

Key contacts



Kezia Owusu-Ansah
Senior Associate,
Finance
kezia.owusuansah@templars-law.com



Abena-Achiaa Otuo
Associate,
Finance
abena-achiaa.otuo@templars-law.com

TEMPLARS ThoughtLab

The Ghanaian Framework for Public-Private Partnerships

Introduction

Ghana, like many other developing countries, faces significant infrastructure deficit that has long hindered its economic growth and development. Addressing Ghana's infrastructure challenges will require raising billions of dollars in annual expenditures. Recognizing the limited financial capacity of the government, Public-Private Partnerships ("PPPs") have emerged as a strategic approach to bridge these infrastructure gaps and deliver efficient and quality public infrastructure and services through private sector resources.

Before 2020, PPP projects in Ghana did not have a single, well-defined legal framework that ensured clear modality mappings and an eventual project implementation mechanism. PPPs were governed by general procurement provisions under the Public Procurement Act, 2003 (Act 663) as well as various sector-specific laws such as Ghana Investment Promotion Centre (GIPC) Act, 2013 (Act 865) and the Renewable Energy Act, 2011 (Act 832). Ghana initiated its journey towards addressing these infrastructure challenges with the formulation of policy guidelines for Public-Private Partnerships in 2004. The next milestone was the National Policy on Public Private Partnership introduced in 2011, aimed at providing "a clear and consistent process for all aspects of PPP project development and implementation from project identification, appraisal and selection to procurement, operation, maintenance, performance monitoring and evaluation".¹ However, the real game-changer came in 2020 with the enactment of the Public Private Partnership Act 2020, Act 1039 (the "Act").

The Act presents an institutional framework for PPP structuring and bidding, projects appraisals and approvals, regulatory compliance, and monitoring and evaluation for the purpose of ensuring transparency and due process. The Act further envisages and sets out common variations and combinations of transaction structures by which PPPs could be executed such as concessions, Build, Operate and Transfer (BOT) and Build, Own, Operate

¹ Foreword of National Policy on Public Private Partnership

and Transfer (BOOT). The Act, however, retains flexibility by permitting public contracting entities to revise the prescribed arrangements and apply arrangements most suitable to the relevant PPP project.

Scope of the Act

The Act applies to and regulates PPPs which are defined under the law as contractual arrangements or concessions between a public contracting entity and a private entity for the provision of public infrastructure or services traditionally provided by the public sector, which result in the private entity performing all or part of such infrastructure or service delivery functions and assuming defined risks over a significant period. This definition therefore excludes privatization or divestment of ownership of state-owned entities and routine outsourcing of public functions without transfer of significant risks from the scope of the Act.

The Act further excludes the following partnerships and transactions from its scope: (a) the grant of mineral rights under the Minerals and Mining Act 2006 (Act 703), the grant of any right for exploration, development or production under the Petroleum (Exploration and Production) Act 2016 (Act 919), (c) procurement of goods and services with public funds which are governed by the Public Procurement Act 2003 (Act 663) and (d) non-commercial activities which are the exclusive preserve of security services.

The transitional provisions under the Act indicate that PPPs and their underlying agreements concluded before the Act are to be governed by the laws that existed at the time the agreements were executed and are therefore excluded from the scope of the Act. Public contracting entities are however required to submit copies of such existing agreements to the Public Private Partnership Office (the “**PPP Office**”) established under the Act. Although the Act does not expressly provide for the amendment of such existing agreements, an amendment of such a pervasive nature that substantially modifies the essence of the original contract may require approval in accordance with the Act.

Transaction Process for PPPs

The Act presents a process for the conclusion of PPPs with 3 primary stages: (a) the project preparation stage; (b) the procurement stage; and (c) the contract and post contract award management stage.

Project Preparation	Procurement	Contract and Post-Contract Management
Pre-Feasibility Study Feasibility Study Report	Government-initiated competitive tendering process - Qualification and Proposal stages Procurement by GIF Unsolicited Proposals	Approval by relevant approving authority Execution by Head of contracting authority

- **Preparing for a Public-Private Partnership**

In the project preparation stage, the contracting authority² prepares a Project Concept Note and Pre-feasibility Study Report in accordance with the Public Financial Management (Public Investment Management) Regulations, 2020 (L.I. 2411) and submits same to the PPP Office established within the Ministry of Finance. After the Pre-Feasibility study is accepted by the contracting authority, the designated appraising authority and the PPP Office, a Feasibility Study is conducted by the contracting authority. The Feasibility Study assesses various aspects of the project, including technical needs of the project; social, economic, and environmental impact; risks and risk transfer to the party best suited to manage the risk; fiscal affordability; and the end-user affordability.

The Public Investment Unit of the relevant contracting authority reviews the Feasibility Study Report. The Feasibility Study Report is then submitted to the appropriate appraising authority for appraisal and development of an Appraisal Report. The Appraisal Report is submitted to the PPP Office for the consideration and approval of the Public Private Partnership Committee (the “**PPP Committee**”) and issuance of the Seal of Quality by the Minister of Finance.

Feasibility study reports prepared by public corporations or state-owned entities will require the approval of the governing body of the public corporation or entity and the relevant sector Minister before submission to the PPP Office. On the other hand, a feasibility study report from a local government authority must be approved by the relevant Executive Committee. The approval of the Feasibility Study report and the Appraisal Report by the Committee and the grant of the Seal of Quality by the Minister of Finance marks the successful completion of a preparation stage.

- **Procurement: Government-Initiated Competitive Tendering Process and Unsolicited Proposals**

The Act sets out a primary procurement process for procurement initiated by a contracting authority. The Act however presents and provides regulation for two alternative approaches for the procurement of PPP projects: through Ghana Infrastructure Investment Fund (the “**GIIF**”) and unsolicited proposals initiated by a private party.

- a. **Government-Initiated Competitive Tendering Process** – The procurement process under the Act is a two-stage national or international competitive tendering process, comprising of (a) the qualification stage and (b) the proposal stage. At the qualification stage, the contracting authority makes an open, public invitation stating the minimum bid qualifications including the requirement that the bidding entity has the requisite technical and industry expertise, financial resources, and good standing. After receiving various bids, a prequalification bidders' conference is held to discuss all issues, concerns, and clarifications related to the prequalification documentation and the PPP project in general as well as finalise the prequalification bids for submission. An evaluation panel comprising a team of sectorial experts set up by the contracting authority proceeds to evaluate the prequalification applications. This is followed by the proposal stage where the contracting authority and the PPP Office jointly issue a request for proposal to the shortlisted pre-qualified bidders (maximum of six).
- b. **Ghana Infrastructure Investment Fund:** GIIF may act as a lead arranger for a consortium to facilitate efficient and timely procurement under limited circumstances, such as the cancellation of a tender or when there is an urgent

² A contracting authority is the public entity, constitutional or statutory body, local government authority, state-owned entity or public corporation which intends to enter into the PPP with a private entity.

need to execute a potentially viable partnership project to serve strategic national interests. The procurement of a partnership project through GIIF requires written approval from the Public Private Partnership Committee.

- c. **Unsolicited Proposals:** Unsolicited proposals initiated by private parties may be considered if they are not already in the Medium-Term Development Plan of the contracting authority or already being considered for implementation. The Act imposes stringent standards for such unsolicited proposals as they are required to be economically and financially viable and align with Ghana's directive principles of state policy, National Medium Term Development Policy Framework, or the National Infrastructure Plan while ensuring that it does not place onerous conditions on Government. If the contracting authority decides to move forward with an unsolicited proposal, it must notify the PPP Office which will register the proposed project in its records to commence the procurement process.

- **Contract and Post Contract Award Management**

After selection of the winning bid, the contracting authority may enter into a PPP by means of standardized partnership agreements provided by the PPP Office in collaboration with the Attorney-General and the Ministry of Justice. The contracting authority is required under the Act to submit its partnership agreement to the applicable final approval authority for approval in order to validly enter into a PPP.

The relevant approval authorities have been set out in the First Schedule of the Act and are determined based on the estimated capital cost of the project established in the feasibility study report. PPPs which trigger articles 174 and 181 of the 1992 Constitution of Ghana on taxation and loans respectively, will however require parliamentary approval, irrespective of the estimated capital costs of the PPP project. Projects with estimated capital costs exceeding US\$200 million dollars require approval of the Cabinet while projects with estimated cost below this cap are approved by the PPP Committee.

All partnership agreements are to be governed by the laws of Ghana. However, the parties are at liberty to select their preferred dispute resolution mechanism and preferred venue for arbitration in respect of disputes arising from a partnership agreement. However, in the absence of an agreement on the dispute resolution mechanism, the default resolution process under the Alternative Dispute Resolution Act, 2010 (Act 798) will be employed.

The parties to a partnership agreement may also amend the agreement by applying to the PPP Committee through the PPP Office adducing reasons for the proposed amendment. Approval for such amendments will be granted only if they do not significantly compromise the obligations of the contracting authority, but rather, are likely to lead to more efficient and effective service delivery. The approval of the relevant approving authority to the amended agreement and due execution will however be required to bring the amended agreement into effect.

Conclusion

Ghana's PPP framework as set out in the Act represents a significant milestone in the country's journey to addressing infrastructure deficits and the provision of quality public services. With a modernized legal framework and a structured approach to PPP projects, the Act facilitates efficient and transparent PPP projects throughout the project lifecycle, from preparation to procurement and contract management. It also provides clear mechanisms for dispute resolution, to ensure that conflicts can be addressed in a timely and equitable manner. As Ghana continues to develop its public infrastructure, this framework will play a crucial role in attracting private sector investments, fostering economic development, and improving the quality of life for its citizens.