and delivery of quality public services;
- (viii) Innovation and diversity in the provision of public services; and
- (ix) Effective utilisation of State assets to the benefit of all users of public services.

Public Private Partnership Act 2006

The PPP Act is the embodiment of the PPP policies. The Act establishes a framework under which public private partnerships may be established in Fiji. The paramount purposes are contained in section 2.

The Act provides for regulations, and it is those

regulations that will set the rules for any particular public private partnership. Some rules that are common to all public private partnerships, such as requirements for consultation and involvement of landowners, are included in the Act itself, but the detail is left to the Regulations to allow maximum flexibility to cover the wider range of public private partnerships that might occur.

The Government wants to ensure that Fiji's infrastructure does not pass out of Fiji's control, while still encouraging private sector investment and innovation whether from within Fiji or abroad. To that end, the Act provides for Fijian interests to have control of the main public private partnership company by having 51% of voting interests, the right to appoint at least 50% of directors, or a Fiji Share.

The Fiji Shareholder can have rights of veto, rights to be consulted, and rights to approve certain actions of the public private partnership. The public private partnership must give effect to the decisions of the Fijian Shareholder, who is the Prime Minister. The regulations for any public private partnership will be in 2 stages. The first stage is Authorisation Regulations. These set the broad parameters, and recognise that a public private partnership is a possibility.

Consultation is required at that stage with the people generally, and particularly affected landowners, users and others with special interests. If the PPP is to proceed further, then Implementation Regulations must be made. These will set out the details of the tender process for the PPP and the conditions that are to apply. Following this, tenders are invited. There is an independent tender evaluation team that makes recommendations.

Cabinet can accept or reject the recommendation, or order renegotiation with the recommended tenderers but cannot amend it or award the contract to another tenderer.

The purposes of this Act are provided for under Section 2 which are:

- a) to improve the delivery of public infrastructure and related services in Fiji;
- b) to assist in the aim of achieving better value for money spent by the Government;
- c) to recognise and encourage the role of the

private sector in maximising of national growth and development;

- d) to provide a robust framework for the development of public private partnerships;
- e) to empower participation by resource owners and municipalities in public private partnerships and provide protection for private interests in those partnerships;
- f) to encourage competitive and efficient markets for the provision of infrastructure and services in Fiji;
- g) to enable fair competition for the right to participate in public private partnerships;
- h) to obtain value for State and municipality contributions to public private partnerships.

Section 3 of the Act defines some of the terms used in the Act. Two of these are worth mentioning in this article since their interpretation can be a subject of debate.

“Land” includes water and land over water, and “owner of land” is defined in the same terms as used in the Mineral (Exploration and Exploitation) Act 2005. The interpretation of landowner is consistent with the interpretation of landowner under the Native Land Act [Cap 133].

“State assets” includes assets of a municipality so as to enable Local Government to have the Minister invoke the Act on its behalf. This definition is fashioned in a manner that would provide the scope for Local Government to participate under this scheme.

Regulation and Consultations

This Act is only an enabling legislation. It provides the legal framework upon which PPP arrangement can be pursued. The details of pursuing these agreements are in the Authorisation and Implementation Regulations. Section 5 stipulates the rules for Authorisation Regulations. The Authorisation Regulation set out in general terms the proposal and the process for selecting private sector partners. The regulations may specify conditions that must be met and may provide a commitment that if they are met and consultation is successful, then Implementation Regulations will be made.

Authorisation Regulations must require consultation, particularly with landowners, affected communities and potential users. Consultation is envisaged to encompass all affected stakeholders including employees and trade unions, the public, the people who will use the assets and services provided, local community groups and sector interests groups. In selecting and implementing PPP projects, the economic, social and environmental concerns of those directly affected at local level should be taken into consideration along with the statutory rights and legitimate economic interests of stakeholders.

It is a cardinal requirement under section 6 of the Act that the Minister must ensure that the effect of the Authorisation Regulations is published widely so as to encourage private sector participation. The success of the PPP programme hinges on public acceptance and support. PPP communications and awareness strategies should be directed at key stakeholders, officials of public service procuring agencies, employees in sectors where PPP will be developed and the general public.

To ensure that members of the public are kept informed, the Act stipulates under section 7 that affected parties have the right to be consulted in a manner appropriate to their preferences, traditional values and customs. Furthermore, clear information must be given and the recommendations of the Ministry, with reasons, must be given either publicly or to those who were consulted. However, consultation outside Fiji is not required.

Once the conditions of the Authorisation Regulations are met and the Minister is satisfied that there is support for the project from key stakeholders, s/he is required by virtue of section 8 to make Implementation Regulations. This regulation is intended to reassure tenderers that if the conditions are met, the PPP proposal will proceed to the next round.

The Implementation Regulations under section 9 set out the possible matters that could be included in the regulation. These are not mandatory, but the appropriate ones can be chosen according to the nature of the PPP. Among other things, the Implementation Regulations can cover financial matters, performance specifications, transfers of ownership at the end of the PPP term, local involvement, termination, and conditions that must be met before charges can be imposed on the public.

In the initial drafting stage of the Implementation Regulations Ministers are invited to comment on the draft Implementation Regulations. Section 10 also makes it clear that nothing contained in or properly

done under the Act or the Implementation Regulations is a breach of the Commerce Act or the Fair Trading Decree.

Investors or proponents of PPP will be allowed to earn a market-based rate of return on their investment. Section 11 of the Act gives maximum flexibility in the setting of charges, variation of charges, exemptions and collection mechanisms. The detail will be in the Implementation Regulations or the PPP documentation.

Tender Processes

The Chief Executive Officer of the Ministry of Public Enterprises under section 12 is provided with the power to manage and oversee the tender process. He or she must do so after consultation with the Chairperson of the Public Works Tender Board and in accordance with any Authorisation or Implementation Regulations.

After consulting the Chairperson of the Major Tender Board and in accordance with the Implementation Regulations, Section 13 requires the Chief Executive to appoint a tender evaluation team having regard to the nature of the proposed public private partnership and the purposes of the Act. The tender evaluation team may comprise up to 6 members, and must include the Chairperson of the Public Works Tenders Board, or his or her nominee. However, there are some restrictions on the tender evaluation team membership.

These are designed to separate the political and administrative processes, and to ensure private sector involvement in the evaluation process. No Member of Parliament or the Senate may be on the tender evaluation team. Nor may any person who has been a Member of Parliament or of the Senate within the previous 12 months be a member of the evaluation team. The Chief Executive must not be a member of the evaluation team, and no more than half the members may be employees of any department.

Section 14 specifies the functions and duties of the tender evaluation team. In summary they include participation in pre-qualification or short-listing processes, and a diligent and impartial appraisal of all tenders.

Tenders must be ranked. Ranking is to be based on:

- suitability to implement the public private partnership;

- compliance with the regulations; and
- how they achieve the purposes of the Act.

Therefore, ranking may not be solely on price, though price would be one of the factors. The tender evaluation team must report to the Chief Executive on the tender process and appraisals. The team must also give public notice of the highest ranked tender, the price and a general description of that tender. The team must also state whether or not it recommends that the highest ranked tender should be accepted.

The Minister must give the Minister of Finance, the Attorney General, and the relevant Minister an opportunity to consult on the report, recommendations and comments. They are then referred to Cabinet. Cabinet can:

- direct that the recommended tender be accepted;
- return the report to the Chief Executive and instruct that there be further negotiations, or a fresh tender round, or that the whole proposal be abandoned.

Cabinet and Ministers are expressly forbidden to:

- amend the recommended tender; and
- accept any tender other than the recommended tender.

This is intended to protect them from lobbying and to maintain the integrity of the tender process.

Restriction

Part 4 of this Act is intended to ensure that the PPP controlling company remains within the control of the Fiji Nationals or a Fiji share. Section 17 describes the rules covering the PPP controlling company. The public private partnership may be made up of all kinds of entities, including the State, but must be controlled by a company that is registered under the Companies Act and has direct or indirect control of those entities that it is required by the Implementation Regulations to control.

The PPP controlling company must be under the control of Fijian interests or have a Fiji share. "Fijian interests" is defined in section 2 to include the State,

municipalities, citizens of Fiji, and companies controlled by the State, municipalities or citizens of Fiji.

Fijian control can occur through:

- Fijian interests (as defined) having 51% or more of voting rights;
- Fijian interests having the right to appoint more than 50% of the Directors.

The roles of the Fiji shareholder are enunciated in section 18 of the Act. The Prime Minister holds the Fiji Share. While the Minister of Finance typically holds shares to control State assets, the Fiji Share has a different role. The Fiji Share does not control either State or private assets, but rather the essential elements, and only the essential elements, of the public private partnership as a whole.

The effects of the Fiji Share are that:

- The Fiji Shareholder may veto specified kinds of action proposed by the PPP controlling company or entities that it controls directly or indirectly;
- The Fiji Shareholder has the right to be consulted on specified matters;
- Specified kinds of contract cannot be commenced or discontinued without the prior written approval of the Fiji Shareholder.

The kinds of actions affected would be specified in the articles of association, but depending on the kind of public private partnership, might include:

- The imposition or raising of charges;
- The conduct of activities outside Fiji;
- The raising of debt above certain levels;
- The discontinuance of a service;
- The declaration of a dividend outside certain parameters;
- Capital or maintenance obligations.

The PPP controlling company, and its directors, are obliged to ensure that obligations protected by a Fiji Share are not breached. The Fiji Shareholder can enforce the obligations protected by the Fiji Share. No other person can do so. If the Fiji Shareholder brings a successful action to enforce Fiji Share rights, the PPP

controlling company indemnifies the Fiji Shareholder for costs.

In the event that section 18 is in breach of the Act, section 19 gives the Attorney General the right to bring proceedings to determine whether Fijian interests hold 51% of the shares or the right to appoint more than 50% of the directors of the PPP controlling company. It also sets out the remedies that the Court may grant.

Landowners can also participate in PPP projects either as equity partners or through the leasing of their land to the PPP controlling entity. Section 20 provides that landowners can include their land in public private partnership in accordance with the terms on which it is held; but they cannot be compelled to do so.

The above mirrors and embodies the Constitutional provision that protects against the deprivation of property without compensation. It however, does not prevent compulsory acquisition if the public private partnership is a public work. It also does not restrict any forfeiture or penalty provisions that might be freely agreed to as part of the public private partnership.

The use of Government guarantee is limited under sections 22 and 23 of the Act. These sections basically prohibit the use of the State and municipality guarantees in Implementation Regulations and public private partnership documentation, but does permit indemnities of the kind that would be given in the ordinary course of business. It also provides that section 62 of the Financial Management Act 2004 is not limited. This means that the Government can still give State guarantees if authorised by the House of Representatives. Section 23 states that the Act will not itself be authorisation for any borrowing, hedging, lending, or guarantee referred to in Part 9 of the Financial Management Act.

Section 24 makes it clear that the Public Enterprise Act provisions pertaining to transfer of State assets and liabilities do not restrict transfers to public private partnerships, but also makes it clear that the Act does not extend those powers. That is, if the transfers are to some entity that is not a government company, its subsidiary or another government entity, then some other authority to transfer will be required.

In other jurisdictions, Local Authorities have benefited

greatly from PPP. In those jurisdictions PPP have been used to fund infrastructure projects thus reducing burdens of taxpayers. Section 25 clarifies that local government may participate in public private partnerships, but the approval of the Minister of Local Government is required.

Way Forward – Processing and Implementation of the Policy

It is essential to ensure that a standardized approach consistent with the policy and the PPP Act is developed, recognizing the need to accommodate diversity at project level. Policy guidelines and procedures will need to be developed and finalized to facilitate the implementation of the various provisions of the Act.

Cabinet (Decision No. 224 of 2006) has approved the formation of a PPP Unit to be accommodated within the Ministry of Public Enterprises and Public Sector Reforms. The first task of the Unit is to identify projects that can be implemented or pursued under the PPP concept. Secondly, the Unit will be required to undertake pre-feasibility of at least two projects.

The Unit will also need to prepare a Business case study for each of the preferred projects it selects. A Business case study consists of a full commercial grade evaluation of the project.

In summary the PPP Unit, in close consultation with other public and private sector interests, should continue to give high priority to:

- a) Delivery of the PPP programme;
- b) Developing a standardized approach in terms of tendering procedures, model contracts and documentation, on par with progress in the programme;
- c) Ongoing development and review of the PPP policy; and
- d) Resolving outstanding obstacles to wider use of PPPs [including legal, taxation, financial and other issues].

This will ensure that PPP becomes a standard element of Government procurement method and a stream of PPP projects is developed and a sustainable and dynamic PPP market is created in Fiji in the long term.
