

One Continent, One Law Firm



2ND PPP GLOBAL CONFERENCE

**“Building Capacity To Support Local
Infrastructure Development Through PPP”**

A PRESENTATION ON PROCUREMENT PROCESS

By:

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Scope

“all forms of **CONTRACTUAL ARRANGEMENT** between a **CONTRACTING ENTITY** and a private sector party with a clear **AGREEMENT** on shared objectives, for the provision of **PUBLIC INFRASTRUCTURE AND SERVICES** traditionally provided by the **PUBLIC SECTOR** as a result of which the **PRIVATE** sector party **PERFORMS PART OR ALL OF GOVERNMENT’S** service delivery functions, and **ASSUMES** the associated **RISKS** over a significant period of time”.

Public Policy Issues Behind PPPs

- The Need for infrastructure
 - Markets, bus terminals, schools, hospitals etc
- The “social” inclination of the public sector
 - If possible, everything should be free
- Large scope of infrastructure needs – hospitals, schools, roads, rail, ports
- Need to maintain and continuously provide the services –eg waste management, toll collection, etc.

The Benefits of PPPs

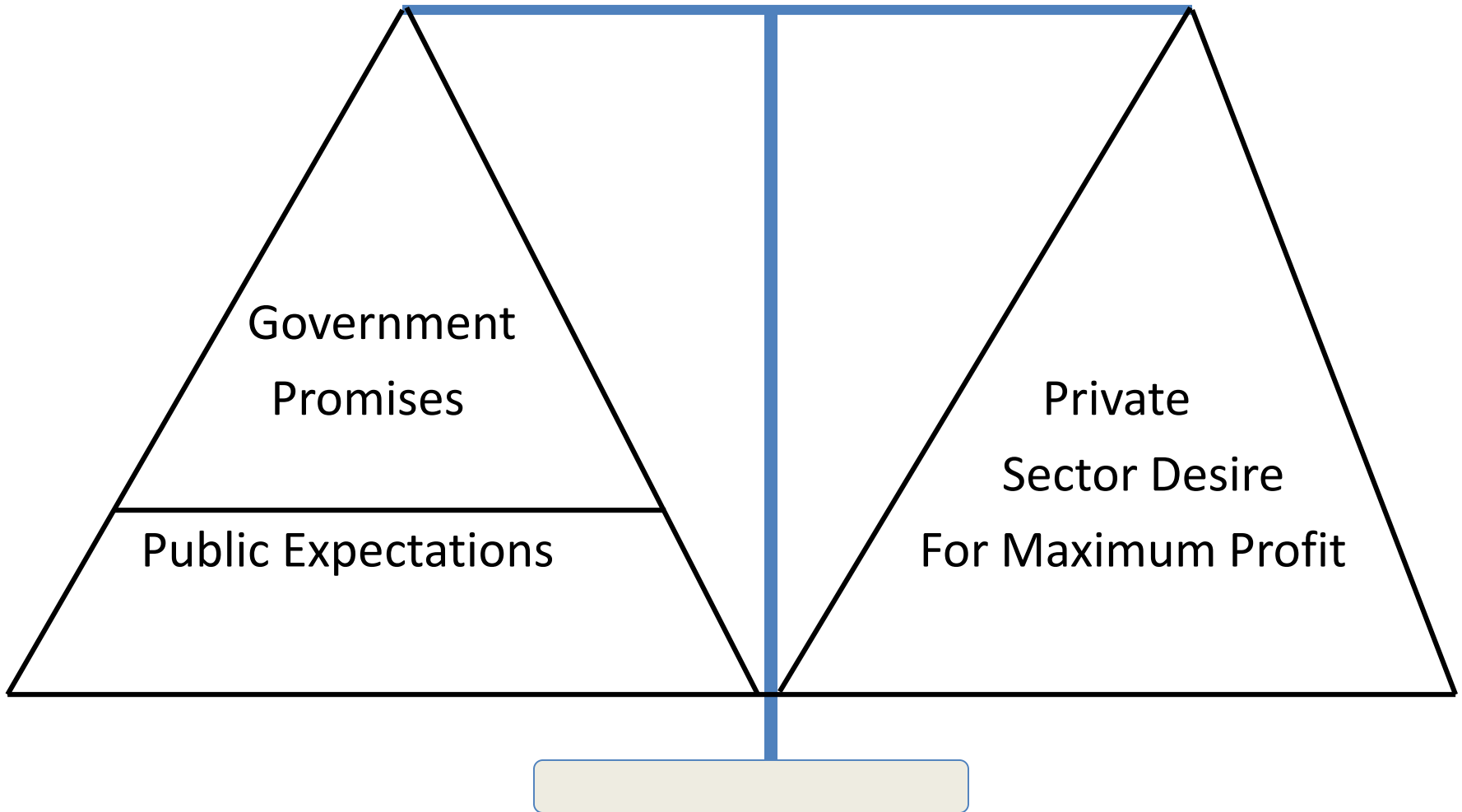
To Governments :

- a) Accelerated delivery of needed infrastructure and public services- on time and within budget
- b) Encouraging the private sector to provide innovative design, technology and financing structures –Article 36(2) of the Constitution
- c) Increased international and domestic investment

The Benefits of PPPs

To The Private Sector :

- Opportunity to Profit
- Sustainable business
- Returns on investment
- Personal satisfaction from contribution to national growth



Guiding Principles

- Environmental and social safeguards
- Clear objectives and output requirements
- Accountability - records, records, records
- Fairness and Transparency- criteria, criteria, criteria

- Competitiveness- open to all qualified
- Responsibility For Managing The Process- MDA, MMDA, GoG
Entities
- Stakeholder Consultation- public scrutiny all the time
- Restrictions on public sector eg conditions for equity stake
- Impact of all relevant laws and policies- eg Act 462, LI 1961, Act
564 etc

Institutional Framework

- NATIONAL LEVEL
 - MOF- PID, Budget Unit, Debt Management Unit
 - PPPAC
 - CABINET
 - PARLIAMENT
 - NDPC
 - DFI effect, if applicable eg World Bank
 - Etc

Institutional Framework

- LOCAL GOVERNMENT (MMDA) LEVEL

- Assembly In Session

- Executive Committee,

- DCE, MCE

- Coordinating Director

- Planning Officer

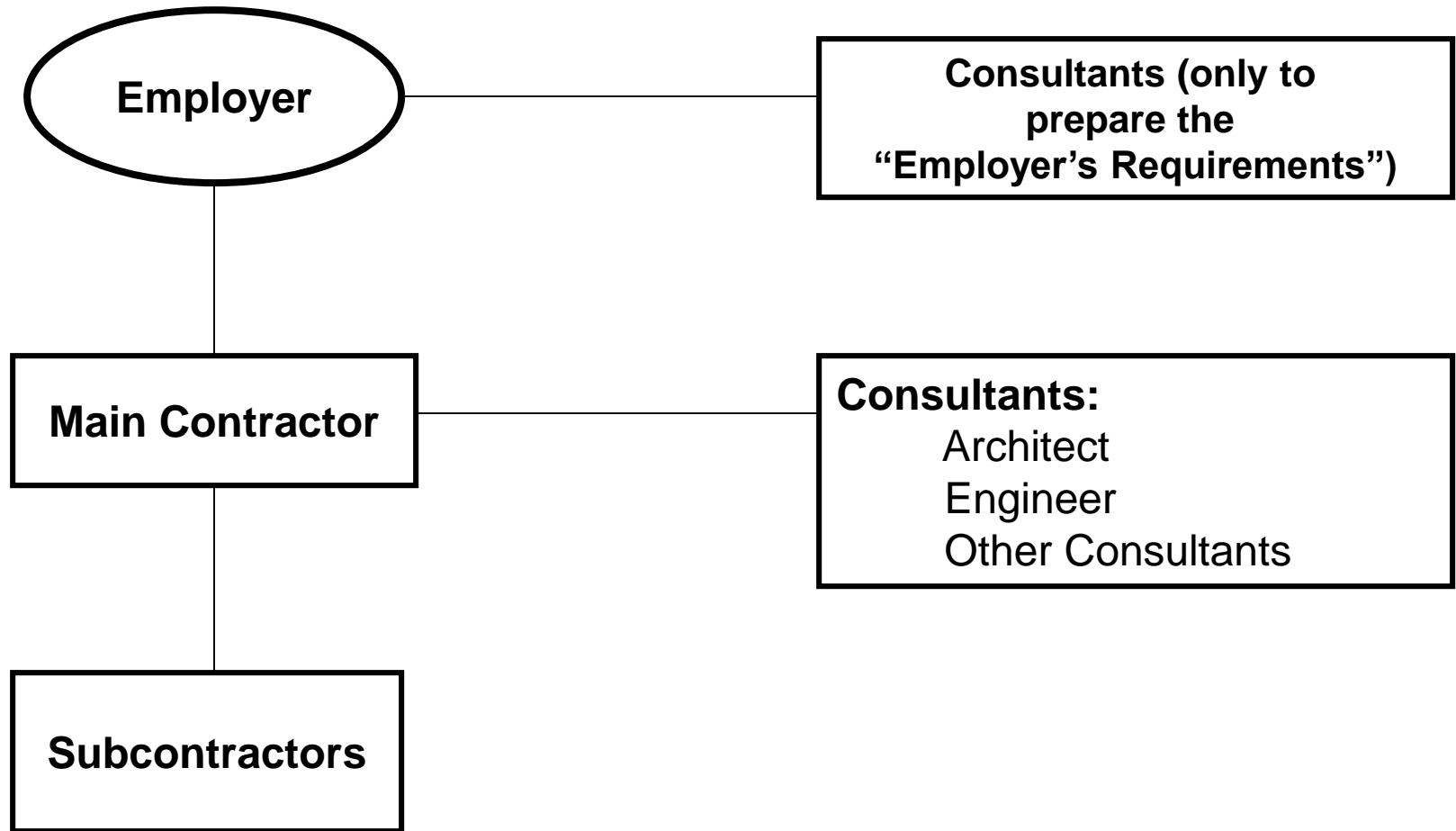
Institutional Framework

- Budget Officer
- PPPAC- depending on the project size
- CABINET- depending on the project size and structure
- PARLIAMENT- depending on the project structure
- NDPC- depending on the source of the project: DDP or NIP or Act 480
effect
- DFI effect, if applicable eg World Bank
- Etc

Typical Procurement Cycle

- Identification and Planning- PIP, NIP, DDP, Assembly's Resolution,, Political Promise
- Document Preparation – Standard: PPA or DFI
- Invitation- newspaper
- Evaluation and Selection – responsiveness test, broad scoring, QCBS, Weighted Technical and Financial Score etc
- Award- direct or after attaining “no objection”
- Contract Management – in-house (weak)

Example (Works) – Public Procurement



Typical PPP Procurement Cycle

- Identification- PIP, NIP, DDP, Assembly's Resolution, Political Promise, Unsolicited Proposal, Etc
- Planning- structure, structure, structure
- AT THIS STAGE BE MINDFUL OF THE FOLLOWING
 - **Concept Note, Prefeasibility, Feasibility, Output Specification is very key at this stage**
 - **Approval requirements**
 - **Registration and Effect of Registration**

Typical PPP Procurement Cycle

- Document Preparation – No standard documents yet-prior approval required: several factors affect this (See case study); specify key outputs- reflect the agreed recommendations of the planning stage here
- Invitation- newspaper
- Unsolicited- how did it originate?- from DDP or New and Innovative
- Evaluation and Selection – responsiveness test, scoring criteria is context specific, Use of Weighted Technical and Financial Score is generally limited, etc

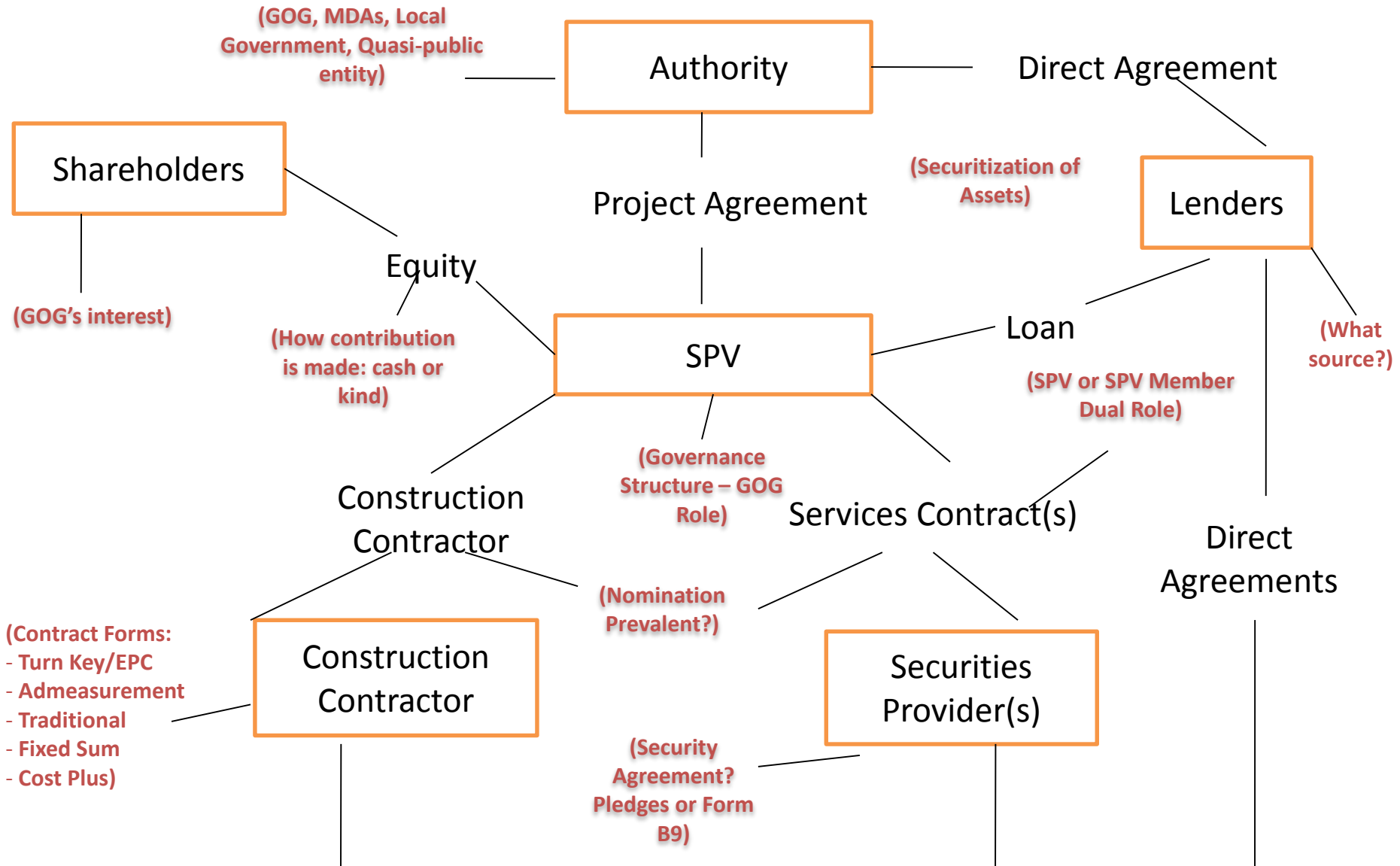
Typical PPP Procurement Cycle

- Intention To Award – eg pending Parliamentary or approval of DA
- Negotiations
- Award
- Contract Management – often in the form of a team (must be very strong)
- Contract Management (Useful if a matrix is developed)
- Reversion to DA or GoG, etc (the FIMS case)
- Post Contract Evaluation / Case Study/Lessons (AVRL)
- Lessons lead to policy revisions etc

Typical PPP Procurement Cycle

- WHY THE DIFFERENCE
 - PRIVATE SECTOR MOTIVE
 - PUBLIC SCRUTINY
 - PUBLIC INTEREST eg Tariff and Fee Fixing Resolution Impact
 - REVERSION EFFECT
 - COMPLEXITY and AGREEMENT INTENSIVENESS
 - ETC

PPP Infrastructure Multiple Contract Scenario



BEFORE DECIDING TO PROCEED ON PPP ROUTE

- Some Good Strategies
 - Decide whether to do “Market Sounding” (No Commitment)
 - Approval required to start market sounding
 - Depending on the “market response” – decide whether public procurement or PPP
 - Cost / Budgeting / Sponsorship / Financial Implication
 - Who bears the cost of Feasibility Study
 - Approval/review requirements – factor into the time projections

Document Preparation Solicitation Plan and Solicitation Documents

- Request for Approval of the Solicitation Process
- Market Sounding NOT same as Expression of Interest
- Determine if EOI is necessary (often not necessary)
- Request for Proposal Following Expression of Interest

INVITATION/RFP

- Contents of a PPP RFP
- Adverts open
- Restricted?- unless following EOI used for prequalification or “swiss challenge

Unsolicited Proposals And Related Matters

- Characteristics Unsolicited Proposals- original, innovative, etc
- Limitations regarding government support
- Non-use of Public Funds
- Adverts open
- Restricted?- unless following EOI used for prequalification or “swiss challenge

General Matters Related to Solicitation

Pre-Bid Meeting

- Submission and Opening of Bids
- Records of Clarification
- Confidentiality of Proposals
- Bid Securities

Evaluation

- responsiveness test
- scoring criteria is context specific
- Use of Weighted Technical and Financial Score is generally limited
- Ad Hoc Evaluation Panel

All “Responsive Bids” To Be Evaluated

- Time For Completing Evaluation
- Certainty of Evaluation Criteria
- Prohibited Criteria In Evaluation
- Due Diligence

APPROVAL TO PROCEED AFTER EVALUATION

- Negotiation – preparing for negotiations; negotiation team; key ticket items; non-negotiable issues
- Confidentiality
- What if it delays- bid validity issues
- Unsuccessful Negotiation – what to do when negotiation fails

- Making Changes Requested By PPPAC/Attorney-General
- Where Parliament Is The Final Approval Authority
- Concluding on Post-Contract Management Issues In the Negotiation
- Agreeing on Definition of “Financial Close”
- Setting Time Limit and CPs for Financial Close
- Completing Record Of Selection And Award Proceedings

Award

- Formal Award and CPs
- Nature of award
- Public information
- “Political” statements
- Transitional arrangements- impact of/on other entities

- **Contract Management**
 - Governing Law of PPP Agreements
 - Matters Related to Ownership of Assets in a PPP Project
 - Acquisition of rights related to project site
 - Payment of Compensation
 - Lender's Lien and "step-in' rights

Complaints Mechanism Settlement of Disputes

- Right to Review
- PPP Complaints and Appeals Panel
- Complaint Bond
- Impact of Dispute on Projects During Construction
- Disputes Involving Customers Or Users
- Disputes between Contracting Entity and Private Sector Party After The Contract Entry into Force
- Suspension of Solicitation Proceedings Following Complaint

Miscellaneous Matters of Importance

- Government Support for PPPs
- The PPP Project Development Fund
- Viability Gap
- Infrastructure Fund
- Municipal Finance Entity (hopefully)
- Loan Agreements and Impact on Public Assets and security

Etc

PPP Special Purpose Entities To Be Incorporated In Ghana

- Local Content Requirement
- Margin of Preference
- Coordination With Other Entities
- Contracting Entities Equity Participation in Special Purpose Entities Set Up For PPP Projects
- Equity Limit Not To Apply To Strategic National Projects

“Transitional Provisions”

- Validity Of PPP Agreements And On-going PPP Processes Upon The Coming Into Force of the Act
- PPP Approval Committee
- Waiver or compliance with 180 day period

Reversion To GoG/MMDA

(FIMS and AVRIL cases)

- Post contract evaluation

- Business lobby issues
- Political Pressure- from either election or business origin
- The Cost and Scope of Feasibility Study
- Output Specifications- speed, level of service, rate of return
- VFM- where is the PSC Comparator
- The need to be very professional and open in the “solicitation process”

Case Study– Accra Kumasi Dualisation

1999 – 2015 : 16 Years

- Sole source; TABCON
- Sole source: ARTERIAL
- COMPETITIVE – 33 responses to EOI
- CURTAILED
- TABCON CLAIM (JUDGEMENT DEBT)
- Unsolicited proposal: ARTERIAL; PARLIAMENT ROUND 1
- ARTERIAL – PARLIAMENT ROUND 2
- TRANSCATION ADVISOR
- ON-GOING

MINISTERS

Edward Salia : MRT

- Stephen Akorli
- Dr. Anane - Chapter 1
- Mr. Agyapong
- Dr. Anane- Chapter 2
- Hon. Joe Gidisu, MP
- Alhaji Amin Amidu Sulemana, MP
- Alhaji Inusah Fuseni, MP

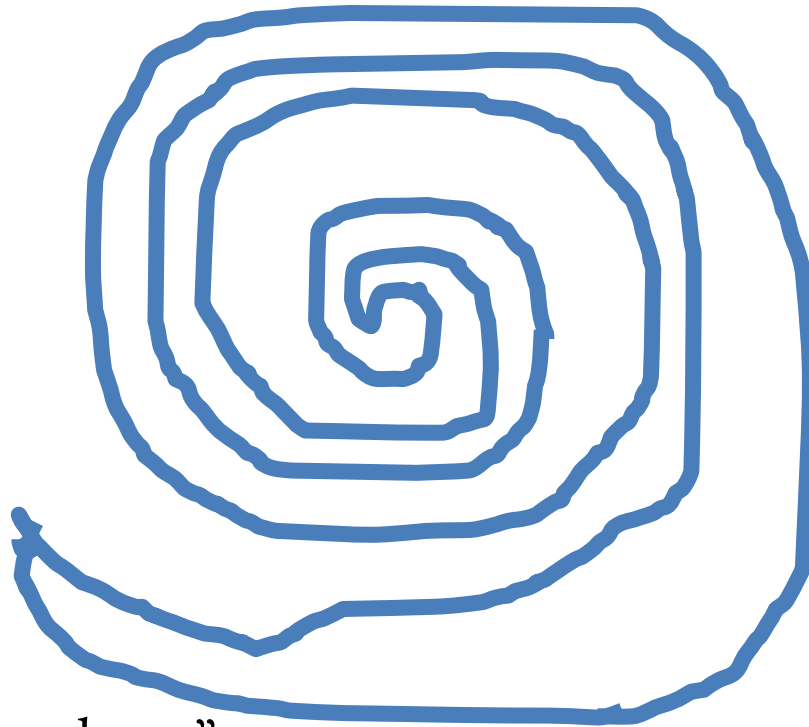
SOME MAJOR CAUSES

- Failure to influence to follow due process – political influence and business lobby
- Start: Stop: Start syndrome resulting from change of ministers
- Lack of coordination on GoG's part
- “Powerful” politicians seeking to bypass process and win
- Internal factions within governments
- Wrong signals to investors from politicians
- Absence of clear “outputs” leading to “gaps” in feasibility etc

- Failure to follow specialist advice
- Rush to enter into “harmless” MOUs
- Failure to balance private sector “profit” motive with public sector’s “public interest” agenda

The “Win-Win” MoU Example

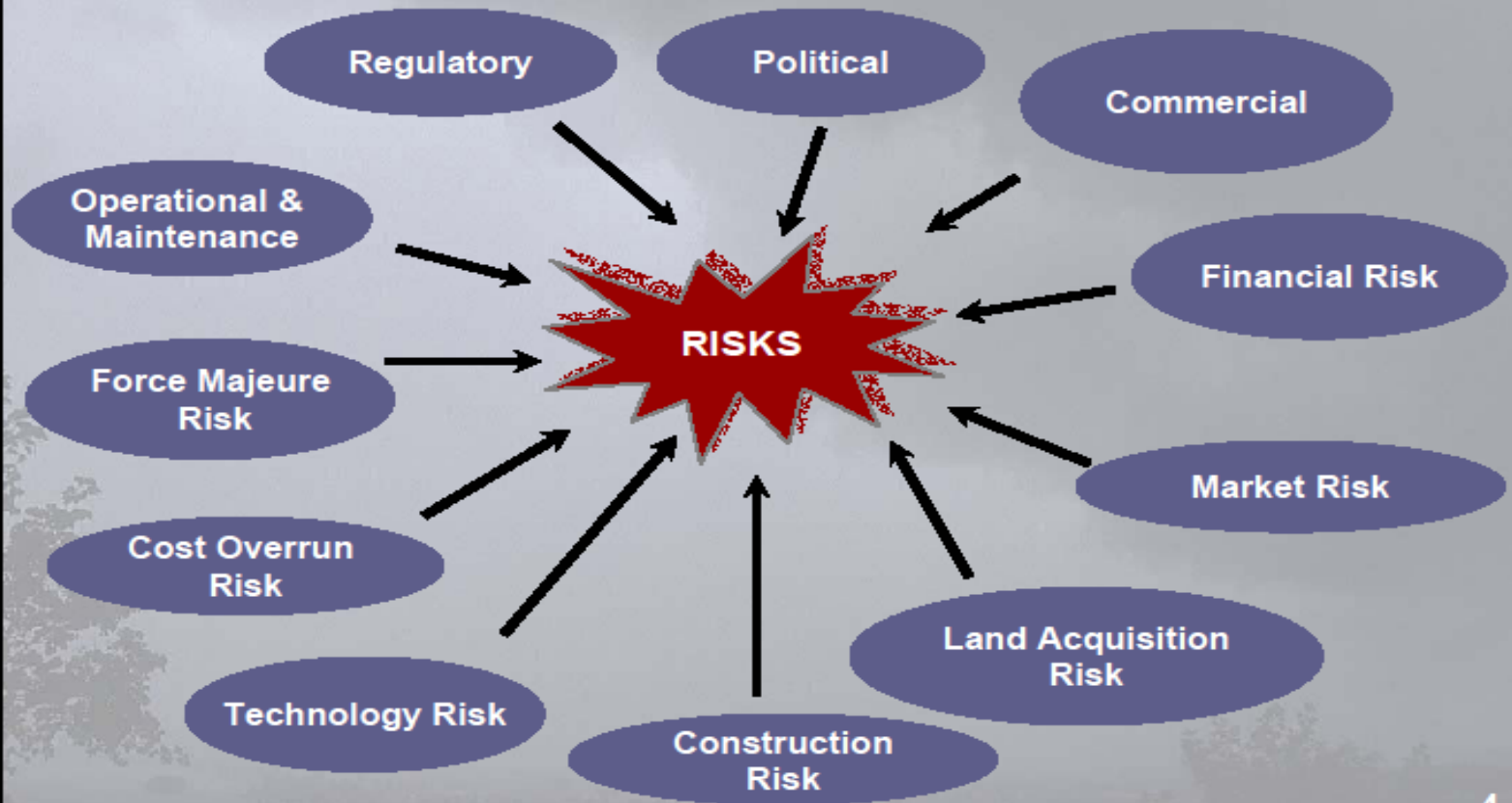
- The double-edged



- The “MOU at large”
- Competing MOUs
- The Resultant \$8m claim

LESSON- ALWAYS BE MINDFUL OF THE
RISKS and ENSURE THEY ARE COVERED

Risks in PPP Projects



REMEMBER IT IS A PARTNERSHIP AND
EACH PARTNER HAS AN OBJECTIVE

Private Sector's Goal- Profit, Profit, Profit

*Public sector Goal- Public Interest, Public Interest,
Public Interest*

Thank You