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Public Private Partnership: A Case Study on Ghana's Roads Sector

Traditionally, it has been the responsibility of the State to provide public amenities with limited involvement by the private sector. Over the years, the revenue available for such projects steadily declined which called for the need to explore fiscally prudent alternative sources of funding such as Public Private Partnerships (PPPs). In 2011, the Ministry of Finance and Economic Planning (MOFEP) published the National PPP Policy (the "Policy") as the first step to establish a PPP regime. In 2012, the World Bank committed to funding Ghana's PPP program.¹ These developments formed the foundation for the commencement of various PPP Projects in Ghana. It further culminated in the recent passage of the Public Private Partnership Act, 2020 (Act 1039).²

PPP holds numerous advantages as a solution for the State to provide public infrastructure and services. Primarily, it shifts the burden of risk to the private party. Additionally, the arrangements are often output-based. In this regard, the State dictates the output standards but does not define how the contracted party will achieve

those standards. This enables the State to derive the best value as the concessionaire is contractually bound to comply with the standards set. Deferred repayment arrangements for PPP projects over the life of the concession period are also one of the main features that make it beneficial for the State.

Despite its numerous benefits, using PPP arrangements comes with potential challenges. Primarily, the process from project conception through development, procurement, and finally to commercial close, can be time-consuming. Private parties also experience difficulty in securing adequate financing for PPP projects. Again, due to the nature of PPP projects, local firms lack the technical capacity required to undertake Transaction Advisory services. These features of Ghana's PPP regime serve as a deterrent to potential investors. Notwithstanding the challenges, there is a high level of national commitment towards establishing a regime best suited for Ghana, and PPP continues to evolve through ongoing projects and legislation.

Past sectorial projects are instructive in the development of PPP. It is a useful venture to study these projects as precedents to gain practical insight. In this Article, we discuss a case study of a PPP project in Ghana's Road Sector.

A Case Study of the Accra- Tema Motorway and Extensions Project (the "Project")

Status: Ongoing (Negotiations Stage)

This is one of the earlier PPP Projects explored in Ghana. The scope of work consists of three distinct road links that function together to move traffic between Tema Port, Accra and the surrounding urban and peri-urban areas. The 27.7 km project is defined as follows:

- 19.5km Tema Roundabout to Tetteh Quarshie Interchange;
- 5.7km Tetteh Quarshie Interchange to Apenkwa Interchange; and
- 2.5km Apenkwa Interchange to Neoplan Junction

¹ <https://projects.worldbank.org/en/projects-operations/project-detail/PP1255958>

² https://www.researchgate.net/profile/Doreen-Robert/publication/319231958_Public-Private-Partnership_in_Ghana/links/55ccc0d807e99b0dc401e5b/Public-Private-Partnership-in-Ghana.pdf

The Project is spearheaded by Ministry of Roads and Highways (MRH) through the Ghana Highway Authority (GHA) as the contracting Entity.

The project was developed using the Design, Build, Finance, Operate and Maintain (DBFOM) model. This is a modified form of a Build, Operate, Transfer (BOT) arrangement and is typically accompanied by a contractual structure that includes; a Shareholders' Agreement, Lending Agreements, Operation and Maintenance Agreements, Construction Contracts (For example, FIDIC Contracts), among others.³

Ing. Philip Lartey, Director in charge of PPP at the Ministry of Roads and Highways, provided insight into the Project development process, detailing the process of the Project as follows:

1.Appointment of a Transaction Advisor

A Transactional Advisor is key to the development of PPP transactions. The tasks of a Transactional Advisor include the development of the technical, financial, and legal aspects of the Project. The

appointment process for a Transactional Advisor is thorough because it is a crucial role in the PPP process. In the case of the Project, the appointment process took approximately a year.

2.Pre-Feasibility

The Technical Advisor undertook a Pre-feasibility study. In this instance, the contracting authority was presented with potential options for the Project, to select the most desirable option. A Pre-feasibility study ensures risks are identified, allocated, and mitigated effectively. It provides the contracting authority with sufficient information to proceed and forms the basis of negotiations. It also minimizes the transaction costs of the Project and avoids unnecessary delays.⁴

3.Feasibility Study

The Technical Advisor conducted a feasibility study on the selected option. This entailed producing detailed analysis and gleaning necessary information to establish the technical characteristics of the Project, project capacity, preliminary design of proposed facilities with their related capital,

and annual project costs. It also includes preparing a draft contract for the Project and preparing a Request for Proposal (RFP).

4.Market Sounding/ Marketing the Project

The Contracting Entity marketed the Project through stakeholder engagements with the Investor Community to solicit ideas and suggestions for the Project. The outputs from this engagement were utilized in finalizing the feasibility study.

5.Pre- Qualification

The pre-qualification process consists of preparing and issuing the Request for Qualifications (RFQ). The tender process is also advertised and launched. The information received from applicants is evaluated to select a group of qualified companies and consortia that will be invited to submit proposals. Of the twenty- three firms that purchased the prequalification dossier, nine firms were shortlisted to the next stage.

³ <https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos>

⁴ <https://pppaf.org/sites/pppaf.org/files/documents/toolkits/highwaytoolkit/6/pdf-version/5-31.pdf#:~:text=for%20a%20PPP%20feasibility%20study%20%20the%20requirements%20s,with%20their%20related%20operatio,band%20annual%20operat%20costs>

6. Bidding Process

The Contracting Authority requested technical and financial proposals from the nine applicants. The bidding process formally begins with the issuance of the RFP documents to the shortlisted bidders. Four firms submitted proposals in response to the RFP and further examination and evaluation of the bids resulted in a single preferred bidder that met the qualifications.⁷

7. Negotiations

Technical, Financial, and Legal Negotiations with the preferred bidder commenced following approval by MOFEP. Negotiations were halted as the financial offer from the preferred bidder was deemed unacceptable to the Government. In line with the PPP Act 1039, the Government is exploring other suitable funding sources on the international market.

Generally, upon conclusion of this stage, the parties will execute agreements, and the construction work will commence. The next stage will entail management of the contract until its termination.

At every stage in our case study, approval

was required and obtained from the relevant institutions such as the Ghana Highway Authority, the PPP Approval Committee of the MOFEP, the World Bank and the Ministry of Roads and Highways. An overall local content of at least 40% was a prerequisite for the Project, and the preferred bidder was also required to form a Special Purpose Vehicle (SPV) to execute the Project.

The interventions of Act 1039 have served as useful tools in facilitating this Project especially in the provision of avenues for appropriate government assistance. The Act will also function as a formal guide to the remaining phases of the Project.

Beyond Act 1039

The passage of Act 1039 heralds the advent of a statutory regulation of PPP processes in Ghana. Although significant improvements are anticipated, certain mechanics of the Act may restrict or hinder the proper development of PPPs in Ghana.

For instance, the second schedule of Act 1039 only defines nine arrangements that may be explored, although there are other

globally recognized arrangements. Contracting authorities are permitted to modify arrangements as needed upon approval of the Minister of Finance. Another area of growing concern is unsolicited proposals.⁸ There is the concern that private parties are increasingly resorting to unsolicited proposals, now reflected under Act 1039, as a means to circumvent the competitive bidding process.

Overall, the benefit of the passage of Act 1039 to Ghana's PPP regime outweighs the shortcomings. It provides for the development, implementation, and regulation of arrangements between contracting authorities and private parties to provide infrastructure and services. It introduces structure to the institutional arrangements in the regulation of PPPs. It is safe to conclude that the PPP regime of Ghana is evolving as a key vehicle and viable prospect for private investment, supported by the State's legislative commitment to promoting these partnerships.

⁷ <https://ppkknowledgelab.org/guide/sections70-qualifying-bidders>

⁸ Act 1039, Section 54.

⁵ <https://ppkknowledgelab.org/guide/sections70-qualifying-bidders>

⁶ https://highways.gov.gh/publication_accr_tema_motorway_extensions-project-project_id-p125595



SNAPSHOTS OF GHANA'S 2021 MID-YEAR BUDGET REVIEW

EMPLOYMENT PROSPECTS

Government will focus on the private sector by accelerating competitive import substitution and export expansion to generate sustainable jobs for persons under 35 years who make up about 75% of the population.

New programs will be introduced and existing ones scaled up and refocused to meet the aspirations of the youth.

FISCAL PROSPECTS

Government will:

Pursue macro-fiscal policies to restore stability, growth and return to the fiscal thresholds by 2024;

Establish the Ghana Enterprises Agency to anchor a new age of entrepreneurship, and job creation;

Revamp the energy sector to ensure stable supply of power; and

Implement Phase II of the Ghana CARES "ObaatanPa" programme

TAX DEVELOPMENTS

Ghana Card PIN has been adopted in replacement of Tax Identification Numbers (TIN);

Establishment of a centralized payment platform to pay taxes among others- "www.Ghana.Gov.com"; and

The Ghana Revenue Authority (GRA) has transitioned to a paperless system.

FIGURES



Real GDP growth- Quarter 1



Inflation Rate- End of June



Fiscal Balance (GDP)-
End of June



Primary Balance (GDP)-
End of June

IN OTHER BUSINESS NEWS.

SUNREF Launches Multi-Million Green Finance Programme⁹

Sustainable Use of Natural Resources & Energy Financing (SUNREF), a green finance label developed by l'Agence Francaise de Developpement (AFD) with support from the European Union (EU), has launched its energy-financing programme in Accra. The programme will offer a credit line of €30 million from AFD and €4 million from the EU, provided to local partner banks for structuring green investments to help various entities and households seize green finance and ecological transition opportunities.

Numbers Swapped¹⁰

Social Security and National Insurance Trust (SSNIT) requires its contributors to replace their scheme identification numbers with the Ghana Card identification numbers. This took effect from 28th June, 2021. The process of merging the two identification numbers will continue until 31st December, 2021. This forms part of Government's efforts towards achieving a digital economy.



Central Bank Goes Gold¹¹

The Bank of Ghana (BoG) has recently launched its domestic gold purchase programme as part of its efforts to build its foreign exchange reserves. This would lead to a route to formalize and improve the ability to sell formal gold markets and thereby reduce their vulnerability to illegal actors in the domestic and international gold supply chains.

Maintaining the Status Quo¹²

The Monetary Policy Committee of the Bank of Ghana has assessed that the risks to inflation and growth are broadly balanced and has therefore decided to maintain the policy rate at 13.5%.

⁹ <https://thebfonline.com/12/07/2021/sunref-launches-multi-million-green-finance-programme/>

¹⁰ <https://www.ssnit.org.gh/news/ssnit-adopts-ghana-card-id-changeover-from-june-28-to-dec-31/>

¹¹ <https://www.bog.gov.gh/wp-content/uploads/2021/06/Launch-of-BOG-Gold-Purchase-Programme-Governors-Remarks.pdf>

¹² <https://www.bog.gov.gh/wp-content/uploads/2021/07/MPC-Press-Release-July-26-2021.pdf>

LEGISLATIVE CORNER.

The Insurance Act 2021 (Act 1061)

The Insurance Act 2021 (Act 1061) has replaced the Insurance Act 2006, Act 673. The new Act re-establishes the National Insurance Commission and provides for the regulation and supervision of the insurance market. The Act seeks to align the insurance market of Ghana with international standards and best practices.

Development Finance Institutions Act, 2020 (Act 1032)

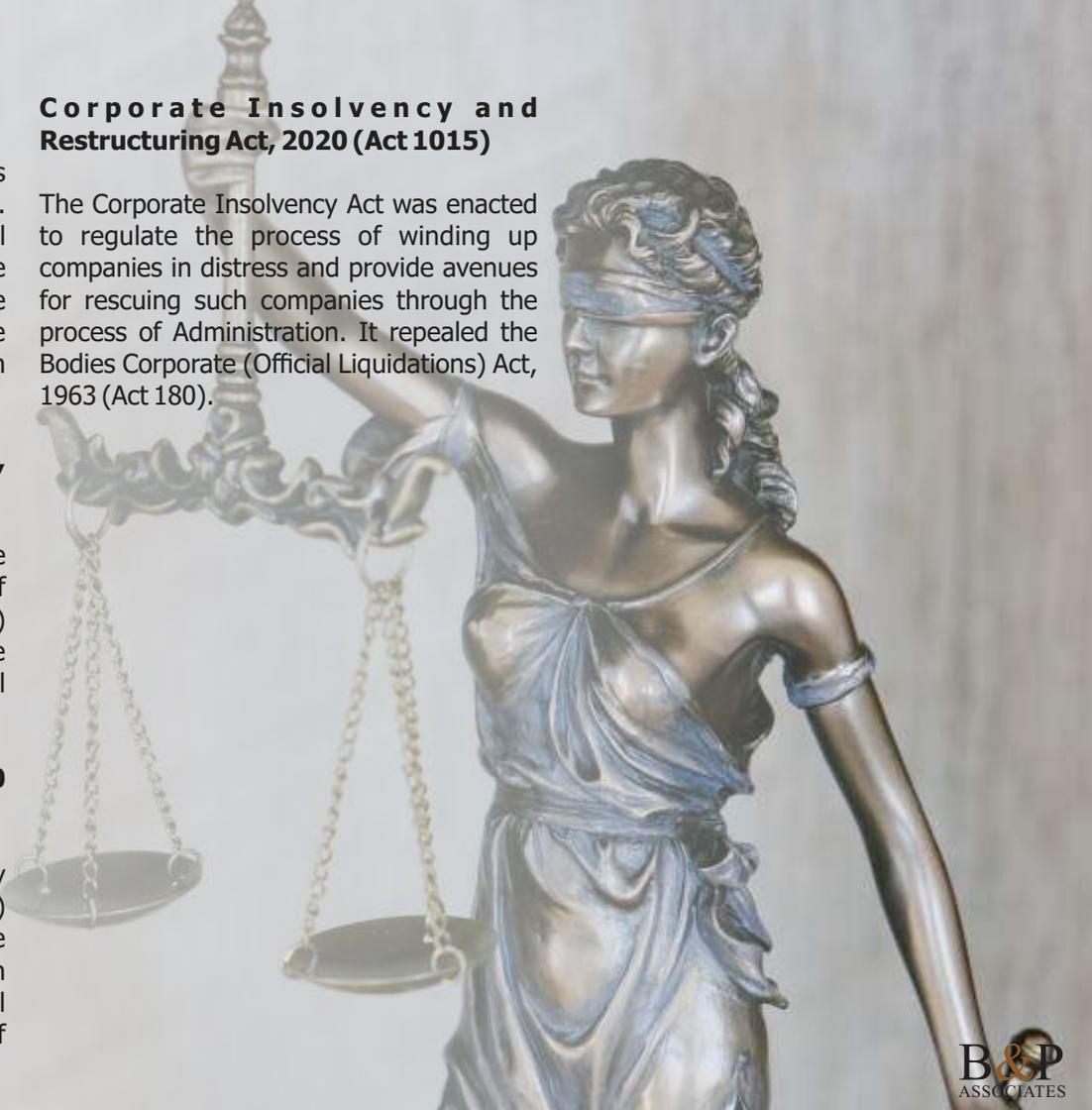
Act 1032 provides a legal framework for the licensing, regulation, and supervision of Development Finance Institutions (DFIs) within Ghana. It seeks to offer innovative mediums of financing and generating capital for investors.

Anti – Money Laundering Act, 2020 (Act 1044).

The enactment of the Anti- Money Laundering Act, 2020 (Act 1044) consolidates the laws relating to the prohibition of money laundering within Ghana. It establishes the Financial Intelligence Centre to assist in the combat of money laundering.

Corporate Insolvency and Restructuring Act, 2020 (Act 1015)

The Corporate Insolvency Act was enacted to regulate the process of winding up companies in distress and provide avenues for rescuing such companies through the process of Administration. It repealed the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180).



WHO's WHO?



Claudia Salomon has been appointed the President of the International Chamber of Commerce (ICC) International Court of Arbitration. She is the first woman to be appointed President of the ICC Court in its almost 100-year history. Ms. Salomon has served as Co-chair of the ICC Commission on Arbitration and ADR Taskforce on Financial Institutions and International Arbitration.



Ing Philip Lartey is the Director in charge of Public Private Partnerships (PPPs) at the Ministry of Roads and Highways. He is an Engineer with over 32 years of experience in the Roads sector of Ghana. In his capacity as Director, Ing. Lartey has been instrumental in the implementation of various PPP projects in the Roads and Highways Sector. He contributed to the passage of the Public Private Partnerships Act, 2020 (Act 1039) and continues to champion the structuring and establishment of PPPs in Ghana.

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About B & P ASSOCIATES

B & P ASSOCIATES is ranked as a Legal 500 Europe, Middle East & Africa (EMEA) Leading Law firm. We are a Corporate and Commercial legal practice and consultancy, with an excellent reputation, based in heart of Accra. The Team is highly regarded for its cross-border legal expertise, responsiveness and commitment. We provide business-oriented legal advice across a range of sectors, to both local and international clients. For more information, visit us at www.bpaghana.com to learn more about what we do.

This publication may provide a summary of legal issues but is not intended to give specific legal advice. If you require legal advice, please speak to a qualified lawyer, which may include a qualified member of our legal team at B&P ASSOCIATES.