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PUBLIC-PRIVATE PARTNERSHIP ACT: AN ANALYSIS OF THE 2023 AMENDMENTS AND THEIR IMPLICATIONS FOR INFRASTRUCTURE DEVELOPMENT

NDIGWAKO, Joel[1]
Senior Legal Officer,
National Housing Cooperation (NHC)
P.O Box 2977 Dar Es Salaam, Tanzania.

ABSTRACT

This article presents a comprehensive analysis of the 2023 amendments to Tanzania's Public-Private Partnership (PPP) Act and their implications for infrastructure development. Public-Private Partnerships involve collaborations where private sector entities undertake various roles, such as renovation, construction, and management of facilities, in exchange for financial compensation and benefits. The PPP Act, originally enacted in 2010, is the principal law regulating such partnerships across multiple sectors in Tanzania. The 2023 amendments reflect the government's ongoing efforts to position Tanzania as a favorable investment destination by refining the legal framework governing PPPs. Key amendments include the introduction of strategic projects, enhanced definitions of critical terms such as Special Purpose Vehicle (SPV) and Strategic Project, mandatory prefeasibility studies, and a streamlined project evaluation process. Additionally, the amendments introduce significant legal clarifications and financial incentives aimed at attracting private sector investment, including tax benefits and government guarantees. The legal implications of these amendments are far-reaching, enhancing clarity, transparency, and governance within the PPP framework. By facilitating efficient project implementation and fostering collaboration between public and private sectors, these changes aim to bolster investor confidence and promote sustainable development. This article delves into the practical challenges and strategic benefits associated with the amended PPP Act, offering insights into its potential impact on Tanzania's infrastructure landscape.

[1] LLM (LAM) Candidate at the Open University of Tanzania, and the Senior legal Officer at NHC –Tanzania.

Key Words: *Implications, Infrastructure, amendments, government, strategic project*

1.0 Introduction

Public-Private Partnerships (PPPs) involve collaborations where private sector entities undertake the renovation, construction, operation, maintenance, and/or management of facilities, either wholly or partially, according to specified output criteria.[2] In this arrangement, the private entity assumes associated risks over an extended period and, in exchange, receives benefits and financial compensation based on agreed terms.[3] The PPP Act, was enacted in 2010, serves as the principal law regulating public-private partnerships (PPPs) and associated affairs in Tanzania. It primarily addresses initiatives across sectors including agriculture, exploration and mining, information and communication technology (ICT), natural resources, tourism, and energy. The Tanzanian Public Private Partnership (Amendment) Act (PPP Amendment Act), which modifies the Public Private Partnership Act (PPP Act), came into effect on 14 July 2023. These amendments reflect the government's ongoing efforts to actively promote Tanzania as a favorable investment location.

In Tanzania, most PPPs take the form of concession agreements primarily for operating existing enterprises, with limited provisions for rehabilitation and new investments. Notably, Faith Based Organizations (FBOs) have successfully implemented PPPs in education, health, and water sectors for many years.[4] However, in other sectors, PPP performance has been mixed, often attributed to project complexity and a lack of clear guidelines defining criteria for public-private partnerships.

Public-Private Partnerships (PPPs) have emerged as a vital tool for advancing infrastructure development and enhancing the delivery of public services.[5] Recognizing their significance, Tanzania has taken steps to refine its legal framework governing PPPs to ensure more efficient and effective collaborations between the public and private sectors. Central to the amendments is the goal of striking a delicate balance between encouraging private sector investment and protecting public interests. By refining the legislative framework, Tanzania aims to attract more

[2] Zhao, J., Liu, H. J., Love, P. E., Greenwood, D., & Sing, M. C. (2023). Value for money assessments for public-private partnerships: Characteristics, research directions, and policy implications. *Developments in the Built Environment*, 100246.
[3] Quan, X., & Solheim, M. C. (2023). Public-private partnerships in smart cities: A critical survey and research agenda. *City, Culture and Society*, *32*, 100491.
[4] Chileshe, N., Kavishe, N., & Edwards, D. J. (2023). Identification of critical capacity building challenges in public-private partnerships (PPPs) projects: the case of Tanzania. *International Journal of Construction Management*, *23*(3), 495-504.

[5] Paul, P. (2023). Public Private Partnership Model Interventions for Enhancing Primary Education Quality: A Case Study of Kilimanjaro Region, Tanzania. *East Africa Journal of Social and Applied Sciences (EAJ-SAS)*, *5*(1).

private investment into critical infrastructure projects while ensuring that these projects align with national development objectives and uphold the public good.

1.1 Comparison of the PPP Act and the PPP Amendment Act

The amendments to the Public Private Partnership Act Cap. 103 (PPP Act) introduced through the Public Private Partnership (Amendment) Act No. 4 of 2023 (PPP Amendment Act) include significant changes to various sections of the original Act. Section 2 of the amended Act now allows for special arrangements, known as strategic projects, in Tanzania, subject to Cabinet approval and prior vetting by the Attorney General.[6] This change expands the scope of projects that can be undertaken under PPPs, promoting more strategic initiatives.

In Section 3, the PPP Amendment Act introduces crucial definitions that were previously absent. Key terms such as Special Purpose Vehicle (SPV), Standard Document, and Strategic Project are now clearly defined.[7] An SPV is a private company formed by a successful private party to implement a PPP project, which may include public entities as members with limited liabilities. Standard Documents include standard requests for qualifications, proposals, and PPP agreements. Strategic Projects are determined by the national planning authority, providing clarity and standardization in the PPP process.

Section 4 of the amended Act mandates that contracting authorities submit prefeasibility studies for potential PPP projects at the start of each budget cycle, ensuring alignment with national development priorities. These studies must be approved by the respective Minister and analyzed by the PPP Centre, which then shares the analysis with the Public Private Partnership Steering Committee.[8] This change enhances the strategic planning and evaluation of potential projects. Furthermore, Section 5(2) now sets a strict thirty-day timeline for the PPP Centre to analyze all relevant documents, ensuring timely project assessments.[9]

Other significant changes include the introduction of Section 7B, defining public funding as government financial support related to PPP projects, and Section 9(1)(d), which requires contracting authorities to submit quarterly implementation reports. Section 15 grants the Minister power to exempt certain projects from competitive bidding under specific conditions, and Section 18A requires private parties to establish an SPV before signing a PPP agreement.[10] Section 22 revises the dispute resolution mechanism, allowing for arbitration under Tanzanian law or international procedures. Finally, Section 23A now requires both mid-year and annual

[6] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 2.
[7] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 3(a).
[8] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 4(d).
[9] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 5(2).
[10] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 18A.

performance reports, and Section 28A establishes the primacy of the PPP Act in cases of legal inconsistency, ensuring a robust and clear legal framework for PPPs.

1.2 Legal Implications

1.2.1 Scope and Application of the Act

Initially, under the previous Act, provisions of the PPP Act, specific exemptions applied to agreements involving special arrangements for transporting natural resources not exploited within Tanzania, subject to approval by the Cabinet. Notably, this exemption encompassed projects like the East African Crude Oil Pipeline (EACOP). The PPP Amendment Act has repealed this exemption. In its place, a new provision states that the PPP Act does not prejudice the execution of agreements related to the development of strategic projects in Tanzania, provided such agreements have received Cabinet approval.[11] Prior to Cabinet consideration, these agreements must undergo scrutiny by the Attorney General.[12] This amendment explicitly applies to ongoing projects such as the EACOP and extends its interpretation to encompass other strategic projects, contingent upon adherence to prescribed vetting procedures and subsequent approval by the Cabinet.

1.2.2 Investment Incentives

A key aspect of the amendments to the PPP Act is the introduction of various incentives aimed at attracting private sector investment. The revised PPP Act now incorporates tax benefits as stipulated under the Tanzania Investment Act Cap. 38 (TIA), along with government guarantees and facilitation in capital acquisition. These provisions are designed to create an enabling environment for private sector engagement in strategic projects, thereby fostering economic development and infrastructural growth. It is noteworthy that the government guarantees specified within the amended PPP Act are limited to mining and petroleum projects. These guarantees encompass the unconditional transferability of profits, dividends, and loan payments in freely convertible currency, safeguarding investors against nationalization or expropriation.

Furthermore, they ensure fair and prompt compensation, with recourse to judicial or arbitral proceedings for the resolution of disputes, as outlined in Sections 28 and 29 of the TIA. These amendments represent a strategic effort to enhance investor confidence and stimulate private sector involvement in Tanzania's infrastructural projects.

[11] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 2.
[12] Ibid.

1.2.3 Streamlined Processes

The amendments to the PPP Act have effected substantial enhancements in project implementation and procurement processes, thereby streamlining operations and bolstering efficiency within Tanzania's development framework. These legislative modifications are designed to curtail project preparation times and optimize the utilization of resources, ultimately facilitating more expeditious and seamless project execution. By permitting direct procurement by contracting authorities, delays are minimized, ensuring that PPP projects are delivered to the public in a timely and efficient manner.

Section 4 of the PPP Amendment Act mandates the submission of prefeasibility studies at the inception of each budget cycle.[13] These studies, which must align with national development priorities and receive ministerial approval, expedite the evaluation and selection of projects. The PPP Centre is tasked with analyzing these studies and subsequently sharing their findings with the Public Private Partnership Steering Committee. This structured approach enhances project scrutiny, thereby enabling more informed and strategic decision-making.

In addition, the amendments to Section 5 impose strict deadlines on the PPP Centre for the analysis of prefeasibility studies, proposals, evaluation reports, and agreements.[14] The stipulated timeframe ensures that project evaluations are completed promptly, facilitating swifter project initiation and execution. This accelerated process is pivotal in ensuring that the benefits of PPP projects are realized by the public more quickly, thereby advancing national development objectives.

Furthermore, the amendments to Section 15 empower the Minister to exempt certain projects from the competitive bidding process under specified conditions, such as cases of urgency, exclusive rights, or intellectual property considerations.[15] This provision allows for a more efficient procurement process, particularly for essential projects where the competitive bidding process may otherwise introduce unnecessary delays. This flexibility is crucial for the timely and effective execution of strategic projects, ensuring that critical infrastructure needs are met without compromising procedural integrity.

1.2.4 Enhanced Clarity and Transparency

The introduction of new definitions under Section 3 of the PPP Amendment Act significantly enhances the legal clarity and transparency of the PPP framework. The explicit definition of "Special Purpose Vehicle" (SPV) ensures a well-defined structure for private entities involved in PPP projects, thereby facilitating smoother project implementation. By delineating the roles and

[13] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 4.
[14] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 5.
[15] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 15.

limitations of SPVs, the amendment mitigates potential legal ambiguities and aligns the operational dynamics of private parties with statutory requirements. This clarity is instrumental in fostering confidence among investors and stakeholders, thereby promoting a more stable investment environment.

The inclusion of the term "Standard Document" further underscores the commitment to uniformity and transparency within the procurement process.[16] By standardizing documents such as requests for qualifications, proposals, and PPP agreements, the amendment reduces procedural discrepancies and enhances the predictability of procurement activities. This standardization not only streamlines the administrative processes but also ensures that all parties adhere to consistent and transparent practices. Consequently, this fosters a fairer and more competitive bidding environment, which is essential for the integrity and credibility of the PPP process.

Moreover, the definition of "Strategic Project" as delineated in the amendment provides a critical framework for aligning PPP initiatives with national development priorities.[17] By clearly identifying projects of strategic significance, the amendment facilitates more effective decision-making and resource allocation. This strategic alignment ensures that PPP projects contribute meaningfully to the broader economic and developmental goals of the nation. The legal precision introduced by these definitions fortifies the governance framework of PPPs, thereby enhancing accountability, transparency, and the overall efficacy of the public-private partnership model.

1.2.5 Fostering Collaboration

The explicit definition of "Public Funding" in Section 7B of the PPP Amendment Act delineates the scope and nature of government financial support available for PPP projects. This clarification is pivotal in enhancing transparency and predictability, thereby encouraging greater private sector participation. By defining public funding to include government financial support that constitutes fiscal commitments or contingent liabilities, the amendment provides a clear framework for the financial backing that private investors can expect. This assurance of government support mitigates financial risks for private entities, thereby making PPP projects more attractive and feasible.

The new provisions within the PPP Act[18] also empower private entities to engage in more effective negotiations. By clearly outlining the parameters of public funding, private investors are better equipped to negotiate terms that are beneficial to both parties. This empowerment leads to more collaborative engagements where both public and private sectors can leverage their respective strengths. The resultant partnerships are not only more mutually beneficial but also

[16] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 3.
[17] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 3.
[18] Public Private Partnership (Amendment) Act No. 4 of 2023, section, 7B.

more resilient and adaptive to changing circumstances. This fosters a cooperative environment where the interests of both sectors are aligned towards achieving common developmental goals.

Furthermore, the clarity provided by the amendment ensures that public funding is allocated efficiently and transparently, thereby enhancing accountability. The explicit delineation of financial support mechanisms reduces ambiguities that could otherwise lead to disputes or inefficiencies. This legal clarity promotes a more structured and predictable financial environment, which is conducive to long-term planning and investment. By fostering a collaborative partnership framework, the amendment strengthens the overall governance and efficacy of PPP projects, ensuring that they deliver maximum value to the public while safeguarding private sector interests

1.2.6 Strengthening Governance and Oversight

The introduction of Section 9(1)(d) in the PPP Amendment Act represents a significant enhancement in governance and oversight of PPP projects. This provision mandates that contracting authorities submit implementation reports based on recommendations from the PPP Centre every three months. By imposing regular reporting requirements, the amendment establishes a systematic mechanism for monitoring project progress and ensuring adherence to approved plans. This enhanced reporting framework is essential in promoting transparency and accountability throughout the project lifecycle.

The requirement for implementation reports serves as a critical accountability measure, facilitating effective resource management and project governance. By regularly assessing and documenting project performance against established benchmarks, contracting authorities are better equipped to identify potential challenges early on and take corrective actions as necessary. This proactive approach not only mitigates risks but also enhances the overall efficiency and effectiveness of PPP initiatives.

Furthermore, the implementation reports mandated by Section 9(1)(d) uphold project integrity by providing stakeholders with comprehensive insights into project execution and outcomes. This transparency fosters trust among stakeholders, including the public, private sector partners, and regulatory bodies. It also reinforces confidence in the governance framework of PPP projects, ensuring that resources are utilized judiciously and project objectives are achieved in a timely manner. Ultimately, the strengthened governance and oversight facilitated by this reporting requirement contribute to the sustainable development and successful implementation of PPP projects, aligning with national development priorities and enhancing public sector accountability

1.2.7 Collaborative Dispute Resolution

The amendments to Section 22 of the PPP Amendment Act mark a significant evolution in the dispute resolution framework, departing from the previous constraints of exclusively applying Tanzanian law and limiting dispute resolution to domestic jurisdictions. Under the original PPP Act, disputes were restricted to negotiation, mediation, or arbitration within Tanzania, adhering strictly to Tanzanian legal provisions. However, the amended provisions now afford parties greater flexibility and accessibility to resolve disputes through international mechanisms, such as the International Centre for Settlement of Investment Disputes (ICSID) or bilateral/multilateral investment protection agreements.

In the event of disputes arising during PPP agreement implementation, the primary recourse remains negotiation aimed at achieving an amicable resolution. Should negotiations prove unsuccessful, the parties are empowered under the amended provisions to mutually elect arbitration as an alternative dispute resolution mechanism. This flexibility not only enhances the options available to parties for resolving disagreements but also reflects a more investor-friendly approach by aligning dispute resolution processes with globally recognized standards and practices.

By expanding the scope of permissible dispute resolution mechanisms beyond Tanzanian borders, the amendments promote international collaboration and provide assurances to investors regarding the fair and equitable treatment of disputes. This adaptation to international norms not only enhances the attractiveness of Tanzania as a destination for PPP investments but also fosters confidence among international stakeholders in the reliability and transparency of the dispute resolution framework. Ultimately, the amended provisions facilitate a more robust and resilient environment for PPP projects, ensuring that disputes are handled efficiently and fairly, thereby safeguarding the interests of all parties involved.

1.2.8 Legal Framework and Consistency

The introduction of Section 28A in the PPP Amendment Act establishes a crucial principle regarding the supremacy of the PPP Act in cases of conflicts with other laws pertaining to the development and implementation of PPP projects. This provision serves to fortify the legal framework governing PPP initiatives in Tanzania by unequivocally asserting the precedence of PPP Act regulations over potentially conflicting provisions in other legislative instruments.

By clarifying the primacy of the PPP Act, Section 28A instills consistency and coherence in the application of PPP regulations across various sectors and governmental functions. This ensures that PPP projects are executed in accordance with standardized legal principles, thereby minimizing uncertainties and discrepancies that could otherwise impede project implementation and undermine investor confidence.

Moreover, Section 28A provides a robust foundation for the governance of PPP projects by affirming the legal authority of PPP Act provisions in resolving any inconsistencies that may arise with other laws. This statutory clarity not only enhances the predictability of legal outcomes but also reinforces the integrity of contractual agreements and regulatory compliance within the PPP framework. As a result, stakeholders, including public authorities, private investors, and regulatory bodies, can operate within a structured and transparent legal environment that upholds the rule of law and supports sustainable development initiatives.

1.3 **Practical Challenges**

Implementing the amendments to the PPP Act, aimed at incentivizing private sector investment and improving operational efficiencies, presents several practical challenges that merit critical consideration.

Firstly, while the introduction of tax benefits, government guarantees, and capital assistance under the amended PPP Act aims to attract private investment, the actual implementation of these incentives can face hurdles. Practical challenges include ensuring clarity and accessibility of these incentives to potential investors, particularly those outside the mining and petroleum sectors eligible for specific government guarantees. Effective communication and dissemination of these benefits are crucial to encouraging broader private sector participation.

Secondly, despite efforts to streamline project processes through mandatory prefeasibility studies and strict timelines for evaluations (Sections 4 and 5), challenges persist in the execution phase. Delays may still arise due to bureaucratic inefficiencies, varying interpretations of regulatory requirements, and the capacity constraints of contracting authorities and the PPP Centre. Ensuring consistent adherence to streamlined processes across different projects and regions remains a significant implementation challenge.

Thirdly, enhancing clarity and transparency (Section 3) and fostering collaborative partnerships (Section 7B) are critical but require robust frameworks for stakeholder engagement and oversight. Challenges include balancing the interests of public and private sectors, maintaining transparency in decision-making processes, and effectively managing conflicts of interest. Building trust and ensuring accountability in collaborative ventures are ongoing challenges that necessitate rigorous governance mechanisms and continuous stakeholder dialogue.

Conclusion

The recent amendments made to the PPP Act mark a significant advancement in Tanzania's approach to fostering public-private partnerships (PPPs). These amendments are designed to enhance the attractiveness of Tanzania as an investment destination by streamlining regulatory processes, promoting efficient dispute resolution mechanisms, and providing tax incentives.

Such legislative changes are crucial in encouraging greater private sector involvement across vital sectors of the economy, thereby stimulating sustainable economic growth and development.

Firstly, the amendments aim to streamline the regulatory framework governing PPPs. By clarifying procedures and requirements for PPP projects, the government seeks to reduce bureaucratic hurdles and improve transparency. This clarity not only fosters investor confidence but also ensures that projects are implemented more smoothly and efficiently. Additionally, the amendments introduce mechanisms to expedite decision-making processes, enabling quicker project approvals and implementation, which is essential for attracting timely investments.

Secondly, the updated PPP Act emphasizes the establishment of effective dispute resolution mechanisms. Recognizing the importance of resolving disputes swiftly and fairly, the amendments include provisions for alternative dispute resolution (ADR) methods such as mediation and arbitration. These mechanisms aim to mitigate risks associated with project delays and uncertainties, thereby safeguarding the interests of both public and private sector stakeholders involved in PPP ventures.

Moreover, the amendments introduce tax incentives and other financial benefits to incentivize private sector participation in PPPs. These incentives may include tax breaks, exemptions, or favorable financing terms aimed at reducing the financial burden on private investors. Such measures are intended to make PPP projects more financially viable and attractive, thereby encouraging greater investment in critical sectors such as infrastructure, energy, and healthcare.

Generally, the recent revisions to the PPP Act underscore Tanzania's commitment to fostering a conducive environment for PPPs and promoting sustainable economic growth. By enhancing regulatory clarity, facilitating efficient dispute resolution, and offering financial incentives, the government aims to attract robust private sector participation and stimulate investments that contribute to the country's development goals. These amendments represent a strategic initiative towards leveraging private sector expertise and resources to address infrastructure gaps and promote socio-economic advancement across Tanzania.