

# Laying the Building Blocks

Strengthening Ethiopia's Public Private Partnership  
Legal Framework

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**Infrastructure development is an essential component for the sustainable, social-economic development of Ethiopia. Like other developing countries, Ethiopia has, however, continued to face challenges in achieving infrastructure development at a fast enough pace to meet the needs of its citizens. In 2011, the World Bank<sup>1</sup> estimated that Ethiopia has an annual infrastructure funding gap of 3.5 billion US dollars. These high upfront costs of infrastructure development have consequently stagnated electrification. An estimated 8700 MW-generating power plants will be needed between 2010 and 2020, requiring a doubling of generation capacity. Further, inadequate transportation infrastructure has stunted the current Rural Access Index at about 50%, and a lack of affordable housing falls short of the demands of a population of over 110 million.**

**The government of Ethiopia, in its development manifesto the 'Growth and Transformation Plan II'<sup>2</sup>, now replaced by the 2020 ten year National Development Plan, recognizes infrastructure development as pivotal to spurring economic growth and development in the country. Among the priority infrastructure development targets is an expansion in energy production, transmission and distribution networks, and expansion of transportation infrastructure and logistic services. The Covid-19 pandemic has placed additional strain on the Ethiopian government's domestic reserves and public budget, which have, predominantly, provided the funding for infrastructure development. This has increased urgency in leveraging alternative solutions to infrastructure financing. Private sector participation in infrastructure services has, therefore, become vital, as government sources alone cannot meet the infrastructure demand.**

Public Private Partnerships (PPPs) are one of the tools the government of Ethiopia has used to fill the infrastructure financing gap, in efforts to secure financing outside of traditional sources and to leverage the benefits of private sector involvement in infrastructure development. PPPs are a procurement option for delivering and managing public assets and services through contracts. PPPs can provide benefits to the government of Ethiopia, as they can play an important role in increasing the available funding for infrastructure and bring in expertise, technical capacity and experience in the building and operation of infrastructure projects. PPPs are defined, within the Ethiopian PPP Framework, as long-term agreements between a Contracting Authority and a private party in terms of which the latter undertakes to perform a public service, receives a benefit of compensation from the contracting authority or tariffs collected from users or

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<sup>1</sup> Forster V. and Morella E. (2011), Ethiopia's infrastructure: A continental perspective < <https://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5595> > accessed 1st April 2021.

<sup>2</sup> Growth and Transformation Plan II' (*Ethiopia*) < <https://ethiopia.un.org/en/15231-growth-and-transformation-plan-ii> > accessed 11<sup>th</sup> January 2021.

a combination of the two, and takes on significant risk arising from the performance of the public activity.<sup>3</sup>

## **The Public Private Partnership Framework**

In 2018, Ethiopia established a PPP framework which consists of the Public Private Partnership Policy, the Public Private Partnership Proclamation, a Directive issued to implement Public Private Partnerships, and the recently published Public Private Partnerships General and Sector Guidelines (2020). The PPP policy provides policy support for development of PPPs in key sectors of the economy including transportation and logistics, energy, water supply, and irrigation. The PPP Proclamation and Directive inter alia sets out rules and procedures for the identification, assessment, selection, prioritization, procurement and implementation of projects throughout the PPP life cycle. The PPP proclamation also establishes and identifies key institutions that are actors within the PPP framework including the Public Private Partnership Board, the Public Private Partnership Directorate General, and the Contracting Authorities.

Gaps, however, have remained in the framework for the implementation of PPPs under the PPP Proclamation and Directive. These gaps include mechanisms, processes and standards for the administration of PPPs, project initiation and appraisal, selection of private parties and the open bidding process, special and restricted methods of procurement, the participation of Contracting Authorities in the PPP lifecycle, procurement procedures for unsolicited proposals, and project implementation. Filling these gaps would ensure that the right projects are selected as PPPs, that they are developed, procured and managed in a transparent and efficient way, and that value for money is delivered. Importantly, it would signal to the market that the Ethiopian government's PPP programme is of high quality, as projects delivered with transparent processes and effective oversight are perceived as less risky and are more attractive to investors. There is, therefore, a need for regulations to fill the existing gaps and act as a bridge between the PPP proclamation and Directive. The PPP regulations would also facilitate institutional functioning within the legal framework and the delivery of the required results from the procedures provided for in the PPP Proclamation. To this end, the PPP Proclamation in Article 65 gives powers to the Council of Ministers to issue regulation for the implementation of the Proclamation (not issued to date).

## **The Office of the Public Private Partnership Directorate General and Oxford Policy Fellowship**

As stated above, one of the key institutions established by the PPP proclamation is the office of the Public Private Partnership Directorate General (PPPDG), within the Ministry

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<sup>3</sup> Public Private Partnership Proclamation No. 1076/2018

of Finance, which is mandated to centrally facilitate and manage PPPs. The PPPDG has three directorates which include the PPP Framework Management and Contract Support Directorate (FMCS), the PPP Project Development and Monitoring Directorate (PDMD), and the PPP Knowledge Management and Capacity building Directorate (KMCD). The FMCS directorate, in particular, is the legal function of the PPPDG and provides legal expertise in the management of the PPP framework and the implementation of PPP contracts. The FMCS directorate comprises a team of four legal experts including the Director of FMCS, two senior legal experts and one legal expert (previously junior legal expert).

As a fairly new office, at the time only just over a year old, the PPPDG (through the FMCS directorate) identified a capacity gap in the legal and public policy expertise available to it in supporting the implementation of the PPP proclamation and managing the newly established framework. To fill this gap, the FMCS approached the Oxford Policy Fellowship to embed a high calibre lawyer who would provide legal technical expertise to the PPPDG. In November 2019, an Oxford Policy Fellow was deployed to the Ministry of Finance PPPDG's office and commenced work in the FMCS directorate, joining an all-Ethiopian team of legal experts as the only foreign legal advisor. As part of a team of lawyers with a common vision to provide legal support to the PPPDG, the embedded Fellow hit the ground running, immediately being roped into the review and the negotiation process of the two maiden PPP solar photovoltaic (PV) projects Power Purchase Agreements (PPAs) and Implementation Agreements (IAs), located in Gad and Dicheto with a combined generation capacity of 250MW<sup>4</sup>. In doing so, the Fellow worked as part of the legal team led by the director of the FMCS directorate. The Fellow was also appointed, by the then State Minister of Public Private Partnerships, onto a four member editorial task team which reviewed and finalised the PPP General and Sector guidelines issued in 2020. Furthermore, the Fellow co-developed the scope of work and reviewed, together with senior and junior legal experts within the FMCS directorate, the Draft Government Support Measures Manual (which is geared towards strengthening the PPP Framework expanding on Article 47 of the PPP proclamation that provides for Government Support Measures).

## **The Road to a PPP regulations draft**

Recognising the gaps that exist in the legal framework for implementation of PPPs in Ethiopia, the two senior legal experts in the FCMS directorate, with input from the embedded Fellow and junior legal expert, prepared a scope of work outlining what would be required to fill the PPP regulatory gap. With the PPP Regulation scope of work in hand,

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<sup>4</sup> Jean Marie Takouleu, 'Ethiopia: Acwa Power secures Gad and Dicheto Solar Power Plant Contract', (Afrik 21, 19<sup>th</sup> September 2019) < <https://www.afrik21.africa/en/ethiopia-acwa-power-secures-gad-and-dicheto-solar-power-plants-contract/> > accessed 15<sup>th</sup> January 2021.

the PPPDG approached the International Senior Lawyers Project (ISLP), which provides pro-bono legal assistance to governments and civil society organizations. The latter connected the PPPDG to a senior lawyer, practising with an American firm Hunton Andrews and Kurth (HAK) who would assist in the drafting of PPP regulations as external consultants. On account of the onset of the Covid-19 pandemic, which led to numerous travel restrictions and lockdowns in several countries, the embedded Fellow was temporarily repatriated to her home country in March 2020, and the government of Ethiopia also directed that civil servants should only physically report to work on a rotational basis to restrict the numbers of people at work for a period of four months.

Despite the restrictions brought about by the pandemic, HAK remotely commenced its assignment based on the scope of work. The first draft of the PPP regulations was provided to the PPPDG at the end of June 2020. The Fellow, together with the two senior legal experts and the junior expert, reviewed and provided comments to contextualize the draft to fit the Ethiopian PPP context. After this review, the embedded Fellow became the focal person within the PPPDG office who communicated with the HAK team, set up virtual meetings, consolidated the Directorate's comments on the draft, led the presentation of comments, and proposed revisions on behalf of the PPPDG.

Having a remote team of legal consultants assisting in the regulation drafting process was not without its challenges. This is because HAK, which

is not licensed to practice law in Ethiopia, did not have full knowledge of Ethiopian laws, nor of the country's wider context. It was therefore necessary for the Fellow, together with the FMCS Directorate team, to have virtual meetings with HAK over a six month period to clarify comments provided on the draft. The remote drafting process also resulted in further challenges, consisting for example of comments that were 'lost in translation', which sometimes caused some delays in the delivery of the final legal work

*"Temwanani Karen Phiri, who has been an embedded Legal Fellow (recruited by the Oxford Policy Fellowship) for the PPP Framework Management and Contract Support Directorate, under the Ethiopian Ministry of Finance, has properly assisted the Directorate in preparing and reviewing PPP tender documents, reviewing draft PPP contracts, reviewing the PPP Guidelines and advising on PPP projects from a legal perspective and one of International standards. Moreover, the Fellow, together with the International Senior Lawyers Project (ISLP), has contributed a lot in drafting the Government support Manual and the PPP Regulations which are in the process of being approved and implemented.*

*Finally, the benefit and contribution of the Fellow, during her stay here for the past 18 months, was very crucial and important to our Directorate and I want to thank, again, OPF and Karen for their support and valuable contribution to our Government and the PPPDG & wish Karen all the best in her future career."*

**Endalkachew Asdegdig**

Senior Legal Expert PPP Framework Management & Contract Support Directorate, Ministry of Finance, Ethiopia

product. The embedded Fellow had, from the benefit of being in-country, a better understanding of country context and applicable local law (on account of interaction that the Fellow has had over time in posting with various legal issues that touch on different aspects of local laws). It is for the foregoing reason that the embedded Fellow was in a good position to act as the focal point of contact within the PPPDG because she understood from her time spent in the Ministry the gaps that existed in the law, the rationale behind the regulation and scope of work, and was able to bridge international best practice with local needs and context.

Despite the challenges, HAK, after taking onboard the comments from FMCS Directorate, undertook a comprehensive revision of the draft regulations. The revised draft was provided to the PPPDG in January 2021 for a final review, by which time the embedded Fellow had returned to Ethiopia. The final draft of the PPP regulations, which was finalised in March 2021, will now undergo review and comment by various stakeholders, including the Ministry of Finance Legal Directorate and the Attorney General, before they can be issued by the Council of Ministers.

## **Fostering development of PPPs and attracting infrastructure investment**

The draft PPP regulations, which are aimed at strengthening the PPP legal framework, will foster the development of PPPs in Ethiopia. Once published, the draft PPP regulations will clearly communicate the Ethiopian government's commitment to PPPs by creating more transparency, fairness, accountability and efficiency and, as a result, generate much needed private sector interest in Ethiopian PPPs, including in infrastructure development. As is, the two maiden long-term power purchase agreements, for solar PV projects signed in December 2019 by Ethiopia's state-owned electricity producer Ethiopian Electric Power (EEP), are estimated to eventually power 750,000 homes in Ethiopia. With the promulgation of the PPP regulations in sight, it is expected that Ethiopia will benefit from increased investor interest in the PPP projects approved in the pipeline of PPP projects, including a total of 18 power projects (five PPP hydropower projects, five wind power projects and eight PPP solar projects, which are anticipated to have a total generation capacity of over 5000 MW of electricity) while the balance of the projects include highway schemes<sup>5</sup>, an affordable housing project to build 17,000 houses in three phases, and a petrol depot with potential to store 300,000m<sup>3</sup> of petroleum products. These projects will bring immense economic benefits and will provide millions of Ethiopians with access to electricity, as well as providing affordable housing to thousands. They will also enhance Ethiopian competitiveness and economic activity through major transportation PPPs, including highway schemes and railway infrastructure, and the stabilisation of the petroleum product supply.

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<sup>5</sup> From Adama to Awash (125km), Awash to Mieso (72km), and Mieso to Dire Dawa (160km).

## Fellow reflection

The World Bank has identified poor regulatory frameworks, and inadequate legislation to comprehensively regulate PPPs, as one of the challenges faced by African countries in successfully implementing them. The COVID-19 pandemic, which has presented further implementation challenges for PPPs, due to their long-term nature, has highlighted a need to rethink how African countries approach PPPs. In this regard, correct conditions, including clear policies, strong regulations and transparency of risk, must exist in order to attract domestic and foreign private sector participation and to build resilient PPPs that not only curb negative environmental and social implications but can also withstand future crises. Ethiopia's move to strengthen its PPP legal framework by introducing draft regulations is, therefore, a very welcome development.

The Oxford Policy Fellowship's intervention of embedding a Fellow into a government ministry allowed me to not only lend my legal expertise to the conceptualisation and drafting process of the Ethiopian draft PPP Regulations, but also allowed me to contribute to various other tasks that will strengthen the Ethiopian PPP legal framework. As an in-country Fellow, I was able to not only familiarise myself with the Ethiopian PPP context and the various Ethiopian sector-relevant laws, but was also able to immerse myself in Ethiopian culture, including food, dance and clothing. I have also, during my time as a fellow, forged lasting relationships with my colleagues at the PPP Directorate and created strong professional ties with contacts in the development sector. The Fellowship experience will also be very useful in my future career aspirations in international development, because it has provided me with unique insight into the existing challenges and opportunities for the strengthening and development of PPPs in the context of a low income African country, such as Ethiopia, which offers lessons that can have a broader application to developing countries facing similar challenges.

Temwanani Karen Phiri, June 2021

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