PPP POLICY

Zanzibar Public-Private Partnership Policy

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PPP POLICY

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Glossary of Terms
ABBREVIATIONS

BLOT  Built Lease Operate and Transfer
BOT   Built Operate and Transfer
RGoZ  Revolutionary Government of Zanzibar
MoF   Ministry of Finance
PDF   Project Development Fund
PPP   Public-Private Partnership
SPV   Special Purpose Vehicle
ZBC   Zanzibar Business Council
1.0 INTRODUCTION

The Revolutionary Government of Zanzibar recognizes the need to finance and develop infrastructure as the demand for public services grows and the strains on government budgets increase. With continuing global economic growth and expansion, the role of government in the provision of public services and infrastructure has evolved, and more and more governments are looking to the private sector to participate in providing these services in partnership with the public sector. The Revolutionary Government of Zanzibar has determined that facilitation and encouragement of public-private partnerships as a way to enhance the provision of public services will be a key strategy going forward and has developed this policy framework to support PPP projects within the country.

2.0 BACKGROUND

Zanzibar has limited experience with the implementation of public-private partnership projects. Past experiences have made the Government reluctant to pursue additional PPP arrangements as a preferred way to develop critical infrastructure, particularly those services affecting social development. Through this policy, the Revolutionary Government of Zanzibar hopes to create a better understanding of the potential benefits that can be brought through public-private partnerships and to provide guidance to both the government and private sector for future PPP implementation.

3.0 DEVELOPMENT GOALS

The MKUZA II National Development Plan establishes the use of public-private partnerships as an important way to mobilize additional resources for development of public infrastructure and commits to ensuring that the proper legal, regulatory and institutional frameworks are in place to promote and implement PPP projects.

This policy framework provides the foundation for public-private partnerships that supports competitive and efficient delivery of services and creates a more conducive environment for PPP projects. Both the government and private sector can benefit significantly from public-private partnerships, but development of these projects must be done carefully, and both must work under clear rules to properly allocate the benefits, risks and responsibilities associated with such projects.
4.0 ZANZIBAR PPP PROGRAM OBJECTIVES

The Revolutionary Government of Zanzibar's main goal under its 'Results for Prosperity' framework is to eradicate extreme poverty and increase economic growth in Zanzibar. In support of this goal, under the National PPP Policy, the government has outlined the following as its main objectives for promoting public private partnerships:

- To expand coverage and improve quality of infrastructure services;
- To obtain capital to modernize & expand infrastructure;
- To achieve the efficiency & innovations typically associated with private sector management/operations;
- To transfer technology and knowhow from the private sector;
- To transfer risk that the private sector is better suited to manage;
- To obtain flexibility to: streamline procurement & operating procedures, structure innovative financing strategies & attract institutional investors, and attract & properly compensate competitive top management;
- To preserve and protect the environment;
- To provide high quality social services;
- To protect the heritage of Stone Town; and
- To concentrate the government's role on strategic planning, policy making, regulation and monitoring.

5.0 DEFINITIONS AND SCOPE OF PPP POLICY

5.1. Definitions

5.1.1. Public-Private Partnership

As defined under this policy, a public-private partnership is a contractual agreement based on shared objectives between the government and the private sector whereby the private sector is given the (often exclusive) right and agrees to provide a public service or public infrastructure traditionally provided by the public sector on behalf of the government, in exchange for specific economic benefits for a specified period of time. Although the private sector will deliver the service, the public sector retains its legal/public obligation to provide the public service/infrastructure.
A PPP agreement is different from traditional procurement and other such arrangements where a contractor is hired to provide a specific service to the government. This policy covers only public-private partnerships as defined above.

Under a PPP arrangement, the public sector maintains a significant role in the project either through purchase of the services provided, provision of public assets to be managed and improved by the private sector and/or through creation of the proper enabling environment for the PPP project to be successful. In any PPP arrangement, the government maintains its role as strategic planner, policy maker, and regulator.

Under a PPP, neither the government nor any government enterprise shall go beyond their obligation to provide basic infrastructure services. As such, this policy does not apply to purely private sector-driven enterprises where no government asset or public service is required.\(^1\)

As part of a PPP, the private sector commonly provides design, construction, financing, operation, and maintenance services, as well as technical expertise and managerial skills, and is compensated according to performance.\(^2\) The public sector takes the lead role in identifying and implementing PPP projects\(^3\), including conducting feasibility studies, mobilizing resources, risk sharing, monitoring and regulation. Risks must be identified and allocated to the party best able to bear and manage them at the lowest cost.

Ideally, PPP projects are financed by the private sector, however in some cases the Government or third-party donors participate in the long term financing structure, provides guarantees or other credit enhancements, or provides some form of capital contribution, when this offers value for money. Repayment sources for PPP projects can come entirely from service tariffs or user charges, entirely from Government budgets, or a combination of both.

### 5.1.2. Public Services

Under this policy, provision of public services refers mainly to infrastructure or infrastructure services that are typically provided by the government. Traditionally, these services include (but are not limited to) the provision of infrastructure such as roads, bridges, ports, airports, energy, water, waste water treatment, solid waste, municipal services, telecommunications and others. However, these services may also include social sectors such as healthcare, housing, and education under non-traditional project repayment mechanisms in which the repayment of the investment does not come from the user, but from the government or a third party.

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\(^1\) In other words, where the private sector would invest on its own, no government involvement should be present.

\(^2\) This compensation may include both a fixed and variable fee.

\(^3\) Although the private sector can also identify PPP opportunities.
As part of the provision of such services, the private sector has the obligation to provide the quality and quantity of services agreed upon, in exchange for a fee, and to develop/construct, finance, operate, maintain, and eventually return ownership of the public asset back to the government. The government always has the right and obligation to monitor prices and quality of service, which may be set through a contract and/or independent regulatory body.

5.1.3. **Types of PPP Arrangements to be Considered**

The range of PPP structures is broad, differing in purpose, service scope, contract length, legal structure, and risk/benefit sharing. At one end of the spectrum would be management contracts where the private sector operates and manages existing public assets, while the other could involve the private sector structuring, designing, financing, constructing, operating, and maintaining an infrastructure asset, thereby taking a considerable proportion of the risks and associated benefits of the project. The PPP agreements under this policy will generally be in the form of a concession or similar structure, however the selection of the PPP arrangement for a particular project will depend on the Government’s strategic objectives and policy in the related sector, the nature of the project and required level of investment, and on the potential economic benefits to be generated under the PPP arrangement. PPP agreements will be tailored to each specific project.

PPP structures can be considered for either greenfield or brownfield projects, or a combination of both.

Contract types can include but are not limited to: management contracts, short term concessions (for instance a short term concession to provide a service, e.g. selling food and beverage), and long term concessions. Long term concessions can be developed under various arrangements including Build Operate Transfer (BOT), Build Lease Operate Transfer (BLOT), or others.

5.2. **Scope**

5.2.1. **Project Size and Duration**

There is no minimum or maximum project size specified in this policy, as each project will be considered based on the government’s specific objectives and the level of investment required. In all cases the term of the PPP agreement depends on the nature of the business, the amount of the investment, and the cash generating capacities of the project and is outlined in the PPP Guidelines for Zanzibar.

5.2.2. **Sectors**

The typical sectors covered under PPP arrangements include transport (ports, airports, rail and roads), telecom, energy, and water/wastewater and can also include social sectors such as health, housing, and education; however other sectors can also be considered. This policy
does not limit the sectors under which PPP arrangements will be considered, as long as those projects are in line with the government's established objectives (as described above). However, it should be emphasized that the overarching objective of PPP policy is to ensure delivery of more efficient and modern infrastructure and public services with participation of the private sector, and not to encourage the public sector to encroach on private sector activities.

5.2.3. PRIVATE OPERATOR/INVESTOR PROFILE

The profile of the private operator/investor should be clearly defined before the tendering process and should be consistent with the scope and size of the PPP project and the Government's strategic objectives. The private sector operator/investor's experience and capabilities are a critical component of the PPP arrangement, and must include:

- Experience developing and operating similar projects;
- Proven track record of similar investments and of mobilizing similar levels of financing (where relevant);
- Financial strength;
- Willingness to invest;
- Reputation and good name;
- Inclusion of local partners;
- No conflict of interest;
- Available staff (committed to the project);
- No cultural/language barriers;
- Technology transfer capabilities; and,
- Other sector and project-specific criteria.

5.2.4. LOCAL GOVERNMENT PROJECTS

Projects of strategic national importance must be handled at the national level (for instance ports, airports, and road projects), while smaller non-strategic projects, such as municipal services, can be promoted directly through local government. In case a discrepancy arises over a specific project, the PPP Department\(^4\) shall make a determination as to whether the project will be handled at the national or local government level. The PPP Department also commits to providing support to local governments coordinated through the Office of Regional Administrations and Special Departments including training, capacity building, and ongoing assistance to promote local government-level PPP projects. A local government

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\(^4\) As of this writing, the current structure includes a PPP Unit under the Department of Economic Management at the Zanzibar Planning Commission, however the RGoZ envisions creation of a PPP Department.
liaison within the PPP Department will continuously work with the Office of Regional Administrations and Special Departments as well as individual local government offices to provide technical assistance or resources necessary to support PPP projects at the local government level.

6.0 GUIDING PRINCIPLES:

6.1. Value for Money

All PPP projects considered by the Revolutionary Government of Zanzibar must provide value for money to the public. To achieve value for money, a PPP arrangement must have economic, financial, social, and environmental benefits that are greater than the economic, financial, social and environmental costs associated with the project, compared to all other viable alternatives. In short, the PPP project must provide the government and the public at large with the highest value, compared to all other alternatives (such as traditional procurement). Achieving a balance between cost-effectiveness and efficiency by undertaking rigorous cost-benefit analysis is an important way for the government to ensure the project will provide value for money. Value for money is tested periodically during project preparation.

6.2. Public Interest

Any PPP project considered should be in the greater interest of the public. The value generated by a PPP project should be properly allocated among all stakeholders (i.e. users, government, employees, taxpayers, private sector, the environment, etc.).

6.3. Transparency and Access to Information

Transparency in all stages of the PPP process is a fundamental condition for any PPP project and should be ensured through proper mechanisms and formal processes. These mechanisms and processes will also enable the government to achieve a proper balance between transparency and flexibility.

Access to timely information is a critical element for ensuring transparency and attracting first class private sector operators/investors as well as keeping the general public informed. Information should be provided according to the following:

- All potential bidders should have equal access to all available information; and
- At the end of any PPP process, a ‘white book’ containing all the information related to the PPP process should be available for public consultation.
6.4. Accountability

One of the most important aspects of any PPP is clear allocation of responsibilities and accountability between all parties involved. In other words, any PPP arrangement must clearly establish the allocation of rights, obligations, and responsibilities between the private and public sectors.

6.5. Competition

PPP projects should always promote greater competition through transparent bidding processes, selection of the most qualified bidder, and proper monitoring to ensure that services are provided according to the specifications and requirements of the project contract. This ensures that users receive the best quality of service for the best value, and incentivizes service providers/operators to continue to improve services and upgrade facilities. Government financial support to a PPP project (whether through a guarantee, a capital contribution or otherwise) will only be provided to private entities selected through competition. The nature of that support must be included in the bidding documents as part of the competition to ensure that the bids reflect the added value of that support.

6.6. Benefit-Risk Allocation

A well-planned, -designed, and -structured PPP project can generate substantial value added. However, private sector participation can also generate additional risks and costs. One of the main risks is the natural conflict between the interests of private investors and those of the public at large. Proper allocation of risks and benefits among government, private sector operators and investors, service providers, and users is therefore fundamental. Risks should always be allocated to the group that is best able to manage that risk, and benefits should be allocated according to the level of risk assigned to each party.

6.7. Results Oriented

In order to align PPP projects with government objectives and implementing principles, projects should be based on desired outcomes or results, rather than required inputs. This allows the private sector investor/operator greater flexibility and creativity in how infrastructure and infrastructure services will be delivered, while ensuring that those facilities and services meet the required results or operating capacity established by the government.
6.8. Public Sector Financial Commitment

6.8.1. **PROJECT DEVELOPMENT FUND**

The Revolutionary Government of Zanzibar commits to providing the necessary initial financial resources to ensure a properly-structured project can attract the high-quality private sector investors/operators necessary to develop infrastructure and provide infrastructure services in Zanzibar. Under this PPP Policy, a project development fund (PDF) is established and these funds can be used to finance project development costs including pre-feasibility and feasibility studies, hiring of technical and transaction advisors, or other costs necessary to develop PPP projects. It is intended that PDF funds used for such activities will be recovered at financial close, paid by the winning bidder, in order to ensure the sustainability of the PDF for future projects.

6.8.2. **GOVERNMENT FINANCIAL SUPPORT**

The government may provide a number of different types of financial support to a PPP project, including guarantees, indemnities, capital contributions, land, tax incentives, guaranteed traffic, equity, debt and operating grants. This financial support/leverage can be financially more efficient, allocating to Government certain risks and tasks that might be difficult or expensive to allocate to the private sector. The nature and size of the Government financial support will be determined based on the needs of each specific project.

Financial support provided by the government, whether in the form of capital or in-kind contributions, may only be awarded to a private investor selected through an open, competitive process and must be announced in the project bidding documents and available to all potential bidders.

As mentioned above, after the initial financing resources, the PPP project should be financed by the private sector, but in some cases the Government or third party donors may participate in the long-term financing structure.

6.9. Environmental Protection

Promoting development in a way that protects Zanzibar’s natural resources is paramount under any PPP arrangement. All PPP projects must be implemented in a way that minimizes impact on wildlife and natural resources, promotes environmental sustainability and complies with local and international environmental standards.
6.10. Corporate Social Responsibility

Companies wishing to participate in public-private partnership arrangements in Zanzibar must maintain a standard of corporate social responsibility that positively impacts local populations and that strives to improve the quality of life for the citizens of Zanzibar.

7.0 THE PPP PROCESS

The PPP process includes three main phases, 1) Project Identification and Preparation, 2) Project Tendering and Selection, and 3) Project Operations & Monitoring. These three phases are described below.

7.1. Phase 1 - Project Identification and Preparation

7.1.1. PROJECT IDENTIFICATION

Project identification is a critical part of the PPP process. Project opportunities that do not meet the government’s strategic objectives should be discharged in the early stages to avoid spending unnecessary time and money considering unqualified projects. Approval of the project should be based on a thorough cost-benefit analysis once it is determined the project adequately meets the government’s objectives. If the cost-benefit analysis meets the minimum threshold for approval, it should be added to a publicly available list of projects to be considered under a PPP arrangement.

Projects under consideration for PPP arrangements should be prioritized and timing of projects should be managed based on local and international market conditions. Pursuing several projects concurrently could significantly impact the successful implementation of those projects given the limited availability of private sector funding and resources. Projects should be launched at the most appropriate time to maximize the interest and participation of private sector investors, and the benefits to the government.

7.1.2. PROJECT PREPARATION

Once the project has been approved, the relevant line ministry and/or sponsoring authority (or local government) is responsible for carrying out a pre-feasibility study to determine the viability of the project. The pre-feasibility study identifies the basic characteristics of the project and assesses whether the project appears on a preliminary basis to represent value for money, technical viability, commercial viability and political buy-in. Once a pre-feasibility study is performed, and if the study is approved by the PPP Department, a feasibility study is conducted. The Ministry of Finance provides all necessary funding for the project’s pre-feasibility and feasibility studies either through approval of spending from the relevant line ministry’s budget or through an application for the use of funds from the government’s Project Development Fund.
The project preparation phase ends with the approval of the project's feasibility study which is submitted to the PPP Department for review and then to the PPP Technical Committee for consideration and recommendation for approval. The PPP Technical Committee's approval and Minister of Finance's signature confirms that PPP is the preferred procurement route and confirms the proposed structure of the PPP agreement. The feasibility study also determines whether it is anticipated that the government will be required to provide resources to make the project financially feasible, and whether such resources would represent value for money.

During the Project Feasibility Assessment the RGOZ should ensure the following:

- That the PPP Project is technically, economically, financially, legally and environmentally sound;
- That the PPP Project's engineering and construction parameters are according to international norms and best practices;
- That the PPP Project's operations parameters are in line with international norms and best practices;
- That the business plan and the main inputs to the financial model are assessed with respect to assumptions that affect the expected future cash flow of the project;
- That the principal risks associated with the project are identified, that they are assessed according to how such risks may affect the project's financial viability, and that they are analyzed according to how they can best be mitigated and allocated.

The feasibility study should be sufficiently detailed to assist in drafting of the key documentation (project information memorandum, request for proposal, etc.) that will be required for the first stage of the procurement phase of the project.

7.2. Phase 2 - Project Tendering & Selection

Prior to beginning Phase 2, projects under consideration for PPP arrangements should be prioritized and timing of projects should be managed based on local and international market conditions. Pursuing several projects concurrently could significantly impact the successful implementation of those projects given the limited availability of private sector funding and resources. Projects should be launched at the most appropriate time to maximize the interest and participation of private sector investors, and the benefits to the government.

7.2.1. PROJECT TENDERING PROCESS

As required under this policy, the procurement process formally starts with an advertisement in the media inviting bidders to express their interest to bid for the PPP project. The invitation for 'Expressions of Interest' should contain a brief description of the project such as the scope, value, contact details for further information, criterion for pre-qualifying applicants, and deadline for submission of application. Firms should be allowed sufficient
time to respond. For a PPP project, this should be a minimum of four (4) weeks. The purpose of pre-qualification is to disqualify those bidders who do not meet the minimum qualifications/requirements and allow the contracting authority to limit the pool of eligible bidders to those companies with a serious and legitimate interest in the project.

A prequalification document is prepared to provide more information on proposed risk allocation for the project and the criteria against which firms that submit EOIs will be prequalified. The PPP Technical Committee should confirm the short list of proponents. This phase ends with the issuance of a Request for Proposals (RFP).

Once the shortlist of bidders is established, RFP documents (bidding documents) are issued to shortlisted firms. The RFP documents should contain a full and clear description of the project and technical requirements, bidding process calendar, required investment, participation criteria, criteria for selection of winning bidder, the proposed allocation of risks, risk matrix, output specification with required performance standard, and remedies against non-performance, etc. The amount of time given to bidders to respond to the Request for Proposals is established under the Zanzibar PPP Guidelines. Once bids are submitted they are evaluated according to the criteria specified in the RFP and scored based on the specific weights assigned to each aspect of the project (on a project-by-project basis).

An important factor at the RFP stage is the quality and clarity of the bid documents, including the instructions to bidders, output specifications, proposed or draft contract documents and the efficiency with which the entire bidding process is managed. The draft contract included in the bidding documents should be as close to the final contract as possible and should take into consideration any requested changes discussed during the bidder's conference. All bid documents included in the RFP must be reviewed and approved by the PPP Technical Committee prior to being issued.

7.2.2. PROJECT SELECTION PROCESS

The best bid from the combined technical and financial proposals is selected, and the draft contract included in the bidding document becomes the concession contract. The contract should state clearly the amount of government financial support that will be provided to the project and must clearly state the roles and responsibilities of each party. The contract should incorporate, among other items, the bidders' technical and financial proposals and contractual terms agreed upon. Contracts between the bidder and sub-contractors providing design, construction, maintenance and/or operations services should also be finalized at this time. The selected bidder should submit agreements with sub-contractors and a letter of intent for financing to the relevant authority for review.

7.2.3. CONTRACT AWARD/SIGNATURE AND FINANCIAL CLOSING
The contract must first be submitted to the PPP Department and PPP Technical Committee for pre-approval before it is submitted to the Ministry of Finance (MoF) for final approval. Approval of the Minister of Finance is required before the PPP contract is signed with the selected bidder.

PPP contracts may be renegotiated in the case of major economic downturns, force majeure or other material changes of circumstance. Contracts can only be transferred with the permission of the relevant regulating authorities.

At the end of the bidding process, following contract signature, the government should publish a ‘white book’ containing all information related to the PPP process – this information should be made available to the public.

7.3. Phase 3 - Project Operations & Monitoring

7.3.1. Project Construction

The government must ensure the PPP Project is properly constructed in a safe and prudent manner and that it meets all best engineering practices within the relevant industry and complies with the requirements set forth under the Concession Contract. The relevant contracting authority is responsible for hiring of a construction supervisor and monitoring project construction to ensure compliance with the PPP contract, with support from the PPP Department, as needed.

7.3.2. Project Operations

PPP project contracts should incorporate comprehensive oversight and regular review mechanisms. Performance targets should be easily measurable, incentives should be meaningful and rewards and penalties effective. All PPPs shall be coordinated and monitored by the relevant contracting authority, as well as the relevant economic, technical, and environmental regulating bodies. As described in Section 8.2 below, project monitoring is the responsibility of the relevant contracting authority, with support from the PPP Department, as needed.

Financial statements produced by Special Purpose Vehicles (SPVs) established under PPP arrangements should be audited by a professional third-party auditor.

7.3.3. Project Monitoring

The monitoring process requires the involvement of the technical and economic regulators assigned under the PPP project contract. These regulators monitor projects to ensure competition, avoid monopolistic practices, and protect users’ rights. With respect to monopolistic services (i.e. port, airport services), the government always maintains the right
to impose economic regulations and protect users' rights through an independent economic regulating entity.

Day to day activities and normal business operations are the responsibility of the private sector operator/investor under a PPP arrangement. To reinforce the separation of operations from regulation, Government officers should not participate in direct management of any PPP project or special purpose vehicle/company.

7.4 Unsolicited Bids

The government must realistically recognize that private investors/operators are often better positioned than government entities to identify potential demand for infrastructure projects and public services. However, unsolicited private sector proposals for PPP projects may create the potential for (and perceptions of) corruption, lack of transparency, and absence of a competitive tendering process and therefore bring into question whether the government will receive the best value for money possible. Achieving the right balance between encouraging such companies to submit project ideas without losing the transparency and efficiency gains of a well-designed and implemented competitive public tender process is paramount.

While all proposals will be treated on a case-by-case basis, consideration of unsolicited proposals will be subject to pre-approval of the PPP Department and must be competitively bid. The process for consideration and implementation of unsolicited bids will be as follows:

1. Unsolicited bids are submitted to and reviewed by the PPP Department for consideration as a PPP project and must receive pre-approval.

2. Once pre-approval is obtained by the PPP Department, the project is referred to the PPP Technical Committee, including a representative from the relevant line ministry/authority for consideration. If the Technical Committee approves the project under a PPP structure, the relevant line ministry conducts due diligence and develops a feasibility study, undertaken by a third party (not the original proponent).

3. If the feasibility study is approved, the project enters into a competitive bidding process and a tender is issued according to the process established under this policy (see Section 7.2.1).

*All documents/studies related to the project submitted as part of the unsolicited proposal must be included as part of the bidding documents and available to all bidders.

4. Once bids are received, the winning bidder is selected based on the selection criteria established in the bidding documents and the procedures described above in Section 7.2.1.

5. If the unsolicited bidder is selected, no compensation is provided. If the unsolicited bidder is not selected, compensation will be provided by the winning bidder, based
on the cost of the studies undertaken as part of the unsolicited bid, only if those studies were undertaken and completed by an independent, qualified third party.

8.0 TRANSPARENCY AND GOVERNANCE

Transparency in all stages of the PPP process is a fundamental condition and should always be monitored by a government controller. A number of principles should guide a competitive bidding process including transparency, fairness and efficiency.

8.1. Transparency

Transparency in the bidding process for a PPP project is a top priority. The private sector will only participate in a bidding process if it believes that the chances of successfully being awarded the eventual contract are proportionate to the costs to be incurred in bidding. Strong procedures must be adopted during procurement of a PPP project to ensure that a level playing field is provided to all potential bidders. This places an obligation on the contracting authority to state the basis on which successful bidders will be selected to all potential bidders from the beginning, while describing the range of works and services that are required. Potential bidders can then make an informed decision on whether or not to participate in the competition, and, if they do, to maximize their chances of submitting a successful bid.

To further instil transparency, the PPP Department will establish and maintain a web based PPP marketplace to transparently announce upcoming and ongoing PPP opportunities.

8.1.1. Fairness

The same factors which drive the need for transparency also drive the need for fairness to all potential bidders. All bidders or potential bidders should have access to the same level of information about the relevant contracting authority’s requirements, full information about the project including data and reports that would have an impact on the bidders’ pricing or subsequent responsibilities, and about the procurement process itself.

The opportunity to bid for the project should be widely advertised and open to both local and foreign companies, using the PPP Department’s and/or Planning Commission’s website, local newspapers and the United Nations Business Development database, dg market.

8.1.2. Access to Information

Access to relevant and timely information is a critical part of infrastructure project development. This information is not only important at the preparation stage in determining Value for Money, required Government financial support, and identifying/allocation risk, etc., but also at the development stage as detailed design and feasibility studies are being prepared. Lack of access to relevant and timely information can result in significant delays,
additional development and preparation of proposal costs, and an increase in the risk premium factored into the bidding price.

8.2. Project Governance

The process of defining an infrastructure project, obtaining all necessary approvals, managing the procurement process, the interface with bidders and key stakeholders, and signing of the contract can be demanding of time and effort. The head of the PPP Department should be responsible for facilitating and coordinating each project and working with the relevant contracting authority to ensure the project is delivered according to the agreed timetable, that all key stakeholders are involved in the decision and that the contracting authority and the Ministry of Finance are fully briefed on the evolving project and the policy and financial implications to the government. The head of the PPP Department should also stay informed of potential PPP opportunities and should be the first point of contact for any projects being considered under PPP arrangements. Project implementation, oversight and monitoring, however, remains the responsibility of the relevant contracting authority, with ongoing support provided by the PPP Department.

The PPP Technical Committee (made up of the Executive Secretary of the Planning Commission, Principal Secretary of the Ministry of Finance, Principal Secretary of the relevant contracting authority (if deemed appropriate), and Attorney General, and others invited to participate as needed on an ad hoc basis), is responsible for reviewing project feasibility studies and recommending projects for approval or denial. Projects recommended for approval are then sent to the Ministry of Finance for signature and official approval before the tendering process begins.

The project team within the PPP Department takes responsibility for initial review and pre-approval of the project, in coordination with the Department of National Planning, and acts as a coordinator between relevant parties throughout the project development and implementation phases of each project through to contract signing, providing support and capacity building as needed. The PPP Department should be supported by external advisers because of the more specialized financial and contractual issues involved in PPPs. Although financial close may mark the end of procurement of the project, the PPP Technical Committee must ensure that there is continuity between the parties involved at the procurement stage and the parties that will manage the construction and operational phases of the project within the relevant contracting authority.

8.2.1. LEGAL FRAMEWORK

The legal framework under which PPP projects will be developed in Zanzibar includes the following:
• The Concession Projects Act No. 1 of 1999 (or any Act replacing the Concession Projects Act of 1999);

• Zanzibar Public Procurement Act No. 9 of 2005 and its Regulations;

• Zanzibar Investment Promotion and Protection Act No. 11 of 2004; and

• Zanzibar Planning Commission Act No. 3 of 2012.

All provisions of any PPP contract should be in line with the above laws and regulations, and in compliance with all relevant labor, regulation, environmental, social, and other sector-specific laws and regulations in place. In cases where legal/regulatory guidance is not provided under the above-mentioned legal framework, decisions will be made on a case-by-case basis by the PPP Technical Committee and other relevant government bodies. If new laws or additional regulations are deemed necessary, the PPP Technical Committee in coordination with the Planning Commission and other relevant parties will become involved in proposing additional legislation.

8.2.2. INSTITUTIONAL FRAMEWORK & RESPONSIBILITIES

The institutional framework under which PPP projects will be developed in Zanzibar includes the following institutions:

• Planning Commission & PPP Department

• Ministry of Finance

• Line Ministries and Local Government (Contracting Authorities)

• Attorney General’s Office

• PPP Technical Committee

• Zanzibar Investment Promotion Authority (ZIPA)

• Zanzibar Business Council

The specific institutional responsibilities of each of the above-mentioned entities for each step of the PPP process are described in the table below.

<table>
<thead>
<tr>
<th>Responsibility</th>
<th>Entities Responsible</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project Identification</td>
<td>Line Ministry/Local Government</td>
</tr>
<tr>
<td>Initial Project Assessment</td>
<td>PPP Department</td>
</tr>
<tr>
<td>Initial Project Approval</td>
<td>PPP Department</td>
</tr>
<tr>
<td>Conduct Pre-Feasibility and Feasibility Studies</td>
<td>Relevant Line Ministry/Local Government</td>
</tr>
<tr>
<td>Feasibility study approval</td>
<td>Ministry of Finance based on PPP Technical Committee recommendation</td>
</tr>
<tr>
<td>Development of bidding documents</td>
<td>Contracting Authority (Line Ministry, Local Government), Technical Advisor</td>
</tr>
<tr>
<td>Approval of RFP Documents</td>
<td>PPP Technical Committee</td>
</tr>
<tr>
<td>Tendering Process</td>
<td>Contracting Authority with PPP Department Support, Technical Advisor</td>
</tr>
<tr>
<td>------------------------------------------------------------</td>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td>Bid Evaluation and Selection</td>
<td>Contracting Authority with PPP Department Support, Technical Advisor</td>
</tr>
<tr>
<td>Contract Review, Negotiation &amp; Approval</td>
<td>Ministry of Finance, Attorney General</td>
</tr>
<tr>
<td>Project Construction Monitoring</td>
<td>Contracting Authority with PPP Department Support</td>
</tr>
<tr>
<td>Monitoring of sector-specific projects</td>
<td>Relevant Contracting Authority with support from Attorney General</td>
</tr>
<tr>
<td>Regulation of PPP process</td>
<td>Relevant Independent Regulatory Body</td>
</tr>
<tr>
<td>Contract Renegotiation and Approval (if material changes needed)</td>
<td>Ministry of Finance with PPP Department support, Attorney General</td>
</tr>
</tbody>
</table>

**8.2.2.1. Process for Solicited Proposals**

For solicited proposals, the PPP Department is responsible for providing support to contracting authorities in the preparation of the project concept note for a specific project. Once a project concept note has been developed, submitted, reviewed and approved by the PPP Department, the project can move on to the pre-feasibility phase. The pre-feasibility study is undertaken by the contracting authority (through the hiring of an independent, qualified third-party advisor) and should be reviewed by the PPP Department, with participation from the Executive Secretary of the Planning Commission. If approved, the project moves on to the feasibility phase which is conducted by the contracting authority through the hiring of an independent, qualified third-party advisor. At this time a transaction advisor is retained to assist with the feasibility phase all the way through to contract signing.

Once the feasibility study is completed, it is submitted to the PPP Department, which presents the study to the PPP Technical Committee for review and approval. If the feasibility study is recommended for approval, the PPP Technical Committee sends the approved feasibility study to the Ministry of Finance for approval and signature, and the tendering process can begin. RFP documents must be approved by the PPP Technical Committee before the tender is launched. Once the tender is launched and proposals are received, the contracting authority reviews the bids and selects the winning bidder, at which point the contract is reviewed and approved by the Attorney General and Ministry of Finance, and signed by the Minister of Finance. The PPP Department provides support and coordination for the above process through to contract signing.

Once the project reaches financial close and construction begins, the contracting authority hires an independent, qualified third party to provide construction supervision services reporting to the contracting authority. After construction, the contracting authority monitors the project, in coordination with the Attorney General's office, through the end of the contract term.
8.2.2.2. Process for Unsolicited Proposals

The process for consideration of unsolicited proposals begins with submission of the unsolicited proposal by the private sector firm to the PPP Department. The PPP Department, in coordination with the Planning Department and relevant line ministry, reviews the project and either rejects or provides pre-approval of the project for consideration under a PPP arrangement. If a pre-feasibility study has not been done, the same procedures for a solicited proposal are followed, as described above. If a pre-feasibility study has been done, the relevant contracting authority then proceeds to undertake a feasibility study following the procedures outlined above. The same processes are followed all the way through project tendering, review and selection. If the original proposer of the unsolicited bid wins, the remaining processes through contracting signing, construction and monitoring are followed, as described above. If the original proposer of the unsolicited bid loses, compensation is provided as described in Section 7.4 above.

9.0 CAPACITY BUILDING

As PPP represents a substantially new scheme for the RGoZ, capacity building will be necessary for all stakeholders in the PPP process. The general level of awareness and understanding of PPP will be improved among all stakeholders to facilitate sound policy development and constructive discussion and debate.

There is a need to ensure that a sufficient level of resources is committed in order to deliver and monitor well-structured PPP projects. The success of the RGoZ’s PPP program will depend on the development and retention of appropriate skills and expertise within the public sector.

It is important to recognize that capacities must be built among public institutions/officials, private sector, users and other stakeholders. A number of capacity building interventions will be initiated by the RGoZ to develop organizational and individual capacities for identification, procurement and management of PPP projects.

Capacity can be developed in parallel with the PPP implementation process by, for example, retaining a PPP expert that can lead the initial PPP efforts and at the same time train a group of local PPP experts. Additionally, the hiring of technical and transaction advisor(s) is not only important for ensuring that the government has the appropriate technical capacity to properly structure and successfully implement PPP projects, but also for providing continuous capacity building to the government throughout the project structuring and implementation process. The hiring of these technical and/or transaction advisors can be paid through the project development fund or by the winning bidder as part of the contract terms.

Significant budget should be allocated to the monitoring and capacity building process. Typically this budget comes from the most attractive initial PPP projects. Part of the proceeds
of those initial PPP contracts should be allocated for this purpose under the project development fund.

10.0 IMPLEMENTATION STRATEGY

The Revolutionary Government of Zanzibar has expressed its commitment to development of infrastructure and provision of infrastructure services through public-private partnerships and commits to involving the private sector and other relevant stakeholders in the implementation of this policy. It is envisioned that PPPs will play an important role in the future development of Zanzibar, and this policy will be an important aspect in the successful implementation of those projects.

11.0 MONITORING & EVALUATION

As mentioned in Section Error! Reference source not found. above, monitoring of specific PPP projects will be the responsibility of the contracting authority, with the support and guidance of the Attorney General's office and the Department of National Planning, Sector Development and Poverty Reduction. Monitoring and evaluation of the national PPP programme will be implemented according to the national M&E framework to ensure the programme is properly aligned with the Revolutionary Government of Zanzibar's national PPP and overall development objectives.

12.0 CONCLUSION

For the successful implementation of public-private partnerships in Zanzibar under this national PPP Policy, communication and cooperation between all relevant stakeholders will be critical. By partnering with the private sector to develop and expand provision of infrastructure and related services, it is hoped that Zanzibar will be able to more effectively and quickly achieve its development objectives, become more internationally competitive, and provide a more conducive environment for private sector investment.
GLOSSARY OF TERMS

Brownfield Project - A project that makes use of previously used land or facilities that are upgraded, expanded or modernized to meet project requirements.

Concession - A concession is defined as the granting of the use of a government asset to provide public services over a specific period of time whereby the concessionaire has the right to profit from the operation of the asset in exchange for a concession fee or other form of payment made to the government for use of those assets.

Force Majeure - A natural event that cannot be reasonably anticipated, controlled or prevented.

Greenfield Project - A project that makes use of previously unused land for development of a new facility or piece of infrastructure.

Government Financial Support - Financial support provided by the government to support a PPP project and bring additional value for money. Government financial support/leverage may be necessary to attract private sector bidders, for example where the private sector is not able to bear certain project risks or costs.

Heat the Market - Heating the market refers to actions taken by the transaction advisor to market the project to potential investors during Phase II of the project life cycle.

Independent Body - An independent body, for the purposes of this policy, is a third-party group independent from project operations, which ensures compliance with the project contract, laws and regulations, as well as international best practices. An independent body can be a government regulatory body or a private company hired to perform these services.

Project Concept Note - The project concept note provides a basic outline of the project including the type of project, anticipated project structure and cost, specific government objectives for the project including desired outputs, and expected timeline of the project including project development, procurement, and construction.

Right of Substitution - The right to and possibility of substituting the existing concessionaire with a new concessionaire of the same quality and capability. The substitution may be required in limited circumstances due to underperformance or force majeure.

Special Purpose Vehicle - A special purpose vehicle is a limited recourse project company specifically created to finance, develop, operate, maintain, promote, etc. a specific project.

Value for Money - A project that achieves value for money is deemed to have economic, financial, social, and environmental benefits that are greater than the economic, financial,
social and environmental costs associated with the project, compared to all other viable alternatives.

White Book – A collection of all technical studies, bidding documents, memoranda, contracts, and other documents relevant to a specific project that is made available for public consultation after contract signing with the purpose of providing full transparency throughout the bidding process.
Review & Analysis of Legal & Regulatory Framework for PPP in Zanzibar

For Review by the Zanzibar Planning Commission and The World Bank
# Contents

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   1.3. **THE PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS ACT, 2005 ("THE PPDPA")** .......................................................... 14  
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1. Legal & Regulatory Framework for PPP in Zanzibar

1.1. Introduction

1.1.1 This opening section of the review report provides a high level overview of the legal and regulatory framework currently in place and guiding the implementation of public-private partnerships ("PPPs") in Zanzibar.

1.1.2 Our review of the laws was guided by what can be considered the essential features or dynamics of PPP transactions as these features are recognized around the world, from the legal point of view. What we took into account is summarised below:

a) PPP transactions can be made up of one or several contractual arrangements. Contracts in Zanzibar are governed by the Law of Contracts Decree. Any private partner in PPP negotiations would look for provisions in that Act that would either hinder or help equitable negotiations, and to understand the procedural aspect of negotiations which will result in the PPP agreements enforceable against the parties to it. We have reviewed the Law of Contracts Decree within this context.

b) PPP transactions will entail, inevitably, the use of public assets in various ways, to be exploited in implementation of PPP projects. At times this will entail disposal of some assets and/or procurement of goods and/or services. The Zanzibar Procurement and Disposal of Public Assets Act regulates the procurement and disposal of public assets, which was evaluated in terms of its potential to positively or adversely impact on PPP transactions.

c) PPPs often require investment from both foreign and local sources (debt and equity) which could potentially be impacted by laws governing financial transactions in the negotiation of and the implementation of PPP projects. This paper reviews the relevant aspects of the Zanzibar Investment Promotion Act to determine whether any aspects of the law would prevent successful implementation of PPP projects involving
foreign and/or local investment. The Mainland Finance Acts of 2012 and 2004 were reviewed but no aspects of these acts were seen to potentially prevent or hinder PPP implementation in any way. The Mainland Public Finance Act may have an impact on PPP implementation where foreign borrowing, donor grant funding, or government subvention are concerned, however any application of the Act in Zanzibar would be in accordance with the Government of Zanzibar’s current legal structure surrounding government spending and revenues.

d) PPPs entail, more often than not, land ownership issues. Are the existing land tenure laws applicable in Zanzibar conducive to PPP transactions? Are there reforms that will be inevitably have to be made to remove any discovered impediments? Can land allocated to PPP projects be mortgaged to raise funds? The Land Decree Act and the Land Registration Act have been reviewed within this context.

1.13 It should be noted that the Zanzibar jurisdiction/legal system is a dual system. There are laws which are applicable to Zanzibar only, and there are laws which are applicable to both Zanzibar and Tanzania Mainland. The latter category applies in Zanzibar in relation to matters referred to as Union Matters in the Constitution of the United Republic of Tanzania, while the former refers to what are considered non-union matters and therefore are governed by non-union laws, generally speaking.1 There could, however, be aspects of those projects which are regulated by “union laws,” as in the case where government guaranteed borrowing is contemplated. For some union matters, laws on Mainland Tanzania may specify their applicability only to Mainland Tanzania (as in the case of the Tanzania PPP Act, which applies only to the Mainland), in which case Zanzibar-specific laws would govern.2

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2 The Mainland PPA does not apply to Zanzibar. Where the procuring entity is a Ministry handling “union matters” the procuring entity will be at the central Government level in Dar es Salaam, even if the project is to be implemented in Zanzibar (for example, in the case of army or police procurements). Whenever there is a discrepancy or uncertainty, the two governments consult to agree on which procurement law should apply.
1.14 Where the reviewed laws did not raise issues that would adversely impact PPP implementation, analysis will be summarized to indicate the purpose of those laws and the aspects that fit into the PPP framework.

1.15 The table below summarizes the various laws and regulations which we considered relevant to implementation of PPPs in Zanzibar, including date of enactment, territorial application, and the main aspects of those laws conducive to or inappropriate to the PPP concept and its implementation. Each of these laws and regulations are then discussed in detail later in the report.

1.16 After the May 2014 round of consultations and discussions that took place surrounding the PPP legal framework in Zanzibar, in general it can be concluded that:

a) The Concession Projects Act (CPA) provides a general legal framework under which PPP projects can be negotiated and implemented as an interim measure, subject to some necessary changes (discussed later in this report) and the gazetting of regulations by the Minister of Finance; and

b) The ultimate preferred option is the enactment of a completely new legislation exclusively applicable to PPPs. To this end, this report identifies the key areas that any new legislation should address, in addition to what is addressed by the CPA.
Table 1-1
Summary of Relevant Laws & Regulations for PPP in Zanzibar

<table>
<thead>
<tr>
<th>Law or Regulation</th>
<th>Year Enacted</th>
<th>Jurisdiction</th>
<th>Main Strengths</th>
<th>Main Weaknesses</th>
</tr>
</thead>
</table>
| Concession Projects Act                                       | 1999         | Zanzibar     | • Flexible in the sense that the definition of “Concession Project” covers all known PPP arrangements;  
|                                                             |              |              | • Provides good basic framework for PPPs including spelling out the prescribed ingredients of the Concession Agreements which are typical PPP provisions. See Section 18 and 19;  
|                                                             |              |              | • Has provisions enabling the passage of regulations and Rules to operationalise PPP processes and to address the institutional gaps in the law. See Section 15 (i) and (vii) and Section 35;  | • Lacks clarity in certain aspects, notably the role of the main Ministers’ Committee, the PPP Unit and the “appropriate Minister,” overseeing the pre-selection, bid invitation, bid evaluation and Concession Agreement signing. There is a strong need to have clarity on the entire process;  
|                                                             |              |              |                                                                                             | • No clear guidance for bidding process or for project monitoring in the Act itself or in any Regulations;  
|                                                             |              |              |                                                                                             | • Absence of Regulations allowed by Section 35;  
|                                                             |              |              |                                                                                             | • Does not address unsolicited bids;  
|                                                             |              |              |                                                                                             | • Does not adequately define institutional roles & responsibilities;  
|                                                             |              |              |                                                                                             | • Eligibility of corporate bodies is reserved for those “registered, incorporated or established in Zanzibar or overseas.” Needs to be recast. See Section 14 (6).  
|                                                             |              |              |                                                                                             | • Performance monitoring is not included in the Act nor in the Section on contents of the Concession. Regulations needed to address this.  
|                                                             |              |              |                                                                                             | • Implementation of local content requirements is inadequate. See Section 31. The law should require that the PPP Agreement prescribe a procurement method that addresses local content and complies with the relevant procurement laws of Zanzibar.  
|                                                             |              |              |                                                                                             | • Unclear dispute resolution clause.  
<p>| The Public Procurement and Disposal of Public Assets Act and the Regulations made thereunder. | 2005         | Zanzibar     | • The Act as such has no aspects which in our opinion raise impediments to PPP implementation. The Act does not make reference to the PPPs or Independent Power Producers (IPPs), but applies to the PPP Unit in the process of identifying, negotiating and signing PPP agreements with private partners as by definition. The PPP Unit under the Concession Projects Act is a Project Management Unit. | • There is an element of confidentiality in this Act which has trickled down into the CPA. However, this does not require amending the Procurement Act or Regulations. The CPA and the Regulations made under the CPA can be amended to eliminate the confidentiality clause currently applied to PPP transactions/agreements. |</p>
<table>
<thead>
<tr>
<th><strong>Zanzibar Investment Promotion and Protection Act</strong></th>
<th>2004</th>
<th>Zanzibar</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The general framework of procurement is accommodated in the current Concession Project Act (the CPA) and therefore the CPA is already compliant with this Act.</td>
<td></td>
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<tr>
<td>• Both this Act and the CPA fall under the same Ministry which helps provide consistency in application of both.</td>
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<tr>
<td><strong>Planning Commission Act No. 3</strong></td>
<td>2012</td>
<td>Zanzibar</td>
</tr>
<tr>
<td>• This law was enacted &quot;to provide for the operation of the Zanzibar Planning Commission, its functions and powers&quot;. The Commission itself is a creature of section 125 the Constitution of Zanzibar.</td>
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</tr>
<tr>
<td>• The Commission is headed by the President and among its members are the two Vice Presidents and the Minister for Finance. By law the Commission is &quot;the highest authority for economic development planning&quot; and has power &quot;to coordinate and supervise the implementation of such economic development plans&quot;.</td>
<td></td>
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</tr>
<tr>
<td>• In the context of PPP projects, the Commission is not specifically assigned a role except that as overall overseer of development projects in Zanzibar, it will regulate PPPs.</td>
<td></td>
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<tr>
<td>• There are no aspects of this law which could be considered weaknesses in the context of PPP projects, however the role between ZIPA and the proposed PPP Department will need to be established and/or clarified in the PPP Guidelines and/or CPA regulations</td>
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</tbody>
</table>
| Contracts Decree | Zanzibar | 1st January 1917 | • This law governs the creation of enforceable contracts in Zanzibar, modeled along the common law concepts of contracting;  
• Subject to the other applicable laws (such as tax laws, labour laws, environmental laws, licensing laws) PPP agreements will be enforceable if entered into in accordance with the provisions of the Law of Contracts Decree;  
• A checklist of what a PPP agreement contained in the Concession Projects Act sets the stage for satisfaction of the provisions of the Law of Contract Decree. |
|---|---|---|---|
| Arbitration Decree [Cap 25] of 1928 and the Proceedings in Arbitration Rules of 1942 | Zanzibar | 1928 | • The law and the Regulations are both outdated which alone could erode the confidence of investors in the efficacy of such an old law. Even the language is still in the colonial context, referring to “the Government of the Protectorate” and the High Court as “Her Majesty’s High Court.” A new arbitration law is required.  
• There are aspects of modern day commercial arbitration which demand a more elaborate procedural regime than the existing ones to address issues like the qualifications of arbitrators appointed by the parties, fee for the arbitration, and venue of the arbitration and evidence rules. This is fundamental for attracting international private investors. |
1.2 The Concession Projects Act

1.2.1 The legal framework in Zanzibar does not specifically address Public Private Partnerships by name, referring to these projects instead as concession projects. As a result, there is a perceived belief generally that there is no legislative framework for PPPs in Zanzibar and therefore a law for PPPs is required. This report asserts that there is a law in Zanzibar which enables the implementation of PPPs, the Concession Projects Act, passed in 1999 ("the CPA").

1.2.2 The CPA was enacted "to provide for the legal framework for the execution of projects under appropriate concession agreements", and the definition of the term "Concession Projects" in Section 2 of the CPA lists the type of projects to be regulated by this law, all of which fall under the category of projects universally recognized as PPPs. The definition is worth repeating, and reads as follows: "Concession project " means a service or project to build, set up, own, operate, rent, lease, finance, modernize, manage, maintain, develop, or transfer in accordance with a concession agreement which may provide for any variant thereof, including BOT (Build, Operate and Transfer), BOOT (Build, Own, Operate and Transfer), MOT (Modernise, Own/Operate and Transfer), BRT or BUT (Build, Rent or Lease and Transfer, BT (Build and Transfer immediately), BTO (Build, Transfer and Operate) and ROT (Rehabilitate, Own and Transfer).

1.2.3 Based on the above, the legal framework for PPPs is included in the CPA. Based on a review of the CPA, this report aims to identify and advise on the aspects of the CPA that would hinder proper implementation of PPP projects in Zanzibar, and make recommendations as appropriate to support a more conducive environment for PPPs.

1.2.4 In broad terms the legal framework established by the CPA has the following features:

a) There is an implementation organ established as a semi-autonomous entity initially known as the Concessions Projects Unit ("the CPU") and later renamed the Public Procurement Unit ("the PPP Unit") (Section 3) with its obligations, functions and rights clearly spelt out in Section 4.

b) There is an oversight organ as well as oversight mechanisms established, namely the Planning Commission under which the PPP Unit operates within the Ministry of Finance and the Ministers' Committee.

c) There are clearly defined sectors within which concession projects (read PPPs) can be implemented and these are spelt out under the Schedule to the CPA. These sectors include infrastructure, water supply, electric power, public roads, airports (aviation), sea port development, environment, railways, industrial zones, leisure parks, storage infrastructure, housing schemes, health and education, property development, and shopping malls.
d) The law provides in mandatory terms for the award of PPP projects through a competitive bidding process to bodies corporate registered and operating within Zanzibar.

e) The Act establishes a nine (9) stage process for concessionary project approval as follows:

i. Report on Project Suitability: Minister of State Presidents Office, Finance, Economy & Development Planning (Now the Planning Commission and Ministry of Finance);

ii. Questionnaire for Potential Bidders: prepared by the PPP Unit;

iii. Pre-Selection of suitable bidders: Ministers Committee;

iv. Invitation to Bid Documentation: PPP Unit and Ministers Committee;

v. Evaluation of Bids: Comments made by the Ministers Committee and submitted to line ministry;

vi. Final Concession Agreement;

vii. Award of Concession Certificate; and

viii. Signing of the concession agreement.

1.2.5 The CPA clearly prescribes the contents which every PPP agreement must include and the checklist is comprehensive enough to address most critical aspects of a PPP/concession contract.

1.2.6 Lastly, the CPA provides for passage of regulations by the Minister for Finance for purposes of implementing the CPA. It is normal legislative practice that in the process of passing any law there will be a basic law passed by Parliament (referred to under Tanzanian and Zanzibar law as "principal legislation") and then, where there is need to have a procedural framework for the implementation of the principal legislation, there will be a section in the legislation which mandates a person or organ named in the law (usually a Minister or a Commissions/Board of Directors) to pass rules or regulations in that regard. The Minister (or his/her equivalent) is empowered to make regulations for the application of the Act, which only requires publication in the Government Gazette. This ensures that the necessary implementing regulations are able to be put in place within a short period of time.

1.2.7 Having concluded that the CPA provides an adequate legislative framework for PPPs, the following analysis specifies issues which should be addressed through regulations implemented under the CPA:

To date, there have been no PPP projects implemented under the Concession Projects Act so an evaluation of implementation issues under the CPA was not possible. However, after a careful review of the CPA, the team found the legislation to be in some respects lacking in the necessary clarity, transparency
and ease of implementation necessary for successful implementation of PPP projects in Zanzibar. In particular, there are several aspects of the CPA that could benefit from further clarity or modification/amendment, or which raise some concern regarding the rights and responsibilities of both the public and private sector within a concession agreement. These aspects include the following:

a) Under the Act, the PPP Unit, hereinafter referred to as the "PPP Department" (as recommended in the revised PPP Policy for Zanzibar), is mandated to, inter alia, promote and market the development of concession projects, approve pre-selection procedures, and draw rules and regulations regarding the bidding procedures for concession projects. Essentially this empowers the PPP Department to make its own rules with respect to procurement for a concession project. However, the Act does not specify, in clear terms, the extent to which the PPU Department will be regulated by the Public Procurement and Disposal of Public Assets Act ("the PPDPA"). The PPDPA Act establishes procurement management units ("PMUs") within Ministries and, presumably, there is a PMU within the Ministry of Finance. How the PPU Unit coordinates with the PMU should be very clearly defined either under the PPDPA or the CPA (or replacement act). As previously mentioned, the CPA leaves room for Ministerial regulations to govern the implementation of PPPs, which includes regulations addressing the relationship between the PPP Unit and the PMU as well as other institutions with functions that might impact PPP projects.

b) The PPP Department is also charged with assisting various ministries in the regulation and management of concession projects falling under them and with advising government in coordinating administrative procedures between ministries, government agencies and local authorities. In the absence of regulations, there is no clear framework under the Act regarding how the Unit should carry out these responsibilities. However, an overly bureaucratic regulatory regime could discourage private investors from bidding on PPP projects, given the heavy burden of reporting to multiple regulatory organs. The institutional framework for PPPs, therefore, must be clearly defined with coordination of all concession (PPP) projects assigned to the PPU Department. As described in the PPP Policy, project management should be the responsibility of individual line ministries with support from the PPP Department, while regulation should fall to an independent regulator. In the regulations proposed in this report (to be issued by the Minister for Finance), these roles are more clearly defined.

c) The PPP Department should have the necessary core capacity to advise line ministries and other government entities with respect to potential public-private partnerships. This is not currently specified in the CPA, but has been included in the PPP Policy document.
d) The Act requires the PPP Department to monitor and oversee the progress of a concession project in collaboration with the private partner. As set forth in the PPP Policy, however, responsibility for monitoring of all PPP projects should fall within the purview of the relevant line ministry. The CPA does not specify the monitoring and regulatory guidelines in this regard, which should be included in the proposed regulations.

e) The CPA does not define the qualifications of personnel required to staff the PPP Department and the latitude of their responsibilities. It is appreciated that not all PPPs will require the same expertise and it may therefore be more appropriate to retain a pool of experts available to the PPP Department to advise on specific projects on an ad hoc basis, which can and should be specified in regulations developed either under the CPA or a replacement PPP Act, including the mechanics of how such advisors would be funded.

f) Under Section 5 of the Act the PPP Department is required to receive and "act promptly" on all applications for permits, licenses or approvals necessary for the performance and implementation of a project. The section, however, does not specifically provide for the manner in which the Department is to process such applications. First, the PPP Department is not responsible for the issuance of permits or licenses of any kind related to projects, which are issued by the Zanzibar Investment Promotion Agency (ZIPA). Second, with regards to submission of applications for consideration by the PPP Department, it is recommended that the proposed regulations under the CPA should address this by laying down guidelines for the project application process.

g) Under Section 6(2) (Definitions) the CPA contemplates PPPs to be between the Government and corporate bodies which are registered and incorporated or established in Zanzibar. This means all parties interested in undertaking projects in Zanzibar must first be registered bodies within Zanzibar, imposing additional costs on those potential private sector investors who would need to undertake the registration process. However, Section 14 (6) of the law permits the invitation of applications for pre selection to be "...open to all corporate bodies or consortium of corporate bodies registered, incorporated or established in Zanzibar or overseas." It is recommended that this criterion be applied to all parties interested in taking part in PPP projects in Zanzibar.

h) The CPA has strict confidentiality requirements which appear similar to those described in the PPDPA Act. Specifically, the CPA states that all documents and information relating to concession (PPP) projects must be treated as "confidential and secret." With the recognized need for greater transparency in such project arrangements, particularly when the private sector is to participate in provision of public services, this creates a problematic information vacuum. It is not clear from the legislation what
level of information is protected or whether the entire project arrangement, including the concession agreement may be held confidential. Revisions should be made to specify that only proprietary information should be kept confidential, but that all other documentation relating to a PPP Project should be available to the public. The Act should also specify the requirement to provide all bidders equal access to information for every project prior to and during the bidding process to achieve the highest level of transparency possible.

i) The Act commits the government to make available any land and buildings to the private sector that may be required pursuant to the terms of the concession agreement. Whereas generally the public assets will remain the property of the government, the Act does permit the private partner to dispose of assets to third parties and retain a portion or all of the proceeds from the sale. The Act does not set out the circumstances where such disposal could be permitted (Section 29(1) and (2)). Moreover Section 21 (4) of the Act permits the inclusion of clauses in a PPP agreement that entitle the concessionaire “to pledge or create any charge by way of security to a bank or financial institution providing financing in relation to the project on the rights of the concessionaire under the concession agreement.” It is recommended that this be revised to remove the ability for private companies to profit from disposal of assets to third parties, and to make clear that government assets cannot be sold or pledged. Only concession rights should be able to be transferred or pledged to a financial institution, with permission from the Ministry of Finance.

j) Section 31 of the Act requires the use of local goods and services in the implementation of the concession agreement whenever they are available and competitive. No further definition of ‘available’ and ‘competitive’ is provided. The regulations should address this by requiring the inclusion of local content for every PPP project, which would be specified for each PPP agreement.

k) Whereas Section 32 empowers the Ministry of Finance to grant PPPs tax exemptions at its discretion, there are no guiding regulations on the qualification, extent, duration and nature of such exemptions. It is recommended that in the regulations the Minister should provide for tax exemption guidelines, and these guidelines should provide for consultations with the Zanzibar Investment Promotion Authority (“ZIPA”). There are aspects of the tax regime in Zanzibar which are “union matters” and according to the Constitution of the United Republic of Tanzania, taxes that fall under this category include “Income tax payable by individuals and by corporations, customs duty and excise duty on goods manufactured in Tanzania collected by the Customs Department.” Specifics related to the tax
regime and tax incentives that apply to PPP projects should be clarified in the regulations.

i) The dispute resolution requirement (Section 34 of the CPA) is very permissive, allowing the parties to decide on the method of arbitration within the concession (PPP) agreement either through regular courts or through arbitration and in accordance with rules of their choice. While this does not necessarily impact the PPP process negatively, in order to introduce an element of predictability for potential investors, it is recommended that an appropriate clause should be included in the regulations identifying two or three international arbitral regimes from which to choose.

In addition to the points made above, there are also several critical issues that are not currently addressed within the CPA, and which should be addressed through either regulations or an amendment to the existing Act, as described below:

m) The CPA does not address the issue of unsolicited bids, which is a critical aspect that should be included. An amendment to the CPA should address the subject of unsolicited bids consistent with the Government of Zanzibar's policy as established under the National PPP Policy, which establishes that all unsolicited bids will be considered, but if approved, must be competitively tendered.

n) Local governments are often the greatest users of PPP structures, as they often find themselves short of the funding required to provide the myriad public services expected of them within their jurisdiction. Local government is not specifically mentioned in the CPA. In order to ensure that legislation is applied consistently at both the national and local government levels, regulations under the CPA should address applicability to local government.

o) Financing of project development costs, including funding of pre-feasibility and feasibility studies as well as hiring of technical and transaction advisors, is not discussed in the CPA. In accordance with the PPP Policy, establishment of a Project Development Fund (PDF) is recommended and should be included as part of the regulations under the CPA.
1.3. The Public Procurement and Disposal of Public Assets Act, 2005 ("the PPDPAA")

1.3.1 The PPDPAA applies to the disposal and procurement of all public assets in the Isles by procuring entities which include all government ministries, parastatals, departments, or companies where the government is a majority shareholder. It has been shown that the CPA provides for procurement guidelines applicable to concession (PPP) projects exclusively.

1.3.2 The PPDPAA establishes an institutional hierarchy at the apex of which is the department for procurement services under the Ministry of Finance (s.4). The department deals with the formulation, establishment and enforcement of standards and the general regulation of procurement activities by government bodies and establishes Procurement Management Units (PMUs) within each Ministry.

1.3.3 The Department coordinates, monitors, and controls personnel needs in Procurement Management Units in the various government departments and agencies. The law requires the use of specified solicitation documents, s.23(1). The law also provides for single source direct procurement whereby the procuring entity contacts a single source directly (s.38). There is no maximum threshold requirement.

1.3.4 Unsolicited bids are not addressed and this seems to have influenced the CPA as that law too has no provision for unsolicited bids.

1.3.5 The CPA procurement framework mirrors the PPDPAA procurement framework and it is not clear under both frameworks how they will interface to ensure that PPPs are not caught between two parallel frameworks. The recommendation in this regard is to exempt PPP transactions from the application of the PPDPAA. This can be achieved at two levels. At the statute level, since the CPA does not expressly refer to the PPDPAA procurement framework, but rather creates a framework that does not require PPDPAA approvals, the CPA should be amended to specify that the PPDPAA framework does not apply to PPP transactions. At the level of regulations under the two laws, the relevant Ministers should introduce clauses to recognize that the PPDPAA regulations shall not apply to PPPs, and that only the CPA regulations and Act will apply.

1.3.6 The above recommendations are made simpler by the fact that both the PPDPAA and the CPA give powers to make regulations to the same Minister.
1.4. Zanzibar Investment Promotion and Protection Act, 2004

1.4.1 This law was passed to establish an institution that is a “Government focal point” for the promotion and facilitation of investments (the Zanzibar Investment Promotion Authority—ZIPA), mandated to promote and protect both local and foreign investments through incentives such as tax reliefs [section 20], freedom to repatriate profits [section 21], employment of foreigners to fill key positions [section 18], and protection against certain specified risks such as expropriation without compensation [section 22].

1.4.2 ZIPA’s other core mandate is for the administration, control and management of Freeport and Free Economic Zones in Zanzibar. As such, ZIPA will have direct involvement in the regulation of PPPs falling within these zones.

1.4.3 All foreign investors in Zanzibar must apply for and obtain from ZIPA a “certificate of approved enterprise” (ZIPA Certificate). The ZIPA Certificate entitles the holder to tax incentives as specified in the Certificate. An investor holding such a Certificate is able to negotiate further incentive packages with ZIPA. Local investors have an option also to apply to ZIPA for Certificates.

1.4.4 ZIPA also acts as a one stop centre for investors holding ZIPA Certificates in facilitating the obtaining of all permits, licenses, visas and other requirements for interested investors.

1.4.5 The Act specifies a dispute resolution by arbitration under the UN Commission on International Trade Rules or the ICSID Rules for disputes that cannot be resolved amicably between ZIPA and investors holding ZIPA Certificates. However, this dispute resolution mechanism is not absolutely exclusive of local arbitration options and courts. The parties are free to agree to resort to these latter options [section 23]. This is a dispute resolution mechanism which is suitably flexible and ideal for resolution of disputes arising out of PPP agreements.

1.5. Planning Commission Act No. 3 of 2012

1.5.1 There is a Zanzibar Planning Commission (the Commission) established by the Constitution of Zanzibar, and which operational under the Planning Commission Act of 2012. This Act designates the Commission as an independent and autonomous government agency.

1.5.2 The Commission is headed by the President and among its members are the two Vice Presidents and the Minister for Finance. By law the Commission is “the highest authority for economic development planning” and it has powers “to coordinate and supervise the implementation of such economic development plans”.
1.5.3 The Act places the Commission at the apex in terms of economic development planning and mandates the Commission to coordinate and supervise the implementation of such plans. This therefore places the Commission in a key position with respect to any possible PPP policy. The Commission is mandated to provide policy advice for national development planning, to formulate long, medium and short term development plans, and to coordinate them at both the national and local levels.

1.5.4 By virtue of the Act the Commission must form part of the key hierarchy of the institutional framework for PPP implementation, given that the Commission is charged with developing and approving national and sectoral development plans, and has the power to apply changes to its policies and issue directives with respect to development planning and implementation.

1.6. Analysis & Recommendations

1.6.1 The current PPP legal framework in Zanzibar is not to be found in one single piece of legislation. The main law under which PPP projects can be conceived, implemented and regulated is the Concession Projects Act, and the other closely supportive laws are the Public Assets Procurement and Disposal Act and the Regulations made under it, the Zanzibar Investment Promotion Act, the Planning Commission Act. In spite of the observation above, in our opinion the legal framework is capable of supporting a PPP project.

1.6.2 In the short term, PPP projects can be initiated and implemented subject to introduction of regulations under the Concession Projects Act to establish implementation/procedural mechanisms.

1.6.3 In the long term, the element of lack of clarity within the relevant laws may discourage private investment in such projects, or discourage government from pursuing such arrangements. The enabling legal, regulatory and institutional structure impacting PPP implementation has components which are scattered over a number of legislations across various sectors. It would take someone with a sound knowledge of not only the legal environment in Zanzibar, but also a deep understanding of the intergovernmental coordination, processes and interaction of laws and institutions in Mainland Tanzania, in order to successfully develop and implement a PPP project. This could be the reason behind the fact that to date no PPP projects have been implemented under the Concession Projects Act.

1.6.4 The current legal structure would still leave many specifics to be defined by the parties involved during the tendering process and contract signing phase. This can serve to jeopardize the PPP effort or cause the Government to agree to less favourable conditions under a specific PPP project due to the additional risk perceived by the private sector and particularly foreign investors.
1.6.5 In light of the issues raised above, below we present a summary of the main gaps within the current legal framework that are of note:

1.6.5.1 The Concession Projects Act, as discussed above, contains a framework for PPP projects. However, in absence of comprehensive regulations to give effect to enable the implementation modalities, it would still leave several uncertainties which are likely to complicate negotiations between the parties involved in the PPP;

1.6.5.2 Unsolicited proposals are not addressed in the current legislation. It is recommended that an amendment to the existing CPA include a provision addressing unsolicited proposals, and that any new PPP Act passed in the future include procedures for consideration of unsolicited proposals consistent with the PPP Policy.

1.6.5.3 There is no provision either in policy or legislation as regards the involvement of local government organs/institutions in PPP activities. Provisions should be made within the Concession Projects Act or its regulations specifying how the legislation applies at the local government level;

1.6.5.4 Dispute resolution mechanisms should be specified so as to provide more certainty to future private sector investors; and

1.6.5.5 Institutional structure for PPP implementation should be specified, including the role of the PPP Department (as proposed in the PPP Policy), line ministries/local governments, the Ministry of Finance, and other key government bodies.

1.6.6 Based on the above, it can be concluded that the Concession Projects Act in its current form is not adequate for sustaining significant economic development through PPP’s, and that additional legal guidance is necessary. Whether an entirely new dedicated PPP Act is developed or whether regulations are drafted instead to provide more clarity and guidance will be the decision of the Government of Zanzibar, however based on our analysis, we weigh the benefits and risks of each option below:

1.6.6.1 A dedicated PPP Act offers the benefit of clarity of the law and better functionality as far as implementation is concerned. Investors are attracted to the legal certainty provided by dedicated and single source law. Considering the involvement of union institutions such as the Ministry of Finance of the United Republic of Tanzania and the Bank of Tanzania, there is a need for clear legislation which fits well with existing Mainland legislation and existing Zanzibar laws. On the other hand, legislative enactment is a long process and it is estimated that a new PPP Act could take upwards of two (2) years to finalise before it could come into force. While there is the possibility to ‘Fast Track’ new
legislation through a certificate of urgency, we do not recommend this approach as it would not allow enough time to solicit stakeholder feedback and input on the new Act before passage into law.

1.6.6.2 Alternatively, the Concession Projects Act could be used to make regulations which would facilitate on-going and up-coming PPP projects. Regulations would avoid the delay associated with new legislation. A comprehensive set of PPP Regulations under the Concession Projects Act could achieve the desired legal certainty and clarity regarding the implementation of PPPs in Zanzibar. The disadvantages of regulations could include confusion with regard to existing procurement laws in Zanzibar and the Mainland, and the potential for investor confidence to diminish if conflicts between laws are not addressed. Regulations would also require amendment of the Concessions Act and the Public Procurement Act to harmonize the laws. This could take time, but would most likely be more time effective than instituting a new PPP Act.

1.6.6.3 For the above reasons, we recommend that development of regulations under the Concession Projects Act, together with amendments to related laws, is the best approach towards more immediate implementation of PPPs in Zanzibar. In the longer term, however, it is advisable that the Government of Zanzibar consider development and implementation of a new dedicated PPP Act to replace the Concession Projects Act, including passing regulations (which could be taken from those developed under the Concession Projects Act), in order to provide a clearer, more transparent legal framework for PPPs in Zanzibar.