

Policy and Legal Environment for Public-Private Partnerships

This note is the third in a series of notes on developing a comprehensive policy, legal, and institution framework for public-private partnership (PPP) programs. This series is extracted from a PPIAF-funded analysis of Uganda's enabling environment for PPPs, which was prepared by Castalia Limited in December 2008.

Many countries do not have a comprehensive policy or legal framework specifically designed to manage PPPs. Nonetheless, there are policies and laws that constrain or affect how PPPs are developed and implemented. In building the PPP framework, we need to take these existing policies and laws into account. Where possible, this means tailoring the PPP framework for a specific country to be consistent with the existing environment. It may also require changes to the existing laws or policies if these are simply not compatible with the PPP framework's aims. A detailed analysis of existing legislation is required to assess this and build an appropriate legal framework.

Procurement

Entering into a PPP for new infrastructure assets or services is a form of government procurement. Moreover, PPPs comprising a concession of existing assets can be considered a form of disposal, while often also involving procurement of a service and further investment. Where the PPP framework introduces new responsibilities and procedures for developing and procuring PPP projects, these must be consistent with procurement law.

Privatization and Divestiture

PPPs can involve transferring control of existing government assets to the private sector through lease, concession, and in some cases management contracts.

Public Financial Management

PPPs generally involve some form of public expenditure and so are subject to laws and policies for managing public finances. However, public expenditure commitments under a PPP tend to have particular features. They are often:

- **Long-term**, when the revenue stream under a PPP contract arises in full or part from government payments over the lifetime of the contract. Such an expenditure commitment often does not start in the year in which the contract is signed; or
- **Contingent**, where the government provides guarantees under which payments are triggered by certain risk events, or guarantees payments by state-owned enterprises under take-or-pay type agreements.

These characteristics may limit the applicability of general public financial management policy and laws. Such expenditures may also be subject to special rules and procedures.

Contract Law

The main potential relevance of contract law for PPP is its provision for how contractual disputes may be resolved. PPP contracts, particularly in developing countries, typically include contract-specific dispute resolution mechanisms that may be based on international arbitration.

Sector-Level Policies and Laws

In the absence of a central PPP policy, some line ministries and government entities have developed their own approaches to PPP. Understanding these sector-level policies, and in some cases, laws, is important to developing the PPP framework for several reasons:

- Development of sector policy priorities dictates the development of the PPP pipeline
- Any inconsistencies between sector-level policy regarding PPPs and a central PPP policy will need to be reconciled—whether by altering the sector or central policies, or a combination of both
- The central PPP framework must also take account of institutional responsibilities defined at the sector level, and any differences resolved

The existence and maturity of policy regarding PPP may vary between sectors.