Should Parliament Approve Public-Private Partnerships in Uganda?
An Analysis of the PPP Bill (2012)

1. Introduction

Over the last four years, Uganda has moved to institute the policy and legal framework to provide for Public-Private Partnership (PPP) as a tool for enhanced provision of public services and infrastructures. In 2010, Government approved the framework policy on PPP and thereafter tabled the PPP Bill (2012) for legislative discussion and approval. This paper analyses one essential clause in the PPP Bill that underscore the notion of value for money in the provision of public services and infrastructures and the extent of parliamentary oversight over the executive in regards to the PPP probable impact on the country's fiscal and debt commitments over both the medium and long terms. The clause to have Parliament approve all PPPs is being contested by the Executive and responsible for the failure by the President to assent to the Bill on two occasions. The analysis of the PPP Bill (2012) is contextualized within both the PPP policy framework as well as the Public Finance Management law to iron out issues of conflict of interest and role clarity between the Legislature and Executive especially as regards to approval of PPPs. The analysis is wind up by positing possible policy recommendations essential to ensuring Parliamentary oversight and Executive management of PPPs.

2. Background to PPPs

Public-Private Partnership is a public financing model that transfers the responsibility (whole or partially) to develop and fund public services and infrastructures from government to a private company for a specified period of time. World over, the PPP model is 'driven by the need to fund infrastructure projects and/or the need for private sector innovation in the design and management of public sector facilities and infrastructure projects.'[1] In 2006, Uganda undertook a strategic decision to focus on the development of high value end energy and road infrastructure projects, a decision that has strained the national budget forcing government to consider alternate funding modalities such as PPPs. Under the PPP Framework Policy, Government of Uganda lists 5 models of PPPs including Design, Build, Finance and Operate (DBFO): Concession: Sale and Lease Back: Lease: and Joint Ventures.

Prior to the 2010 PPP Framework Policy, Uganda undertook a series of PPPs including;

A. The Umeme 20 year concession (2004 – 2024) that involves Umeme Limited, a company wholly owned by CDC Globeleq of UK. At the time of agreement, Umeme was mandated to collect revenues from all customers connected to the national electricity power grid, make an investment of a minimum of US$ 70 million, pay monthly lease fees to UEDCL and return all assets to UEDCL at the end of the lease.
B. The Rift valley railway concession signed in 2006 between the governments of Uganda and Kenya on one side and the Rift Valley Railways (RVR) on the other is intended to offer full

[1] Concept and Background to Public Private Partnerships (PPP)/Private Finance Initiative (PFI) by Alshawi, 2009 http://www.oecd.org/mena/47562550.pdf

mandate to RVR to rehabilitate, operate and maintain the rail networks as one railway system so as to improve the management, operation and financial performance of the two rail networks (Kenya and Uganda) in a coordinated manner.

C. The 250-megawatts Bujagali Hydropower generating facility which is a DBFO PPP approved by Government in 2007 with Bujagali Energy Limited, a company owned by affiliates of Sithe Global Power, LLC and the Aga Khan Fund for Economic Development.

It's important to note that the above concessions and agreements were not fully backed up by any substantive policy and legal framework and have since been embroiled in vicious cycles of conflicts, nonperformance and inconsistencies to the principal of value for money which is a key consideration under PPPs.

3. The PPP Framework Policy

Government has registered mixed results in previous and current PPPs including failures and performances below expectation. In May 2009, just 3 years into the PPP, Parliament of Uganda gave a green light to the Executive to terminate the Rift Valley concession citing 'regular default on part of RVR to pay up concession fees, maintain railway assets and increase cargo update.'[2] Similarly, in March 2014, Parliament of Uganda recommended that the concession agreement between Government and Umeme be terminated due to 'gross illegalities and manipulations encountered in the procurement of the Umeme concession and the scandalous provisions of these power distribution agreements signed between Government of Uganda and Umeme Limited.'[3] The lack of a clear policy and legal regime has greatly impacted on the ability of Parliament to play its oversight role and check eminent excesses of the Executive in regards to PPP ventures already underway.

The PPP framework policy was subsequently approved by Cabinet in 2010 to set the procedural context and future legislations for government commitment to the principle of PPPs as a public service and infrastructure delivery mechanism. Public infrastructures according to the PPP framework policy refers to physical assets and related services in sectors such as roads, rail, ports, communication, correctional facilities, health care facilities, educational, accommodation and court facilities as well as related services. In light of the analytical proposition of the paper, the following provisions are essential to understanding the extent of parliamentary oversight over the executive in designing and approving PPPs;

A. The Policy entails a structured approach for assessing projects with public-private partnership potential. This approach is based on carrying out a detailed feasibility study to

[2] Finally Uganda Opts to Terminate RVR Concession - http://www.theeastafrican.co.ke/news/-/2558/593100/-/rgkw10z/-/index.html

[3] Terminate Umeme and Eskom Contracts'-Parliament. http://www.parliament.go.ug/new/index.php/about-parliament/parliamentary-news/367-terminate-umeme-and-eskom-contracts-parliament

show that the public stands to win in terms of service, cost and quality as well as ensuring that the projects are affordable and will provide value for money.[4]

B. Transparency and openness are important requirements of all government procurements. The use of PPPs should not diminish the availability of information on the use of government resources to Parliament, tax payers and other stakeholders. There should be an emphasis on transparency and disclosure of the processes and outcomes, acknowledging the need to protect commercial confidentiality where appropriate.[5]

The above policy provisions thus set the framework for a Parliamentary oversight role in the process of developing, discussing and approving PPPs.

4. The PPP Bill (2012)

The PPP Bill (2012) was first tabled in Parliament in February 2013 by Government with the intention of instituting a legal framework to govern PPPs. In tandem with the PPP framework policy, the intent of the Bill is to bridge policy and legal deficiencies by providing for a specific legislation that governs the relationship between Government and the private parties through distinct guidelines as well as roles and responsibilities of the various government offices during PPP implementation. Overall the intent, provisions and procedures of the Bill are sufficient to; (i) ensure value for money through project feasibilities (ii) guarantee transparency (iii) enhance competitiveness through standard procurement processes and (iv) set role clarity between the Legislature and Executive. This paper however, analyses one essential provision in the PPP Bill that underscores the notion of the extent of parliamentary oversight over the executive in regards to the PPP approval as well a probable impact on the country's fiscal and debt commitments over both the medium and long terms.

4.1. Should Parliament Play a Role in the Approval of PPPs

Parliament in July 2014 passed the PPP Bill (2012) and forwarded it to the President for assent. On two occasions, the law has been rejected by the President and retuned to Parliament on grounds that 'it's inconsistent with existing legislations. Clause 26 is the point of contention particularly the following sections;

i. Clause 26 (1) - 'PPPs should not be signed without the approval of Parliament.
ii. Clause 26(7) - signed PPPs should only be amended or varied with the approval of Parliament, and
iii. Clause 26(8) - Parliament shall not approve an amendment or variation to a project agreement unless the agreement is so amended or varied.'[6]

[4] Public-Private Partnership Framework Policy, MFPED p1
[5] Ibid p10
[6] Parliament in Trouble with Museveni – The Independent , www.independent.co.ug/cover-story/9770-parliament-in-trouble-with-museveni-again#sthash.8FZH93IZ.dpuf

The above provisions have been contested by the President on two occasions citing expert opinions and his own judgement that 'debating PPPs in Parliament will deter foreign investments in the country' and subsequently recommending the Bill to be reconsidered and deletion of clause 26 be effected. However, the need to stipulate a clear role for parliament in the approval and audit of PPPs is not only a precautionary measure following the failures and poor performance of previous PPPs but a key oversight responsibility of Parliament in light of the Public Finance Management Act (PFMA) as follows;

A. Parliament is mandated to analyse policies and programmes that affect the economy and the annual budget and where necessary, make recommendations to the Ministry on alternative approaches to the policy or programme,[7]
B. Parliament is equally empowered to ensure that public resources are held and utilized in a transparent, accountable, efficient, effective and sustainable manner and in accordance with the Charter of Fiscal Responsibility and the Budget Framework Paper,[8] and
C. A government official shall not enter into a contract, transaction, or agreement that binds the Government to a financial commitment for more than one financial year or which results in a contingent liability, except where the financial commitment or contingent liability is authorized by Parliament.[9]

Under the proposed Bill, a PPP exists where a contracting party (Government) enters into a commercial transaction with a private company, where the company performs a function on behalf of Government. The PPP by nature involves a financial commitment by government and may involve contingent liabilities with a classical example of Umeme where government failure to meet specific terms of the concession has resulted into financial loses. Clause 26 that provides for a strong parliamentary oversight over potential PPPs is cognizant of the strong provisions in the minority report by the Shadow Minister for Finance – Hon Geoffrey Ekanya, who noted that a deletion of clause 26 as proposed by the President will 'legalize back door borrowing and allow the executive to usurp the powers of parliament. To ensure that the country's interests reign supreme and indeed that Parliament retains a degree of oversight, the following are essential recommendations;

A. In tandem with the highlighted provisions of the Public Finance Management Act (4.1. A) above, the Executive should lay feasibility reports of PPPs before Parliament for broad analysis in terms of value for money and implications to the medium term financial positions and where necessary, Parliament advises the Executive on the best modalities as well as alternative approaches to the PPP.
B. Parliamentary role in PPPs should only be limited to receiving, discussing and making recommendations in regards to the potential PPPs. This role should not in any way extend to

[7] Public Finance Management Act – clause 12 (1).
[8] Public Finance Management Act – clause 12 (2).
[9] *Ibid,*. Clause 23 (1).

discussion and approving PPP agreements. The Constitution under Article 119 (5) gives the Attorney General exclusive rights to conclude government agreements, contracts and treaties.

C. The stated role of Parliament in clause 26 (1) which provides that 'PPPs should not be signed without the approval of Parliament,' should be reconsidered to a more advisory role requiring Parliament to only review and input into the feasibility report of a potential PPP as this will equally ensure transparency and openness by availing information on the use of government resources to Parliament, tax payers and other stakeholders. This is clearly the spirit of the PPP framework policy.

D. The Approved PPPs should be as a mandatory requirement communicated to Parliament and annual reporting mechanism enshrined as an accountability mechanism between the Executive and Legislature to counteract mixed results of previous and current PPPs.

5. Conclusion

The initiative to institute a policy and legal framework for PPPs in Uganda is not only timely but well intentioned to bridge government funding gaps and bring about private sector innovations and expertise to public service delivery. I believe government should retain an upper hand to monitor PPP implementation. Public Private Partnerships can squarely work well across all sectors of government. I am a strong proponent of reducing government monopoly over public service delivery because of the inherent institutional weaknesses of many public agencies. Government is better off playing as a regulator than a provider of public services. Therefore all sectors can with an efficient regulatory mechanism in place work best under PPPs. The contestation between the Legislature and Executive over the approval of the PPPs can be mutually mitigated by ensuring an analytical role for Parliament especially during the feasibility undertakings of a potential PPP. The Constitutional mandate of the Executive through the Attorney General to negotiate and conclude government contracts and agreements should not be interfered with by Parliament. However to ensure Parliament plays its oversight role over Executive business, PPP agreements should be deposited with the Clerk to Parliament for ease of access as and when required.