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**AN EXAMINATION OF THE LEGAL AND
REGULATORY FRAMEWORK FOR PUBLIC-PRIVATE
PARTNERSHIP (PPP) INITIATIVE IN GHANA**

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ABSTRACT

Public-Private Partnerships (PPPs), being a measure through which private companies collaborate with the public sector to develop and manage complex infrastructure programmes and services, are increasingly being used throughout the world as a solution to address serious infrastructure deficit. In most developing countries such as Ghana, investment in public infrastructure has not matched the increasing need of the population. As a result, underinvestment in critical infrastructures such as road transportation, electricity, housing, water and sanitation among others has posed a serious challenge to the government in its quest for development. The World Bank has estimated that for Ghana to fill its infrastructure gaps, the country needs over US\$1.5 billion annually for the next ten years in various sectors of the economy. The investment required exceeds government total revenues available in the short term. Ghana has therefore recently adopted the PPP initiative to develop and maintain ageing infrastructure. This paper examines the legal and regulatory framework for PPPs in Ghana and argues that the present legal and regulatory regime governing PPPs in Ghana are not enough to ensure a successful PPP programme.

1.0 INTRODUCTION

Since Ghana attained independence in 1957, the responsibility of providing both social and economic infrastructure for the citizens has mainly been that of the government.²³ Government became the main financier of the entire public infrastructure. In the early 1980's, the country faced a serious challenge to fund its public infrastructure as a result of dwindling revenues, which led the country to adopt the International Monetary Fund (IMF) and the World Bank Structural Adjustment Programme.²⁴

Currently, Ghana's infrastructure development is relatively poor, both in qualitative and quantitative terms, in spite of its growing economic wealth.²⁵ Investment in public infrastructure in recent times, has not matched the increasing need of the population. The nation's railway network, had suffered serious neglect before it is currently being given government attention. Underinvestment in road transportation, electricity, housing, water and sanitation has posed a serious challenge to the government in its quest for development. The World Bank has estimated that for Ghana

23 See the Ghana Constitutions of 1957, 1960, 1969 and 1979.

24 See Public-Private Partnership: A new strategy of infrastructure financing in Ghana. <<http://www.ghanabizmedia.com/ghanabizmedia/august-2012-policy/755-public-private-partnership-a-new-strategy-of-infrastructure-financing-in-ghana.htm>> (Accessed on 13th November, 2013).

25 Treading a public private partnership path that work <<http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>> (Accessed on 09 November 2013).

to fill its infrastructure gaps, the country needs over US\$1.5 billion annually for the next ten years in various sectors of the economy.²⁶

As part of the World Bank's commitment to developing Ghanaian infrastructure, the Bank approved an interest free credit of US\$30 million for Ghana to revolutionise infrastructure development through the new Public-Private Partnership (PPP) initiative.²⁷ This support from the World Bank is aimed at closing the funding gap and leveraging private sector investment from 2012-2016.²⁸ In order to give effect to the provisions of Article 36 (2) (b) of the 1992 Ghanaian Constitution,²⁹ which gives private individuals the right to participate in economic activities, the government, after a wider consultation established the Public Investment Division (PID) within the Ministry of Finance and Economic Planning to regulate private sector participation in public infrastructure delivery.³⁰ This was part of the government support to bolster private sector participation in infrastructure development through the PPP initiative.

Attempts at formalising the Public Private Partnerships process in Ghana and establishing a solid framework started

26 See Ghana-PPP Projects. <<http://www.worldbank.org/projects/P125595/ghana-ppp-project?lang=en>> (Accessed on 13th November, 13).

27 See New Partnership Project to Mobilize Private Investment for Ghana's Infrastructure. <<http://www.modernghana.com/news/386267/1/new-partnership-project-to-mobilize-private-invest.html>> (Accessed on 11th November, 2013).

28 Ibid.

29 See <www.parliament.gh> for the full text of the constitution.

30 See <<http://www.mofep.gov.gh/about/objectives>> (Accessed on 18 the November, 13).

with the then Ministry for Private Sector Development in 2003.³¹ As a result of a series of consultations with the stakeholders, a policy document titled "Policy Guidelines for the Implementation of Public-Private Partnerships in Ghana" was approved by the cabinet in 2004.³²

However, the guidelines were not fully operational, thereby denying the private sector the impetus of participating in national development. In the Late President John Atta-Mills administration, the initiative was resurrected, culminating in the launch of another national policy document for PPPs.³³ On 3rd June 2011, the government adopted the National Policy framework for PPPs in Ghana to provide a guide in the meantime for PPPs. A minister of State in charge of PPP was also appointed at the Presidency.

The Public-Private Partnership Bill is currently before the country's legislature and when passed, it is intended to serve as detailed legal framework for Public Private Partnership programme in the former Gold Coast.³⁴ While in Ghana and several other countries, the strategy of government has shifted

³¹ Since early 2000, under the administration of President Kufuor, a whole ministry was established for private sector development with the aim of facilitating public private cooperation in national development.

³² In the 2004 PPP policy guidelines, it attempted to officially integrate and position both the public and private sectors in development process. In fact, the private sector was positioned as Ghana's engine of growth to indicate its importance.

³³ See Public Private Partnership (PPP) in Ghana. Retrieved from <<http://www.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=269857>> (accessed on 18th November, 2013).

³⁴ See Ghana Public Private Partnership Bill. < <http://www.mofep.gov.gh/?q=news/060713>> (accessed on 18th November 2013).

from direct government procurement of infrastructure and services to privatisation and various other arrangements, PPP is considered as a viable alternative of infrastructure financing.³⁵

At the opening ceremony of the 2013 Annual Bar Conference held in Ho, Ghana, the Honourable Chief Justice of Ghana, Mrs Justice Georgina Wood reiterated the importance of having a standard legal framework for PPPs in Ghana.³⁶ At the conference with the theme titled *'The Role of the Legal Profession in Developing Public Private Partnership Regulatory Framework for National Development,'* the Chief Justice posited as follows:

There are a plethora of laws with PPP impact in Ghana, though most are uncoordinated. The uncertainty of the legal regime for PPPs in Ghana results not only in inconsistent approaches to the participation of the private sector in the delivery of PPPs, but it also constitutes a potential risk that may adversely affect the appetite of private sector partners to participate in PPP projects in Ghana.

She further urged lawyers to forge a radical change in their

³⁵ See Treading a public private partnership path that works <<http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>>.

³⁶ See CJ calls for legal framework for public-private partnerships. <<http://www.modernghana.com/news/490314/1/cj-calls-for-legal-framework-for-public-private-pa.html>> (Accessed on 23 November, 2013).

traditional focus and that for lawyers to play their active roles in the nation's development, they should understand the interplay between finance, economics, project financing and execution, as well as the prevailing needs of the society. She stated thus:

Consequently, legal instruction must not continue to focus solely or purely on the traditional law subjects, legal rules, statutes and decided cases only, but rather begin to bring to the fore, the economic, political, financial and social underpinnings that make the legal rules and principles more relevant to society. It is only then that lawyers will begin to be at ease with specialised legal documents including PPP Concession Agreements that they might be tempted to consider far too technical for their comprehension. In this regard, there is the need for lawyers to again acquaint themselves with the rules, customs and practices of international trade and finance.

She posited that because of the complex nature of PPP arrangements, effective drafting of a sound comprehensive legal framework will require highly accomplished legal expertise with adequate understanding of both general and sector-specific laws governing PPPs.

It must be stated that PPP is not a recent phenomenon in Ghana, for example in 2006; the Ghana Water Company Limited (GWCL) signed a 5-year management contract with Aqua Vitens Rand. There are other projects being undertaken

under the PPPs that are still in the pipeline.³⁷ However, results were mixed and negotiations between the parties to the PPP transaction have proved somehow difficult because of the lack of a clear legal and regulatory framework that will govern these types of often complex and transactions.

2.0 SECTOR LEVEL ANALYSIS OF INFRASTRUCTURE DEVELOPMENT IN GHANA

Attempt is made here to briefly examine the level of infrastructure development in Ghana in various sectors of the economy.

2.1 Transportation Sector

2.1.1 Road Transportation

Ghana has a total road network of 66,200 km, out of which 12,400 km are urban roads, 42,192 km are feeder roads, while 11,628 km are for trunk roads.³⁸ Although transportation in the country is still relatively underdeveloped, the country however shows a great potential and a strong environment for foreign investment.³⁹ The network of roads is considered

³⁷ For example, the SunonAsogli Power Plant, a typical PPP project which is expected to produce fifteen per cent of the total electricity generated in the country (200 megawatts of power).

³⁸ See Ghana Infrastructure Plans. <http://www.mofep.gov.gh/CG2012/userfiles/file/ghana_infrastructure.pdf> (accessed on 19th November 2013).

³⁹ See Ghana Infrastructure Report Q1 2013. <<http://www.marketresearch.com/Business-Monitor-International-v304/Ghana-Infrastructure-Q1-7259384/>> (accessed on 18th November 2013).

adequate to meet the minimal requirements for sub-regional integration.⁴⁰ Nevertheless, the roads in major cities are mostly congested as a result of heavy traffic. Only 41% of the entire road is considered to be in good condition.⁴¹ Some critical roads linking the capital city to the rest of the country are still under construction for more than Six years and are yet to be completed due to resources constraint.⁴² However, transport projects are expected to increase because of oil discovery in the country. No doubt, in order for Ghana to meet the requirements for economic growth, Urban, Highways and feeder roads in the country must receive urgent attention.

2.1.2 Rail Transportation

Ghana's total railways network spans about 1,300km. The rail network links the Capital city of Accra-Kumasi-Takoradi and has really helped in the transportation of commodities for export.⁴³ As the largest producer of cocoa in the world, the railroad is considered to have a strong effect on cocoa production and distribution.⁴⁴ Currently, Ghana's rail system is partially operational because of lots of old tracks that need to be rehabilitated and upgraded. This portends negative effects on the development of the mining sector and will certainly

⁴⁰ Ibid.

⁴¹ See Ghana Infrastructure Plans *supra*.

⁴² See Updating our road infrastructure < <http://graphic.com.gh/editorials/3052-updating-our-road-infrastructure.html> > (Accessed on 19th November, 2013)

⁴³ The country is rich in Cocoa, bauxite, timber and manganese

⁴⁴ Transportation Infrastructure and Development in Ghana < <http://sdan.repec.org/p/hd/papers/hdhs-00607207.html> > (accessed on 19th November, 2013)

not support the development of the country's emerging oil sector.⁴⁵ In order to fully open up the country for economic development, the government has considered rehabilitating and modernising the road networks in the Western region. In 2010, a contract worth US\$6-billion was signed with the Chinese National Machinery Import and Export Corporation (CMC) for the construction and upgrading of railroads in the country.⁴⁶ When completed, the rail network is expected to link central business districts with other parts of the country and also to provide easy transportation of containers and petroleum products from the oil and mining regions to the ports of Tema and Takoradi.⁴⁷

2.1.3 Maritime and Inland Water Transportation

Ghana's busiest seaports located at Tema and Takoradi are recently equipped and upgraded to provide services to both the local and international traders. Recently, the volumes of activity have been on a sharp increase to the extent that there have been serious congestions and capacity constraint which are gradually becoming impediments to further development in that sector.⁴⁸ There are usually long queues of vessels waiting to berth due to limited facilities available to

⁴⁵ Oil was discovered in commercial quantity in Ghana in 2007.

⁴⁶ See Ghana signs railway contract with Chinese firm. < <http://www.modernghana.com/news/306377/1/ghana-signs-railway-contract-with-chinese-firm.html>>. (accessed 19th November, 2013).

⁴⁷ See Infrastructure - Transportation in Ghana. < <http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/transportation-infrastructure.html>>. (Accessed on 19th November, 2013).

⁴⁸ See Ghana Infrastructure Plans.

decongest the ports. This may expose the vessels to potential attacks by the pirates. The Volta Lake is also an important means of transportation in Ghana. Over the years, it has been a major source of transporting petroleum and agricultural products as well as passengers. However, the lake suffers from volatile ecological conditions and obsolete equipment.⁴⁹ The government is carrying out expansion and the development of a multimodal transportation system on the Volta Lake.

As a result of increasing demand, ports in Ghana are now being congested. For example, the Port of Tema has a container handling capacity of around 375,000 annually. However, as a result of increasing demand; the port has been handling about 420,000 containers. The congestion problem needs to be addressed in order to increase efficiency in its operations.⁵⁰

2.1.4 Aviation Sector

Ghana's international airport (Kotoka International Airport) is a host to most international airlines that fly regularly into the country.⁵¹ The airport connects Ghana to Africa and the rest of the world. KIA is one of the leading airports in sub-Saharan with high international safety standards. In 1996, the country embarked on rehabilitation and expansion programme which has brought about refurbishment of the

⁴⁹ Ibid.

⁵⁰ Ghana's Infrastructure: A Continental Perspective.

⁵¹ See Infrastructure - Transportation in Ghana.

facilities at both the international and the domestic terminals. This has greatly increased the capacity of the airport to attend to both travellers and cargoes with dispatch. However, for Ghana to be able to cope with the global economic trend there is still the need to expand and build more airports in the light of the oil discovery in the country.

2.2 Water and Sanitation

Ghana is one of the few countries in Africa that already met the MDG target for water supply. Access to safe and drinking water rose from 69 percent in 2003 to 84 percent in 2008 thereby exceeding the MDG target of 76 percent.⁵² Despite the water utility's improvements in recent times, cost recovery and revenue collection, distribution losses remain high at around 50 percent with adverse impacts on service quality. There are two explanations for Ghana's poor performance in this respect. The first is the country's ageing water distribution infrastructure, which is full of leaks.⁵³ The second reason is because of the large scale commercial theft from the networks. As a result of these huge losses, water supply is now being rationalised as there are intermittent supply. The very poor quality of water output is now impacting negatively on the country's achievement of the Millennium Development Goal in the area of water provision, because although there is good

52 Vivien Foster and Nataliya Pushak. Policy Research Working Paper on Ghana's Infrastructure: A Continental Perspective. The World Bank 2011 at Page 16.

53 Ibid.

connection of water pipes to most houses, water supply is not adequate. The government will have to carry out reforms aimed at addressing these challenges.

While it can be said that Ghana is on track to meet the Millennium Development Goal in the area of water supply, the situation on sanitation is different. Evidence has shown that although access to improved sanitation facilities has increased in recent times, this still falls below the expected standard required by the MDG. As at 2013, it was estimated that about 16 million people do not have access to sanitised latrines while close to 1.8 million people do not even have access to latrines at all.⁵⁴

In a keynote address delivered by the Deputy Minister for Local Government and Rural Development at the commemoration of the World Toilet day on 19th November 2013, the deputy minister lamented that Ghana may not likely meet the 2015 Millennium Development Goals target on sanitation.⁵⁵ He however stated that his Ministry is willing to support collaborations with development partners and other key stakeholders because the government has put in place the necessary policy, institutional, and legal/investments framework to address this developmental setback.

⁵⁴ See Ghana: World Toilet Day Commemorated in Accra. <<http://allafrica.com/stories/201311201258.html>> (accessed on 21st November, 2013).

⁵⁵ *Ibid.*

2.3 Electricity Infrastructure

If Ghana's economy will continue to rise, the country will have to seriously address the challenges of power supply. The country has been witnessing social, political and economic stability over the past decade. Since the year 2010, the nation's economy has been growing at a very fast rate. For instance in 2011, due to the commencement of oil production, the annual GDP growth was put at 14.4 percent compared to 8.0 in 2010 and 7.1 percent in 2012.⁵⁶ The growth performance was low in 2012 due to lower production of cocoa and oil. The country's medium-term outlook remains healthy, with projected GDP growth of 8.0% (6.5% non-oil) in 2013 and 8.7% (8.9% non-oil) in 2014, which is an improvement over and above the average annual growth rate of 6.5% for the period since 2000.⁵⁷ Investments in public infrastructure like power supply; commercial agriculture and oil and gas are expected to drive this growth.

Currently, the country's power generation stands at about 2,200 MW and by 2017, the government plans to increase the generation capacity to more than 4,000 MW.⁵⁸ For this to be achievable by 2017, then transmission and distribution networks will have to be rehabilitated and expanded. The

⁵⁶ See Ghana's power challenges and national productivity. < <http://www.ghanabizmedia.com/ghanabizmedia/december-2012-cover-story/867-ghanas-power-challenges-and-national-productivity.html> > (Accessed on 21st November, 2013).

⁵⁷ See Ghana Economic Outlook. < <http://www.afdb.org/en/countries/west-africa/ghana/ghana-economic-outlook/> > (Accessed on 21st November, 2013).

⁵⁸ See Ghana Infrastructure Plans.

major causes of the challenge facing the power sector are as a result of lack of maintenance of the electricity equipment and the refusal to change the obsolete ones.

The government is therefore carrying out both Structural and regulatory reforms aimed at encouraging private investment in the development of the power industry.⁵⁹ In doing this, the government has already commenced the reformation of the energy sector to bring it in line with the international standards. The government also plans to increase the generation capacity and enhance inter country connections by expanding the West African Power Pool (WAPP) to boost electricity supply within the West Africa Sub-region.⁶⁰

2.4 Telecommunication Infrastructure

Before 1996, telecommunication sector in Ghana was under the direct control of the government. This monopoly led to inefficiency and corruption. However, with the enactment of the National Communications Authority Act, 1996,⁶¹ the monopoly of the former Telecommunication Corporation was abolished thereby giving way to the National Communications

⁵⁹ See *Electrical Power in Ghana - Overview*. <<http://www.mbandi.com/indy/power/at/gh/p0005.htm>>. (Accessed on 21st November, 2013).

⁶⁰ Founded in the year 2000, the West African Power Pool (WAPP) is an institution established by the mandate of the Economic Community of West African States (ECOWAS), to among others, develop a sustainable regional electricity supply system in order to promote the economic growth of the ECOWAS sub region. To achieve this objective, there is the need for WAPP develop and implementation of key infrastructure so that all ECOWAS member states are given access to economic energy resources.

⁶¹ Act No 524 of 1996.

Authority (NCA) as the new national telecommunication regulator.⁶² In 2009, the NCA announced that it was prepared to give licenses to private investors to install telecom infrastructure in the country to boost capacity in that sector.⁶³ The Commission stated this through its Director of Regulatory and Administration, Mr Joshua Peprah at a day's workshop with stakeholders in the communication industry.⁶⁴ The commission reiterated the importance of having a good telecommunication bandwidth as follows:

When we have adequate, clean and reliable international bandwidth, we will carve a niche for ourselves in the international outsourcing market and that way enterprises will not hesitate to establish anywhere in the country outside of the capital. But we need the citizenry to come along with us on this because without the telecom masts, we can't extend the benefits of the bandwidths to the rest of the country.

There are currently six (6) network operators in the country. These are: Vodafone Ghana Limited, Scancom Ghana Limited (MTN), Airtel Communication, Millicom Ghana Limited (Tigo), Globacom Ghana Limited (Glo) and Expresso. The

62 See Infrastructure Telephony in Ghana. <<http://www.gipcghana.com/invest-in-ghana/why-ghana/infrastructure/ict-infrastructure.html>> (. Accessed on 21st November, 2013).

63 See <<http://www.ghanabusinessnews.com/2009/04/24/ghana-to-license-third-parties-to-provide-telecom-infrastructure-for-co-location/#sthash.pGffHtFX.dpuf>> (accessed on 21st November, 2013).

64 The Workshop was held in Accra on 24 April, 2009.

market for telecom operators stood at 26,616,427 with Scancom Ghana Limited (MTN) leading with about 46 percent of the market share, followed by Vodafone with 21 percent.⁶⁵

With these improvements in the telecommunication sector, it has been said that a great deal needs to be done to improve and sustain higher quality of service in the country.⁶⁶ Appropriate laws which would provide an enabling environment to the private sector will be of utmost importance.

3.0 REASONS FOR THE INVOLVEMENT OF THE PRIVATE SECTOR IN THE DEVELOPMENT OF INFRASTRUCTURE

There are many reasons why the government may need to collaborate with the private sector in the delivery of public goods and services. These reasons have been grouped and discussed under five major sub-headings as follows:

3.1 Attracting Private Capital Investment

Governments are attracted by the benefits of mobilizing private capital. The estimated demand for public infrastructure is huge and sometimes above the entire budget projection of a nation. The World Bank estimates that Ghana needs over US\$

⁶⁵ Ibid.

⁶⁶ See Francis K. A. Allotey and Felix K. Akorli, *Telecommunications in Ghana*, <<http://www.vii.org/papers/ghana.htm>> (accessed 21st October, 2013).

1 Billion annually to address its infrastructure challenges.⁶⁷ It is evident that the government alone lacks the required resources to meet this demand. So, harnessing private capital can help governments to speed up the delivery of public infrastructure without delay. The banking and finance markets have moved to accommodate the needs of PPP transactions.

3.2 It increases efficiency and the use of resources

Scarce public resources are not being used efficiently by the public authorities. Also, because of the poor incentives for efficiency, the public sector is not rightly positioned to efficiently build and operate public infrastructures. Combining such incentives in the operation and management of the public infrastructure through the private sector is therefore necessary. Typically, private sector operators enter into such transactions with the intention of maximizing profits which are geared majorly by increased efficiency in investment and operations. If the PPPs are designed in such a manner as to allow the operator realise this goal, the efficiency of the infrastructure services will be achieved.

The greater efficiency of the private sector can be linked to the following factors:-

- (a) The private sector's commercial approaches to problem

⁶⁷ See Threading a Public Private Partnership Path that Works. <<http://www.ghanabizmedia.com/ghanabizmedia/july-2011-policy/364-treading-a-public-private-partnership-path-that-works.html>> (Accessed on 17th May, 2012).

solving with serious focus on cost-effectiveness which leads to the rationalization of cost of labour and materials;

- (b) By allowing less politically oriented decision making will surely lead to better governance and it will improve accountability; and
- (c) Improving competition and transparency will greatly reduce the opportunity for corrupt practices and it will reveal those costs that were hitherto hidden.⁶⁸

3.3 Technology, Innovation and Know-how

By involving the private sector, access to new technologies and experienced management not currently available through the public monopoly will be the result. This will include access to skills and those technologies and know-how which were otherwise not known to the public sector. These technologies may even be developed for the project specifically which would not have been developed under the traditional procurement system.

3.4 Transparency and Anti-corruption

Openness and good governance will lead to equality in the treatment of the investors and it will promote competition.

⁶⁸ Jeffrey Delmon, Page 14.

Lack of transparency and good governance therefore increases the likelihood of bribery and corruption, reduces competition, increases costs and reduces quality of the output. PPPs therefore provide opportunity to implement good governance in the process of implementation.

4.0 LEGAL FRAMEWORK FOR PUBLIC PRIVATE PARTNERSHIPS (PPPS) IN GHANA

The legal frameworks for PPPs in Ghana are as follows:

4.1 The Constitution

The 1992 Constitution of the Republic of Ghana makes provisions for the national development imperative for the country through the Directive Principles of State Policy which requires that all governments must pursue sound policies that would ultimately ensure the "*establishment of a just and free society*", where every Ghanaian would have the opportunity to live long, productive, and meaningful lives.⁶⁹

To complement the efforts of government in the realisation of these objectives, and in recognition of the positive impacts the private sector could play in economic development, the right of the private sector to participate in economic development has therefore been enshrined in the constitution. S.36 of the Constitution provides;

⁶⁹ See S.34 (1) of the 1992 Constitution of Ghana.

- (2) The State shall, in particular, take all necessary steps to establish a sound and healthy economy whose underlying principles shall include -
 - (a) The guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity;
 - (b) Affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy;⁷⁰

The above quoted provision of the constitution especially subsection 2(b) succinctly shows that the government is committed to giving room to the private sector to participate in nation's development by creating an enabling environment for the businesses to thrive. Although the constitution does not contain detailed provisions for the PPP framework in Ghana, it however sets the ball rolling for private sector participation in development through the Public Private Partnerships.

4.2 National Policy on Public Private Partnerships (PPPs)

In June 2011, the Ministry of Finance and Economic Planning developed a National Policy on Public Private Partnerships in

49. *ibid*

Ghana. This was made to provide some degree of consistency in the way and manner PPP projects are to be carried out in the country. The policy covers areas such as project identification, selection, appraisal, procurement, operation, maintenance, performance monitoring and evaluation. The policy applies to all ministries, agencies and levels of government and shall be pursued in accordance with the basic principles of affordability, value for money and sufficient risk transfer.⁷¹

In drafting the policy framework, extensive consultations were made with relevant stakeholders such as financial institutions, professional associations, industry representatives, ministries, departments of government, metropolitan and district associations. The views and opinion gathered were codified and reflected in this policy. The policy covers basic principles governing procurement processes. These include accountability, transparency and competition as well as predictability and environmental safeguards among others. It further provides that all projects shall be structured in such a way as to encourage local contents and technology transfer. The key objectives of the PPP programme as contained in the national policy are summarised as follows;

- a. To leverage public assets and funds with private sector resources from local and international markets to accelerate needed investments in infrastructure and

70 S.36 (2) of the 1992 Constitution of Ghana.

71 See the National Policy on Public Private Partnerships in Ghana. <http://www.mofep.gov.gh/sites/default/files/docs/pid/ppp_policy.pdf> (Accessed on 23rd August, 2013).

- services;
- b. To encourage and facilitate investment by the private sector by creating an enabling environment for PPPs where value for money for government can be clearly demonstrated;
 - c. To increase availability of public infrastructure and services and improve service quality and efficiency of projects;
 - d. To ensure the attainment of required and acceptable local and international social and environmental standards;
 - e. To protect the interests of all stakeholders including end users, affected people, government and private sector;
 - f. To set up efficient and transparent institutional arrangements for the identification, structuring and competitive tendering of PPP projects;
 - g. To provide a framework for developing efficient risk sharing mechanism; and
 - h. To encourage and promote indigenous Ghanaian private sector participation in the delivery of public infrastructure and services.

The policy however does not purport to provide a comprehensive legal and regulatory framework for PPPs in Ghana. This is because the policy itself states that until a

53. Isabella Okagbue Women's Rights are Human Rights (NIALS Lagos, 1996) 6
54. Ibid, p.9 in particular note 35

detailed PPP law is enacted by the parliament, the policy shall continue to provide legal and regulatory framework to guide parties involved in the PPP project in the country. Therefore, until the Ghanaian Parliament enacts the PPP Act, this policy shall guide all PPP transactions.

4.3 Public Procurement Act, 2003

In an attempt to stem the tide of corruption in Public Procurement in Ghana, the Parliament enacted the Public Procurement Act⁷² which was substantially fashioned after the UNCITRAL Model Law on Public Procurement.⁷³ The Act contains provisions that can ensure transparency and accountability in procurement processes. It sets out the methods, structures and tendering procedures for procurement and the procedures for reviews/approval and other miscellaneous matters connected therewith. The Act complements the provisions in the Financial Administration Act and the Regulations made under it.

The Act further establishes an independent regulatory body called the Public Procurement Authority. The Authority is empowered to supervise all procurement activities by all government Ministries, Agencies and departments at all levels of government. To ensure an effective supervision, the authority carries out a periodic assessment of activities to

⁷² Act No 663 of 2003.

⁷³ See Act 663- Antidotes to Corruption in Procurement .Public Procurement Authority Bulletin
<<http://ppaghana.org/documents/Bulletins/PPAE-BulletinJulAug2013Final.pdf>> (Accessed on
24th November, 2013).

uncover all probable lapses and therefore initiate appropriate measures remedy them.

4.4 Financial Administration Act 2003 and Financial Administration Regulations 2004

This Act⁷⁴ was passed into law on 28th day of October 2003. It was passed to promote public sector accountability and combat corruption. The preamble to the Act states the main purport of the Act succinctly thus:

"AN ACT to regulate the financial management of the public sector; prescribe the responsibilities of persons entrusted with financial management in the government; ensure the effective and efficient management of state revenue, expenditure, assets, liabilities, resources of the government, the Consolidated Fund and other public funds and to provide for matters related to these."

Section 1 of the Act empowers the Minister of Finance to ensure that transparent systems for all government procurement are maintained and that the minister must cause the full account of all public moneys and resources to be laid before the parliament. The Minister shall also ensure the exercise of regularity and propriety in handling all government expenditures.⁷⁵

⁷⁴ Act No 654 of 2003

⁷⁵ See 5.1 (3) (c) of the Act

Section 2 of the Act further empowers the Minister of Finance to make regulations or give further directions that are in compliance with the provisions of this Act where they are considered necessary and expedient for the proper implementation of this Act and for the safety, economy and advantage of public revenue and property.⁷⁶

Pursuant to the Provisions of Sections 2 and 73 of the Financial Administration Act 2003 which empowered the Minister to make regulations for the conduct of financial businesses on behalf of the government, the Minister made the Financial Administration Regulations which came into effect on 8th day of April, 2004. Both the Act and the Regulations provide detailed directions and control for overall sound financial administration for the country.⁷⁷

5.0 THE INSTITUTIONAL LANDSCAPE

Institutions here are the government establishments or agencies that are responsible for the proper implementation of PPP Programme in the country. The PPP Policy provides that such institutions should support the following broad functions. These are:

⁷⁶ See S.2 (2) of the Act.

⁷⁷ See Main Legislation and Policy Documents Regarding Decentralization and Local Governments in Ghana. <http://books.google.com.my/books?id=BoLxNCD29CkC&pg=PA98&lpg=PA98&dq=overview+of+the+Ghana+Financial+administration+act+2003.&source=bl&ots=b7T-JKsMpPV&sig=pkcuQOn9w_S22VtVcjQeE6lKjow&hl=en&sa=X&ei=51ORUpalAYjZ-rQfx0YHIAw&ved=0CHMQ6AEwCQ#v=onepage&q=overview%20of%20the%20Ghana%20Financial%20administration%20act%202003.&f=false> (Accessed on 24th September, 2013).

1. Advising on PPP Policy development, monitoring, dissemination and enforcement;
2. Advising and supporting individual project in the areas of preparation, designing and execution;
3. Giving advice, support and promoting PPP Projects;
4. Giving project approval where necessary ;and
5. Ensuring proper financial management.

The following are the relevant institutions that are responsible for implementing PPP programmes in Ghana:

1. The Ministry of Finance and Economic Planning;
2. The Public Investment Division;
3. Contracting Agencies or MDA's; and
4. National Development Planning Commission.

The responsibilities of the institutions will be examined one after the other.

5.1 Ministry of Finance and Economic Planning (MOFEP)

The Ministry of Finance and Economic Planning is the ministry that is responsible for developing the legal, regulatory and institutional framework for PPPs programme in Ghana. The ministry is also responsible for issuing standardised PPP provisions and manuals in order to ensure sound financial management of the PPP Programme. The minister in charge of this ministry performs central roles in the development of the PPP programme. The minister is empowered under the law to make regulations to support the existing legislations on PPPs in the country. These are the Financial Administration Act of 2003, The Public Procurement Act and the PPP National Policy.

5.2 The Public Investment Division (PID)

This is a department under the Ministry of Finance and Economic Planning (MOFEP) that ensures efficiency in management and delivery of public investments for sustainable growth and development.⁷⁸ According to Mr Ekow Coleman,⁷⁹ this unit is the most important unit that performs a key role in the management and implementation of PPP programme in Ghana. It provides advisory services and support to all ministries, Departments and Agencies that intends to engage in PPP programme. He stated further

⁷⁸ See Public Investment Division. <<http://www.mofep.gov.gh/?q=divisions/pid>> (Accessed on 24th November, 2013).

⁷⁹ Being an interview with Mr Ekow Coleman of the PPP Advisory Unit of the Public Investment Division in Accra on Wednesday 9.01.13.

that the Division shall also promote a flow of bankable, sustainable and viable PPP deals. The Division is to carry out these objectives through a procedure that is transparent and commands public confidence. The division has some units within it that assist in carrying out these objectives. These are; the PPP Advisory Unit; Project and Financial Analysis Unit; Public Entities and Strategic Projects Units.

5.3 Government Contracting Entities

These are Ministries, Departments and Agencies of government both at the Central and Municipal levels. It is the MDA's that have the power to identify a project that is suitable and grant concessions in respect thereof. The MDA's are encouraged to develop capabilities within themselves in order to assist in project identification, contract management, project monitoring, reporting and evaluation. This will be done by setting up Project Management Units within each of the Ministries, Departments and Agencies of the government concerned.

An important point to mention here is that Ghana operates a Unitary System of Government whereby there is only the Central government and districts.⁸⁰ The laws made by the parliament are binding on all authorities and persons in Ghana.⁸¹ Since the parliament makes law for the country, it

⁸⁰ See S.4 (1) of the Ghanaian Constitution. The country has 6 Metropolitan, 49 Municipal and 161 Districts making 216 MMDs.

⁸¹ See S.93 (2) for the powers of the parliament to make laws for the whole country.

also presupposes that the decisions of the Public Investment Division will be binding on both the central and the district units. Therefore, the likelihood of conflicts between the national laws and the state or regional laws as applicable in a federal system will be reduced.⁸²

Therefore, it will be more convenient for the relevant implementing agency like the Public Investment Division to ensure a uniform compliance of the law within the country.

5.4 National Development Planning Commission (NDPC)

The Ghana National Development Planning Commission has the mandate to prepare the National Infrastructure Plan (NIP) in conjunction with the relevant contracting authorities before embarking on the project. The National Infrastructure Plan identifies those projects that will be carried out within a specific period of time. Therefore, before any PPP Project can be initiated by any agency, it must emanate from the National Infrastructure Plan (NIP) otherwise, the relevant agency must seek the approval of the commission before embarking on such new project.

6.0 THE PRIVATE SECTOR PROPONENT

The National Policy is silent on the qualification inherent in a Private Sector before participating in the procurement

⁸² Conflict of laws between the states and Federal Government usually occurs in a Federal System of Government. A typical example is Nigeria. This is further discussed in Chapter 4 of this Thesis.

process. However, since the general procurement law applies to procurement of goods and services including PPP procurement especially in the areas where the National Policy is silent, then recourse would have to be made to its provisions with respect to the qualification of tenders. Section 21 (1) of the Public Procurement Act provides that;

- (a) A tenderer in all public procurement shall possess the necessary;-
 - (i) Professional and technical qualifications and competence;
 - (ii) Financial resources to execute the project;
 - (iii) Equipment and other physical facilities for the execution of the project;
 - (iv) Managerial capability, reliability, experience in the procurement object and reputation; and
 - (v) Personnel to perform the procurement contract;
- (b) Shall have the legal capacity to enter the contract;
- (c) Shall be solvent, not be in receivership, bankrupt or in the process of being wound up, not have its business activities suspended and not be the subject of legal proceedings;
- (d) Shall have fulfilled its obligations to pay taxes and social security contributions and any paid compensation due for damage caused to property by pollution;

- (c) Shall have directors or officers who have not in any country been
 - (i) Convicted of any criminal offence relating to their professional conduct or to making false statements or misrepresentations as to their qualifications to enter into a procurement contract, within a period of ten years preceding the commencement of the procurement proceedings; or
 - (ii) Disqualified pursuant to administrative suspension or disbarment proceedings.
- (f) Shall meet such other criteria as the procurement entity considers appropriate.

All the above requirements are conjunctive and must be satisfied in addition to any other specification(s) that may be included in the tender documents or other documents for invitation to bid.

7.0 KEY PRINCIPLES IN PPP PROCUREMENT

There are core principles which are very cardinal to any PPP transaction. These include transparency, accountability, openness and fairness of the process. These will determine whether the procurement process in the country is in line with the best practices.

7.1 Transparency, Accountability and Competition

Transparency and accountability are very important principles that ensure integrity in any procurement process. The National Policy provides that these core principles shall guide all PPP Projects. On the requirement of transparency in the PPP Procurement Process, the policy states as follows:

1. That the process of procurement must be well defined and instructions to bidders must be clear and unambiguous so as to prevent manipulations and abuse of the procurement process;
2. That the conditions set out for bidding and evaluation must be made available to all prospective bidders and must ensure the attainment of value for money and efficiency of the process.
3. That where a decision is taken to consider an unsolicited bid, clear and objective reasons must be given to support of such decision which should be in conformity with the provisions of the National Policy.
4. That access to information about the project shall be guaranteed except where national security will be prejudiced.

On the need to enthrone accountability in the PPP procurement process, the policy has set out some basic principles regarding

this. All implementing agencies shall ensure that all PPP transactions are in accordance with these basic principles. These are;

1. That every PPP Procurement process shall be in accordance with the laid down rules and regulations.
2. That decisions must be objective and in accordance with law and policy; and
3. That all public sector authorities must adhere to the prescribed processes laid down for taking decisions within their respective organisations.

Furthermore, the policy provides that in order to get value for money in all PPP Projects, the project should be subjected to a competitive bidding. This is the only way through which the bidder with the most economically viable bid will emerge. All procurement processes must be subjected to these three basic principles.

The provisions of the Financial Administration Act 2003 and Financial Administration Regulations 2004 will also help in ensuring transparency and accountability. These provisions will further complement the national policy in this regard. Since all procurements are subject to the Financial Administration Act and its regulations, this will in no doubt go a long way in enthrone accountability.

Currently, Ghana does not have competition law, although, the bill is still pending before the parliament.⁸³ This bill when passed into law will ensure efficiency in the production of goods and services in the country. The Competition Law will complement the scanty provisions in the PPP National Policy to ensure competition in PPP Procurement. An authority with the full powers to implement the provisions of the law and raise awareness on the importance of competition in procurement process should also be established.⁸⁴

Recently, the country has started reviewing and re-designing public procurement procedures in order to make it in line with international best practices and to achieve value for money. To achieve this, the Public Procurement Authority (PPA) met with other stakeholders in September 2013 to officially launch the reviewed Standard Tender Documents (STDs) for the procurement of goods, works and services.⁸⁵ Mr Samuel Sallas-Mensah, who is the Chief Executive Officer of PPA, stated that this was informed as a result of the fact that the world of procurement had moved on and many changes had occurred in the way tender documents were formed, including changes in specifying requirements of how goods, works and services are procured.

83 See Ghana Will Soon Have A National Competition Law. <<http://ghanaconsumerwatch.wordpress.com/2009/06/16/ghana-will-soon-have-a-national-competition-law-issuer/>> (Accessed on 25th November, 2013).

84 See Karen Ellis, Rohit Singh, Peter Quartey & Elvis Agyare-Boakye. *Assessing the Economic Impact of Competition: Findings from Ghana*. UKaid, London, 2010. Page V.

85 See Ghana begins review of procurement processes. <<http://www.ghanabusinessnews.com/2013/09/12/ghana-begins-review-of-procurement-processes/>> (Accessed on 25th November, 2013).

The PPA boss said further that the review of the documents had become imperative at a time the public was demanding greater accountability and transparency in the conduct of procurement with public funds. He said the Public Procurement Act, 2003 (ACT 663), was being amended to reflect current developments. He posited that *"It is therefore necessary to align our procurement documents and processes with such developments."* He said the review and re-design of the PPAs STDs formed part of a 2.7 million dollars support from the Swiss Government to assist Ghana to initiate a project that would introduce sustainability criteria into her public procurement regime.

7.2 Publicity and Confidentiality

The National Policy includes the principle of openness as one of the most basic principles guiding PPP Projects in Ghana. The general rule is that all information relating to the PPP transactions shall be made known to the public. However, such information that is commercially sensitive is permitted to be kept from the public domain and should therefore be held confidential. The Policy further provides that all PPP transactions shall be made open and citizens shall have the right of access to information about the project, except where national security will be prejudiced. Therefore commercial sensitivity and national security are the two main issues that can make a PPP transaction to be held in secrecy.

It must be stated here that currently, Ghana does not have a law that guarantees the right to information. The Bill remains in the legislative pipeline since it was initiated in year 2010. The Right to Information Bill when passed into law will provide for the implementation of the constitutional right to information held by a government agency.⁸⁶ The law will afford the general public the right to know what is taking place in public offices and the ability to monitor the implementation of policies and procurement procedures.

The following are the potential benefits of the Freedom of Information Law:

1. The law will afford Ghanaians the right to know the activities of the government, agencies and the officials with respect to the allocation of public resources. This is a potent power to fight corruption. It is trite that corrupt practices flourish in darkness and secrecy, so any attempt that is aimed at opening governments and their agencies to public scrutiny is very likely to advance anti-corruption efforts.⁸⁷
2. The law when passed will further promote transparency in government and this will lead directly to the

86 See Ghana's cabinet approves Right to Information Bill. <<http://www.globaltimes.cn/content/787808.shtml#UpRSlsRinxBw>> (Accessed on 26th November 2013)

87 Freedom of Information Act: A Powerful Weapon Against Corruption; So Why Has Its Passage Continued To Remain Elusive To The Ghanaian Parliament? - <http://www.modernghana.com/stories/254616/freedom-of-information-act-a-powerful-weapon-again.html> (Accessed on 26th November 2013)

reduction of corruption in government. To buttress this point further, it is necessary to show the corruption equation thus; $\text{Corruption} = \text{Discretionary Powers} + \text{Monopoly} - \text{Transparency}$.

It is instructive to note that the above equation basically states that the potential of corruption is based on three factors. These are;

- a. If the decision making process in the state is subject to the discretionary powers or based on the whims and caprices of the leader or the decision is highly subjective;
 - b. If the state has firmly established a system of monopoly over the sources and use of resources in the state and in such a way that it leaves no room or very little room for competition. If there are too many licenses, permits, subsidies concessions among others; and
 - c. Lastly, if there is lack of transparency in the decision making process, then such government will have a very high potential of being corrupt. Therefore, increased transparency will certainly help in reducing corrupt practices.
3. Thirdly, information in a democracy is like oxygen in a human body. Where the acts of government officials are shrouded in secrecy the people of Ghana will not

be able to know the happenings within the government and this will in effect limit their access to participate in democratic processes.

4. Lastly, a bad government needs secrets to survive. Keeping governmental actions in secrecy will ensure continuous wastes, ineffectiveness, inefficiencies and gross abuse of power to survive. There is a certain impunity that enables non-performing governments; public and even private institutions to continue to hold sway over the people because citizens are basically kept in darkness and ignorance. The Freedom of Information act is a powerful weapon against this culture of impunity.

In his article titled "Public Private Partnership (PPP) in Ghana"⁸⁸ William Dowokpor lamented on the lack of information regarding PPP projects in Ghana. He stated that in connection to the concepts of inclusiveness and openness is accountability. He wondered why the concept of confidentiality will override openness and accountability in the country. He posited thus;

When the confidentiality practice in corporate governance meets with the proverbial inefficiencies of the public sector in a PPP, it results in a total mess!

88 William Dowokpor, Public Private Partnership (PPP) in Ghana (2013). <<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=269857>> (Accessed on 30th November, 2013).

In the ragging 15 million cedi guinea fowl project for example, I hear arguments for confidentiality as a corporate governance principle. But I will counter that with good corporate governance practices which include openness and accountability. I think it is premature for a society with weak regulatory institutions to put confidentiality above openness and accountability in a PPP financed with public money. The controversies surrounding otherwise useful projects SADA projects can be avoided if adequate information showing how monies spent, are made available to oversight institutions such as parliament and the general public. That is why we have public affairs departments attached to such projects. Like the PPP itself, the relevance of the guinea fowl project remain unquestionable. What is fuelling the suspicion is the lack of adequate information at the right time. A word to the wise is enough!

It follows from the foregoing therefore that access to information is a veritable tool to minimise corruption in the PPP and other procurement processes. This right of access will increase transparency, accountability, inclusiveness and integrity in government.

8.0. DISPUTE RESOLUTION IN PPPS IN GHANA

The National PPP Policy on PPPs is silent on how to resolve disputes arising from PPP contracts in Ghana. However,

since the intendment of the provision of the Arbitration and Conciliation Act of 2010 is to apply to all matters, then its provisions will be applicable to all PPP disputes in Ghana.

In order to promote alternatives to the courts in Ghana for the resolution of disputes, the parliament recently amended the Arbitration Act of 1961 which undoubtedly preceded many statutes that were enacted on businesses and investment. It also pre-dated Ghana's accession of the United Nations Conventions on the Recognition and Enforcement of Foreign Arbitration Award popularly called the New York Convention of 1958.⁸⁹

The new Arbitration Act replaces the 1961 Act. The Act governs all arbitral proceedings as well as the enforcement of both foreign and domestic arbitral awards within Ghana. The provisions of the Act are substantially in conformity with the UNCITRAL Model Law. Section 1 of the Act provides that subject to the provision of the Act, it shall apply to all matters. The Act upholds and respect party autonomy by giving the parties the right to go to arbitration and to determine how such arbitration will be conducted.⁹⁰

Section 5(1) gives the parties the right to go to arbitration

89 Ghana acceded to the UNCITRAL Model Law on the Recognition and Enforcement of Foreign Arbitration Awards in 1968.

90 Kwadwo Sarkodie Arbitration in Ghana - The Alternative Dispute Resolution Act 2010, (2011). International Construction Law Review, Page 3. Also available at <http://www.mayerbrown.com/files/Publication/5ee12231-1295-4559-8167-89d93cdf2a06/Presentation/PublicationAttachment/91e048fe-67d4-4e3f-9d10-8bbf9861e753/ArbitrationGhana_Sarkodie.pdf>.

in the settlement of their dispute while S.5 (2) provides that except as otherwise provided, the procedure to be adopted in the arbitral proceeding shall be as the parties and arbitrators determine. Accordingly parties to the proceedings may agree on a set of arbitration rules to govern the arbitration. In this way, the Act recognises and upholds the right of contracting parties to agree to arbitrate.

The Act also governs the enforcement of foreign arbitral awards in Ghana. Specifically, S. 59 of the Act provides that the High Court of Ghana shall have the powers to enforce the provisions of the act in accordance with the New York Convention. However, such an award must not be a subject of appeal at the higher courts. The Act does not limit the arbitral awards which may thus be enforced to those made in the territory of a state which is party to the New York Convention.⁹¹

9.0 PARTICIPATION BY FOREIGN NATIONALS

A foreign investor may team up with a Ghanaian entrepreneur or company for a joint venture, usually in the form of a partnership or a limited company. The law allows any foreigner who intends to invest in Ghana to team up with a Ghanaian entrepreneur or a firm for a joint venture in order to form a company or partnership. Such person or companies must comply with the provisions of these legal instruments; -

91 KwadwoSarkodie Arbitration in Ghana - The Alternative Dispute Resolution Act 2010.

The Companies Code, 1963 (Act 179); the Business Name Act, 1962 (Act 151) and the Partnership Act, 1962 (Act 152).

In addition, such foreign investor must satisfy the provisions of the Ghana Investment Promotion Act 1994 as well as the specific legislations made for each sector of the economy. Under the Ghana Investment Promotion Centre Act, 1994 (Act 478), a foreign investor is required to have a minimum equity capital of US\$10,000 before participating in any joint venture partnership with a Ghanaian. The Ghana Investment Promotion Centre (GIPC) Act, 1994 (Act 478), governs investment in all sectors of the economy except minerals and mining, oil and gas, and the Free Zones. In addition, there are sector-specific legislations to regulate energy, telecommunication, banking, insurance, securities, mining, and real estate among others.⁹²

The Government of Ghana has no overall economic or industrial strategy that discriminates against foreign-owned businesses. In some cases a foreign investment may enjoy additional incentives if the project is deemed critical to the country's development.⁹³ Foreign companies are permitted to take part in government-financed and/or research and development programs on a national treatment basis.⁹⁴ In July 2013, Ghana's Parliament adopted the Ghana

92 See 2013 Investment Climate Statement Issued By The Bureau of Economic and Business Affairs, Ghana. Retrieved From [Http://Www.State.Gov/E/Eb/Rls/Othr/Ics/2013/204648.Htm](http://www.State.Gov/E/Eb/Rls/Othr/Ics/2013/204648.Htm). Accessed On 27.11.13.

93 Being an Interview with Mr. Ekow of the Public Investment Division of the Ministry of Finance in Accra, Ghana on 11th day of January, 2013.

94 Example is the Public Private Partnership Programme.

Investment Promotion Bill 2013. If this Bill is signed into law, it will introduce positive changes in country's investment landscape.⁹⁵ In the 2013 Bill, the right of Ghanaians to invest has been extended to petroleum and mining sectors. This is an improvement over the provision of the 1994 Investment Act.

All companies that intend to do business in Ghana must first register with the regulations and procedures of the following government agencies;

- a. Ghana Investment Promotion Commission;
- b. Registrar General Department,
- c. Ghana Revenue Authority;
- d. Ghana Immigration Service; and
- e. Social Security and National Insurance Trust (SSNIT).

According to The World Bank's Doing Business 2013 report issued in 2012, the report stated that there has been significant improvement in the average time to start business in Ghana. From about 129 days in 2003, 33 days in 2010 and now to 12 days in 2013.⁹⁶

10.0 CHALLENGES FACING PPPS IN GHANA

Although PPP is still new in Ghana, it however has some

95 Ghana: Parliament Passes Revised Law Governing Investments. <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403648_text> (Accessed on 29th November, 2013).

96 Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises. <http://publications.worldbank.org/index.php?main_page=product_info&cPath=1&products_id=24391> (Accessed on 29th November, 2013).

challenges which need to be addressed. These are:

10.1 Lack of Comprehensive Legal Framework

The PPP National Policy, which was made by the Ministry of Finance, is still the applicable regulation governing PPPs in Ghana. The National Policy is not comprehensive and cannot enjoy the same legal status with an Act of parliament. It should be noted that in the absence of a sound legislative initiative, the rules and meanings of concessions will have to emerge from the decisions of the court of law. There are major areas such as termination of concession agreement, dispute resolution mechanisms and many others that the policy does not cover. The Public Private Partnership Bill is still pending before the parliament as at the time of this paper. If the country intends to attract investors both within and outside the country, then it must ensure that there is comprehensive and adequate legal framework that will guarantee future investment returns.

10.2 Openness and Transparency

Although there are few legislations to combat corruption in procurement processes in the country, there is need to further ensure openness and transparency through the enactment of vital laws that will complement the PPP Policy. The country needs the Freedom of Information Law as well as Competition Law. These laws will give the citizens the right to know what is going on in relation to PPP procurement processes. Secrecy in PPP procurement promotes the likelihood of corruption.

These laws will further help to strengthen and enhance integrity in the procurement processes.

10.3 Inadequacy of PPP Experts

There are very few experts in the field of PPP Procurement in Ghana. According to Mr. Ekow of the Public Investment Division of the Ministry of Finance, he stated that this is due to the fact that the initiative is still very new in the country. The few experts are the ones that are managing and implementing PPP projects in the whole country. Currently, the country has Six (6) Metropolitan, Forty Nine (49) Municipal and One Hundred and Sixty One (161) Districts making a total of Two Hundred and Sixteen (216). There is no doubt that all these Metropolitan, Municipals and Districts need to build capacity within each level of authority. Therefore, inadequacy of PPP experts is still a major challenge to the PPP programme in Ghana.

10.4 Corruption

Although, Ghana has ratified the United Nations Convention Against Corruption as well as the African Union Convention on the Prevention and Combating of Corruption among others, corruption still poses a great challenge to the implementation of projects in the country. This implementation gap is evident in the scorecard of the Global Integrity Report for the year

97 See Overview of Corruption and Anti Corruption in Ghana. <<http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-ghana/>> (Accessed on 30th November 2013).

2010.⁹⁷ The report scored the country high in terms of the quality of its anti-corruption legislations but low in terms of enforcement. Since PPP is part of the methods for procuring infrastructure, it is therefore not insulated from corruption.

11.0 CONCLUSION/SUGGESTIONS

With the current stable democratic and economic transitions in Ghana, the country needs to seriously step up its drive towards achieving good socio-economic infrastructure through the Public Private Partnership initiative. There is the need to enact and strengthen the laws that will encourage private sector participation in infrastructure development if the country intends to achieve its Vision 20-20 objectives. Legal certainty and regulatory stability are key component that attract private sector investment in infrastructure development.

Aryee JRA,⁹⁸ while delivering his inaugural address titled — Saints, Wizards, Demons and Systems” at the University of Ghana explained the reasons why most government policies and programmes failed and how they can become more successful not only in Ghana, but in other developing countries of the world. He suggested that the right combination of committed politicians and bureaucrats (saints); appropriate policy analysts and available reliable information (wizards); management of hostile and apathetic groups (demons); and

⁹⁸ Aryee JRA. *Saints, wizards, demons and systems: Explaining the Success or Failure of Public Policies and Programs* (2010) (Accra, Ghana University Press, 2000).

insulation of the policy environment from the vagaries of implementation (systems) are sine qua non to the successful implementation of government programmes generally.

As the Ghana Minister of State for Public Private Partnership⁹⁹ pointed out that Public Private Partnerships should not be seen as ending all developmental challenges, it can however greatly help the country in building and modernising critical socio-economic infrastructure that can serve as the wheel for nation's development. Thus, in achieving this, the country needs to show more commitments in order to allow the partnership work and build capacities by training more experts especially in the areas of finance, public governance, compliance and transparency, human resources and legal among others.

A comprehensive legal and regulatory framework is very essential in sustaining PPP programme. The National Policy on PPP which is the main document regulating PPPs in Ghana is not comprehensive enough to ensure a successful PPP programme. There should be certainty in the law on PPPs in order to clarify and define the obligations of the contracting parties and the regulatory agencies. In the absence of a sound and comprehensive legislative initiative, the rules on the definition and award of PPP contracts and other vital issues

99 Being the Statement of the Minister of State for (PPP) in Presidency at a reception organized by the United Kingdom Trade and Investment Unit of the High Commission for the Global Training Consulting Limited (GTC) in Accra, Ghana on 15th July, 2013. <<http://www.modernghana.com/news/475667/1/public-private-partnerships-not-solution-to-proble.html>> (Accessed on 29th November, 2013).

will emerge from decisions of courts, leaving legal uncertainty to persist and its attendant price and protracted litigation.

The law and policy regulating PPPs in Ghana as presently constituted do not support the drive to fully ensure transparency and accountability in the bidding process. Transparency and accountability enthrone integrity in the PPP procurement process. This would ensure that all bidders are treated fairly and equally and would afford them the same opportunities. Laws that promote transparency and accountability should be enacted to complement the provisions of the National Policy on PPP. Examples of these are the Competition law, Freedom of Information Law, Preferential Procurement Law among others. Once the investors have confidence that the bidding process is transparent, Ghana PPP programme will attract the best and most economically viable bids.

Information is also another very viable tool to monitor procurement processes. The freedom of information law should be enacted to afford Ghanaians access to information about the activities of their government, agencies and the officials with respect to the allocation of public resources. This is a potent power to fight corruption. Information law will also promote transparency and reduce corruption. There is no doubt that a bad government needs secrecy to survive. Keeping governmental actions in secrecy will ensure continuous wastes, ineffectiveness, inefficiencies and gross abuse of power to survive. There is a certain impunity that enables non-performing governments; public and even private

institutions to continue to hold sway over the people because the people are basically kept in darkness and ignorance. The Freedom of Information Act is a powerful weapon against this culture of impunity.

Also, an effective dispute resolution mechanism should be put in place in order to resolve any potential dispute between the parties. Private parties (including the concessionaire, financiers and contractors) will be more encouraged to participate in PPP projects when they have confidence that any dispute arising between the contracting authority or other governmental agencies and the concessionaire; or between the private parties themselves can be resolved fairly and efficiently without wasting time. Because of the commercial nature of PPPs, where huge amount of money is committed to the projects, litigation will be undesirable. Each PPP contract should therefore provide for an acceptable mode of settling disputes which must, of course, not be antithetical or obnoxious to the allowed dispute resolution system under the legal framework of the concerned country.

In the same vein, there is the need to train more experts in order to be able to develop capacities in the relevant agencies of government in Ghana. Expertise should be developed to cover contract management, legal, policy and financial aspects of the PPPs. This is the only way by which there can be an appreciable increase in the deal flow of PPP projects in Ghana.