

PPP Country Paper

Malawi

Submitted to SADC-DFRC 3P
NETWORK Public-Private-Partnership
Working Group

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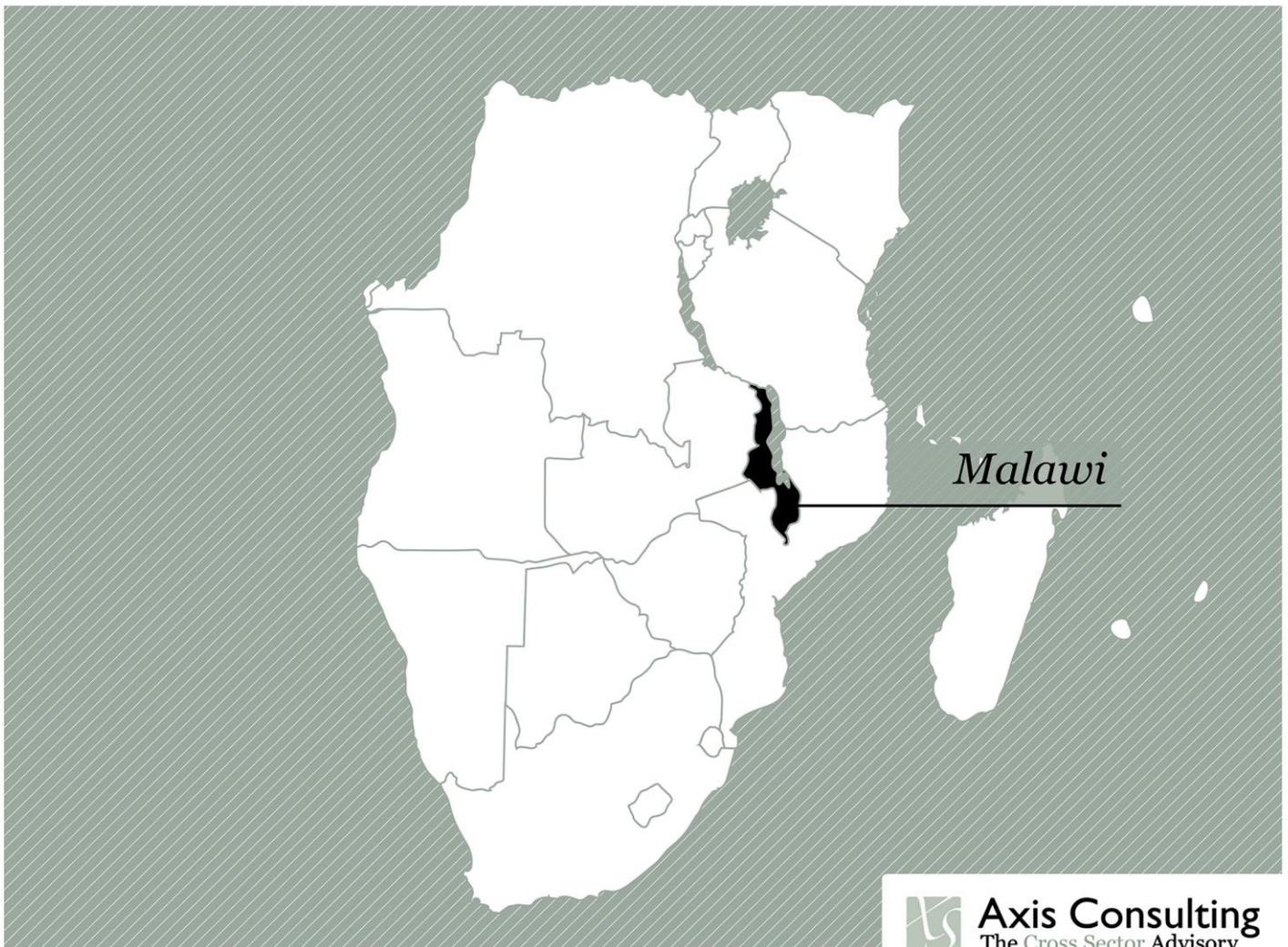


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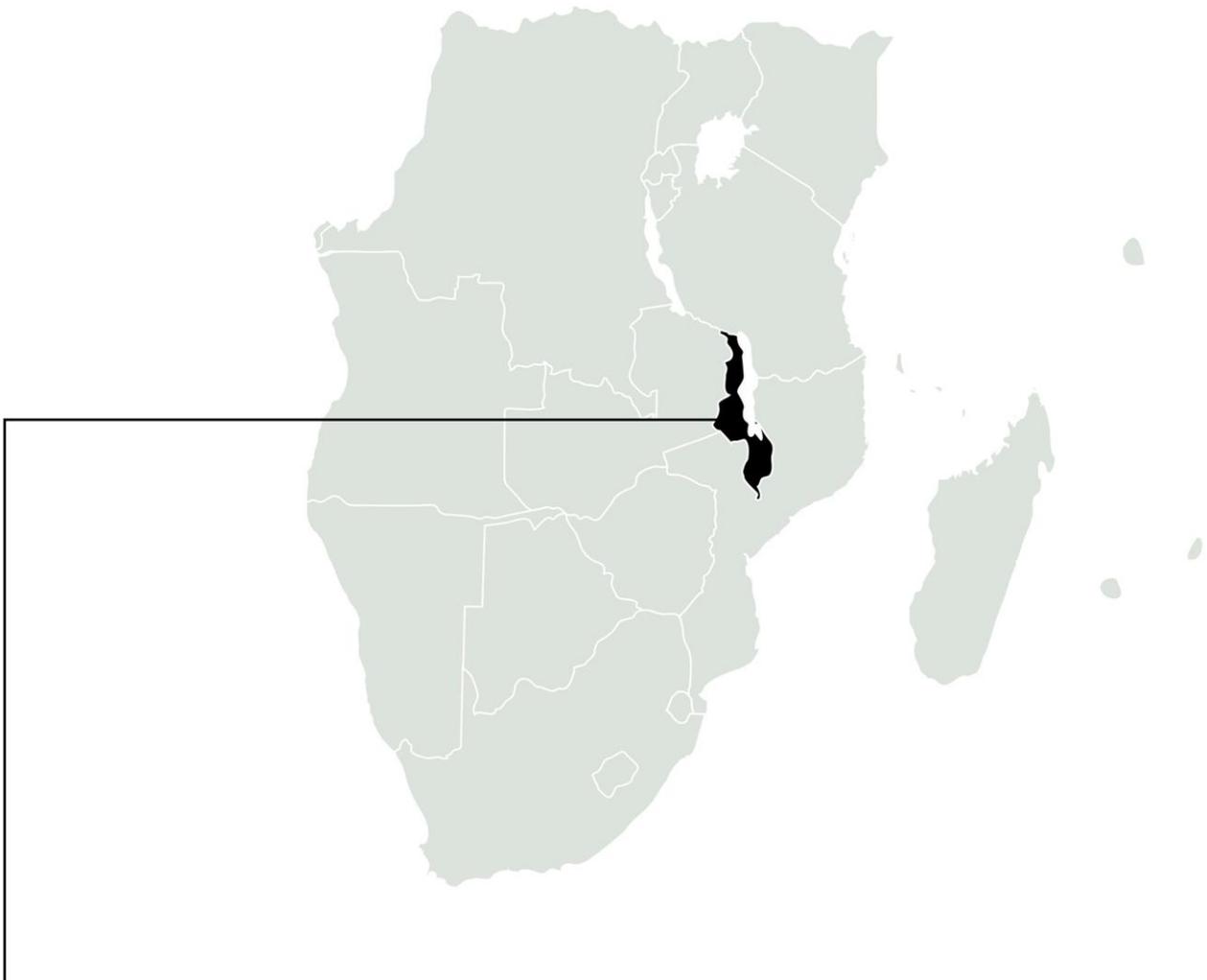
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List of Abbreviations

| | |
|--------|---|
| AfDB | African Development Bank |
| BOT | Build, Own and Transfer |
| BOOT | Build, Own, Operate and Transfer |
| BOO | Build, Operate, Own |
| CAs | Contracting Authorities |
| CEO | Chief Executive Officer |
| DFROT | Design, Finance, Refurbish, Operate, Transfer |
| DFBOT | Design, Finance, Build, Operate, Transfer |
| IDA | International Development Assistance |
| IPP | Independent Power Producer |
| GDP | Gross Domestic Product |
| MBA | Masters in Business Administration |
| MDGs | Millennium Development Goals |
| MGDs | Malawi's Economic Growth and Development Strategy |
| MEPD | Ministry responsible for Economic Planning and Development |
| MoF | Ministry of Finance |
| OPC | Office of the President and Cabinet |
| PFI | Public Finance Initiative |
| PPPC | PPP Commission |
| PPP/s | Public Private Partnership/s |
| RAs | Regulatory Authorities |
| SADC | Southern African Development Community |
| SADC3P | Southern African Development Community- Development Finance Resource Centre PPP Network |
| VfM | Value for Money |





KEY INDICATORS - 2012

Malawi

| | |
|------------------------------|-------------|
| Population (Mio.) | 15.4 |
| GDP per capita (US\$) | 253 |
| PPP Level of Maturity | Low |

(Regional Strategy Paper, 2012)

1. Engagement Overview

XS-Axis Consulting, Wehrheim (The Cross Sector Advisory) has been engaged by the Client, Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P) to prepare 14 country papers taking a look at current practice of PPPs with a specific focus on PPP Policy, Institutional Arrangements, and Legal Frameworks as a follow-up of the Draft Regional Strategy paper submitted to SADC3P in November, 2012. This paper focuses on Malawi's PPP Policy, Institutional Arrangements and Legal Frameworks as a Member State in SADC providing specific recommendations for the implementation or enhancement of private sector participation in the development of public infrastructure in the country. The main objective is to serve as a strategic paper for the Government of Malawi and its Ministries in order to refine, develop and ultimately develop further its PPP Policy, Legal Framework, and Institutional Arrangements aimed at closing the 'infrastructure gap', and its negative impact on economic growth, job creation and social cohesion in Malawi. Moreover, the country paper shall serve the SADC3P Network to identify areas of support to be offered by the SADC3P Network towards identified Member States.

We render this report to the best of our knowledge and belief. Our results are based on the most recent verifiable information available at time of the report. Public sources were used where appropriate and fact based observations were made.

2. Introduction

Malawi, officially the Republic of Malawi is a landlocked country with a population of 15.4 Million (Mio.). Since April 2012, Joyce Banda has been President of Malawi for a term of five years. Its neighbouring countries include Zambia to the North-West, Tanzania to the North-East, Mozambique to the East, South and West. Malawi belongs to one of the world's fastest economically reformed countries, but in recent years shows a slowing down of its economic performance with an average Gross Domestic Product (GDP) growth rate of 4.3% in 2012, down from 9.7% in 2008 (KPMG Draft report, 2013).

The new Government has instituted key policy reforms to address macroeconomic imbalances and revive the economy (African Development Bank (AfDB), 2013, web page). Despite continuous efforts of the Government of Malawi, foreign exchange shortages, fuel and electricity supply shortages continue to be constraints to the business environment, and cost of living keeps going up. Thus, The World Bank recommends urgently that the country further progresses on policy reforms, investment climate, women's empowerment and poverty (World Bank, 2012, web page). AfDB estimates a medium-term forecast of 5.5% and 6.1% as far as the annual growth rate for 2013 and 2014 is concerned (AfDB, 2013, web page).

Malawi's global competitiveness ranks 129 of overall 144 countries, which remains disappointing (the fifth weakest country) compared to other SADC Member States. Rankings for Malawi as far as the infrastructure quality is concerned compared to other SADC countries --this relates to the quality of the overall infrastructure and quality of roads, railroad, port infrastructure, air transport infrastructure, and available airline seat kilometres-- is also quite poor (ranking 121, fourth weakest country) thus reflecting Government's lack of efforts to improve the level of service provision as far as infrastructure is concerned (World Economic Forum, The Global Competitiveness Report 2013-2014, 2013, p.265). Overall, the low level of competitiveness of Malawi is an indication of Government's and policy makers' poor commitment, and the political will as an essential driver towards achieving sustainable growth in the country, and prosperity for its people. In terms of the most problematic factors affecting doing business, and sustainability in the country, the Global Competitiveness Report 2012-2013 provides an insight focusing on lack of accessibility to financing as well as foreign currency regulation as the main limiting



factors inhibiting economic progress in Malawi. The country does not have a credit rating and it has remained a poorly developed country with limited infrastructure and a massive infrastructure backlog.

In May 2011, the Cabinet approved a Public Private Partnership (PPP) Policy Framework introducing the objectives associated with PPPs in the country. The PPP Policy document clarifies the vision and rationale behind introduction of PPP schemes, guiding principles such as Value for Money (VfM), risk allocation, policy objectives, PPP types, and the implementation Framework suited for PPPs to provide remedy for the infrastructure challenges ahead in the country. Next to the PPP Policy Framework, the Government published in Malawi Gazette, the PPP Act No. 27 on 23rd, December, 2011 thus setting the stages for a Legal Framework based on which future PPP pipelines are to be defined.

There is strong support for PPPs in Malawi, and a PPP Commission has been established in the Federal Government. Thus, the Government of Malawi recognizes and publicly acknowledges through the highest office (of State President) the need to explore more private sector involvement in the delivery of services and infrastructure in the country through PPPs as a major means of uplifting Malawi out of poverty. In addition, Malawi's Economic Growth and Development Strategy (MGDS) supports the theme of "strengthening the cooperation between the private and public sectors", in order to improve the macroeconomic environment for business growth. Parallel to PPPs, Government acknowledges the contribution of its privatisation scheme to introduce more private sector participation in the economy (Government of Malawi, Webpage PPPC Commission).

Due to these efforts, the Government of Malawi in collaboration with the World Bank has embarked on a Regional Communications Infrastructure Project aimed at improving the quality, availability and affordability of communications services in the country while at the same time improving Malawi's connectivity to international communications services. On June 25th, 2009, the World Bank's Board of Executive Directors approved an International Development Association (IDA) credit of US\$20 Mio. (MK3 billion) for Malawi under the Regional Communications Infrastructure Program (Public Private Partnership Commission Malawi, 2013, web page). Other experience relates to a PPP project on health care delivery which was implemented in 2009 (Institute for Global Health & Infectious Diseases, 2013, web page). Further investments in irrigation (World Bank and Ministry of Irrigation and Water Development, 2011, p. 1-8), and rural electrification were proposed (Government of Malawi, 2009, p.1). Another project relates to operation and lease of the Bingu International Conference Centre which is in the negotiation phase based on a restricted tender process (Peermont is one of the selected bidders next to two other bidders).

This paper is to be considered as a follow-up strategic document to the Regional Strategy paper submitted to SADC3P in November, 2012 recognizing that PPP Frameworks do not develop in isolation, but evolve over time along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific cultural, legal and procedural and institutional settings. The Regional Strategy document examined the current status of PPP frameworks across all Member States to classify SADC countries into four categories as far as their level of maturity of PPP Frameworks is concerned. It distilled Malawi to belong to those increasing number of countries in SADC that have established a PPP Policy and/or a PPP Law aimed at the promotion of their PPP schemes. The next chapter will elaborate on Malawi's specific PPP experience, its PPP Policy, Legal and Institutional Framework as a continuation of the above mentioned cross-country Regional Strategy aimed at providing an in-depth insight into the specific country strategy for Malawi.



3. Methodology

Our approach in this country specific paper is to provide an overview of Malawi's PPP Policy, Institutional Arrangements, and Legal Framework by taking into account the country-specific strategies, and drivers for resorting to PPPs considering the individual level of PPP development in the country. The ultimate idea is to draw lessons for Malawi, and to come up with specific recommendations concerning potential areas of assistance needed. The Regional Strategy document distilled Malawi in 2012 to be prone towards promoting PPPs, and establishing institutions to promote the existing Policy Framework. This paper will touch upon this evaluation and move further to analyze the current progress made in Malawi aimed at depicting those developments made since 2012 as far as the PPP Framework conditions are concerned.

Methodologically, we will first take a look at the definition of the term PPP in Malawi since experience across countries shows that lack of a proper term and definition of what a PPP typically encompasses does indeed result in poor implementation of PPP schemes. Next, we will evaluate Malawi's approach towards developing a PPP Framework based on the recommendations provided to the Minister's of Finance and the road map developed for SADC countries aimed at establishing a typical good practice PPP Framework. This includes the evaluation of Malawi's PPP Framework in terms of its PPP Policy –examining whether its Policy contains its Government's formulation of its objective to use PPPs, the scope of the PPP program and the implementing principles. Then, we will consider whether Malawi's operational Framework related to the implementation of PPP processes and the institutional responsibilities underpins its national PPP scheme. In addition, we will take a look at the legislature and entities participating in the PPP program as an integral part of any good Framework approach. Ultimately, we will evaluate as to whether Malawi's PPP programs are backed up by prudent laws and regulations enabling public sector to enforce and implement PPPs and set the boundaries within the contractual context. The overall idea is to distil proper recommendations from our work for SADC3P, and the Government of Malawi as far as next steps is concerned.

4. Examination of the Term PPP

The term PPP is defined quite clearly in the PPP Act of No. 27 of 2011 to imply the following: “PPP means a contract in which a Contracting Authority partners with a Partner to build, expand, improve, or develop infrastructure or service in which the Contracting Authority and private sector partner contribute one or more of know-how, financial support, facilities, logistical support, operational management, investment or other input required for the successful deployment of a product or service, and for which the private sector partner is compensated in accordance with a pre-agreed plan, typically in relation to the risk assumed and the value of the result to be achieved“ (Government of the Republic of Malawi, The PPP Act, Part I, Preliminary, No. 27 of 2011, p. 25).

The Malawi Government defines PPPs as cooperative ventures, but makes clear in its PPP Policy that the underlying structure is a legally enforceable contract that is typically long-term and ranges from 10 to 50 years (Government of the Republic of Malawi, PPP Policy Framework, 2011, Article 3, p.6). These contractual arrangements need to identify clear responsibilities, specify the relevant financial terms and provide sharing of risks (Part V, Article 22, paragraph 2, a-h, PPP Act, No. 27 2011). Thus, a proper risk allocation with respect to transferring of appropriate technical, operational or financial risks to the private party (Part VI, Article 26, paragraph 2, (c), (iii), PPP Act, No. 27 2011) is an essential element of the term PPP in Malawi. On top, the underlying nature of the investment is targeted not only towards infrastructure projects, but also services and products (Part II, Article 3, paragraph 1, PPP Act, 2011).

Output specification is an explicit requirement for structuring PPPs. Its relevance has been put



forward in Article 4.4 of the PPP Policy issued in 2011 noting that "...a PPP is a contract for service and outputs, rather than merely a physical asset". In terms of bundling, the PPP Act puts forward bundling in terms of expanding, improvement or development of infrastructure or services as functions. In this context, not only Build, Own, Operate and Transfer (BOOT) projects are considered as PPPs, but also Build, Own and Transfer (BOT), or Build, Own and Operate (BOO), etc. (Part V, Article 25, paragraph 3, a-g). A solid payment structure is the underlying driver of the cooperative venture which includes "... payment to the Partner by way of compensation from a revenue or charges or fees collected by the partner from users to customers of a service provided by it" (Part V, Article 22, paragraph 2, (f), PPP Act, 2011). The next chart provides an overview of the main features of PPPs in Malawi.

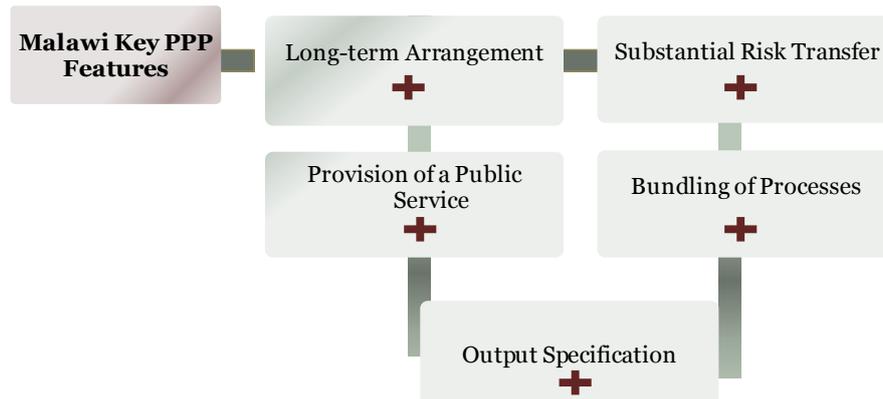


Chart 1: Evaluation of Key characteristics of PPPs in Malawi

In sum, the Malawi Act entails in terms of defining the term PPP, all relevant and essential elements highlighted in the Regional Strategy document which are considered as essential to structure PPPs properly.

5. Application of SADC PPP Framework Road Map

The experience to date across comparators and SADC countries indicates that there is no unique formula for developing a sound PPP Framework. More specifically, the development of a common framework for SADC needs to take into account the economic and political context of countries, their historically grown institutional and legal structures as well as the actual experiences with PPPs so far, with some countries having made considerable strides and others having made very little progress, and some none at all. Nevertheless, if PPPs are to work and render the expected results, we suggested in the Regional Strategy Paper dated 2012 the following PPP Framework bearing a number of key features related to Policy, Institutional Structures and Legal Framework (see next chart).

Thus, successful PPP schemes are characterized by clear policy statements, competent and enabled institutions that can appropriately identify, procure and manage PPPs, and efficient oversight procedures as well as proper legal frameworks. Nevertheless, it must be borne in mind that firm political commitment, stakeholder dialogue and a number of other factors such as a sound and strong PPP pipeline are important contributing factors for the promotion of PPPs in a larger context. It is also important to be aware of the contribution of sector reforms and their role in developing and supporting PPP schemes. In a number of countries sector institutions, for instance, power sector regulators have had an important role as far as the promotion of IPPs and investment in the power sector are concerned. It is in this context that Member States with a low level of PPP maturity should acknowledge the relevance of sector institutions in terms of their



contribution towards developing PPPs over time and across various sectors --which are however best supported by setting up efficient and proper Frameworks at the national level. In this section, we examine these various elements of a PPP Framework to see how far Malawi has proceeded in terms of its PPP Policy implementation and practice as well as looking into its institutional structures and Legal Framework more in-depth as well as the political commitment of the Government and its approach towards stakeholder integration into the PPP process.

SADC Framework Roadmap

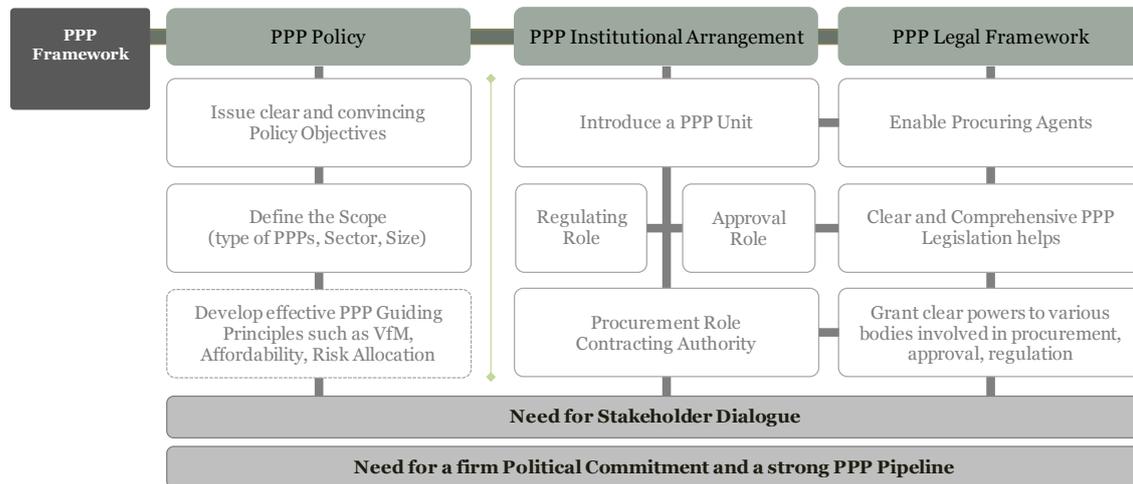


Chart 2: Overview SADC Road Map, Regional Strategy Paper, 2012

5.1 PPP Policy in Malawi

Malawi formulates the rationale behind its PPP program in its comprehensive PPP Policy Framework enacted on 18th May, 2011 serving as a supporting document to the PPP Act No. 27 dated December, 2011. The overall objective of PPPs in Malawi is embedded in Government’s commitment towards fulfilling the Millennium Development Goals (MDGs) aimed at reducing poverty through economic growth and transforming Malawi to an export based economy which is integrated in the global economy environment (Government of the Republic of Malawi, The PPP Policy Framework, Article, 2, 2011). On top, the Government aims at strengthening the investment climate in the country, especially through investments in infrastructure. Article 6 provides more insight into the Government’s PPP goals to include enhancing the opportunities for realising both strategic and operational benefits. Thus, the Government has integrated PPPs in its broader public expenditure reform programme, as well as in the Public Sector Investment Programme (PSIP). In so doing, the Government seeks to strengthen macro-economic stability, allocate scarce resources in line with priorities and improve the effectiveness and efficiency of public sector expenditures by linking them to strategic objectives (Government of the Republic of Malawi, PPP Policy Framework, Article 6, 2011).

Most clearly, Government’s associated PPP objectives are further laid out in the PPP Act, Part II, Article 3, paragraph 1, whereby the objectives shall be “(a) to improve the delivery of public infrastructure and services in Malawi; (b) to assist in achieving better value for public expenditure by the Government; (c) to promote private sector investment in infrastructure and services; (d) to encourage participation by resource owners in public-private partnerships and provide assurance for private interests in those partnerships, e) to encourage competitive and efficient markets for the provision of infrastructure and services in Malawi; f) to minimize the fiscal burden of providing infrastructure development and service delivery through the public treasury and thereby allowing resources to be freed for social services, and ; and g) to promote



private sector contribution towards the attainment of positive social indicators associated with optimal access to infrastructure and services (Government of the Republic of Malawi, PPP Act, Part II, Article 3, 2011). Overall, Malawi has quite a comprehensive list of PPP program objectives embarked upon to implement promising PPP projects for the future generation and the people in the country.

The associated benefits with the implementation of PPPs are laid out in Article 6 of the PPP Policy. PPPs are deemed to be speedy, efficient and cost-effective, and render Value for Money (VfM) (Government of Malawi, The PPP Policy Framework, 2011, p. 9), See an overview of benefits below).

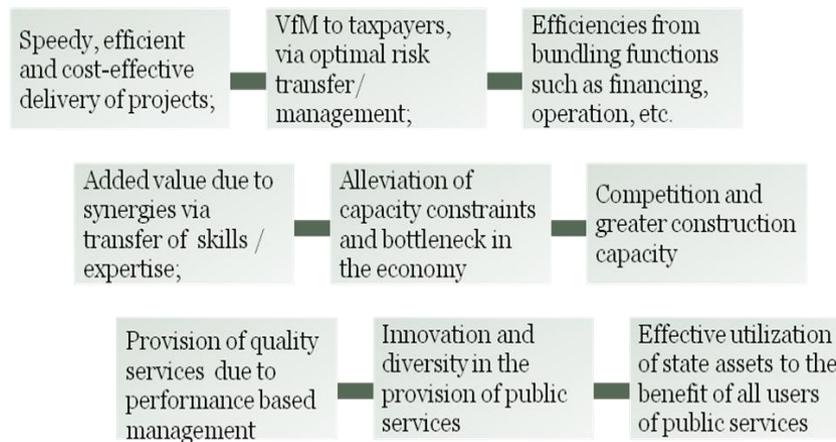


Chart 3: Overview of Benefits of PPPs in Malawi

In terms of scope, a proper PPP Policy contains also information on various types of PPPs or desired contracts, potential areas of sector application and sometimes also the size of PPP projects in terms of volume desired (World Bank, 2012, p.71). The Malawi PPP Policy Framework elaborates quite generally on the types of PPPs that may be pursued in the country. According to Article 4.4, UK based Public Finance Initiative (PFI) models may be considered as PPPs since in terms of purpose, scope, and legal structure as well as risk sharing they are partnerships between public and private sectors. However, the Government also addresses different permutations and combinations thereof to make clear that there are various forms and terms associated with PPPs (special names). It recognizes that PPPs vary and may bear characteristics of several different forms and that new types may emerge from time to time. On one end of the spectrum, outsourcing that has no allocation of risk to private sector is not necessarily considered as a PPP, but any type of contract involving the private sector to conceive, design, build, operate, and maintain and finance a project, thereby assuming a considerable proportion of risk is a PPP. The Policy Paper emphasizes that the choice of the PPP arrangement for a particular project will hinge upon Government’s policy in the related sector and on potential VfM to be generated under such an arrangement. Emphasis, however, will be on developing new infrastructure facilities or major rehabilitation of an existing facility so that additional or higher quality services are provided for the citizens of Malawi (Government of the Republic of Malawi, The PPP Policy Framework, Chapter 4.4, 2011).

The PPP Act and Policy Framework both draw a clear demarcation line between PPPs and privatizations or divestitures. In the implementation of PPP arrangements listed in subsection (1), public sector may use any or a combination of the following modes of private sector involvement- Types of infrastructure facilities and services Build Own Operate Transfer (BOOT); Build Own Transfer (BOT); Build Own Operate (BOO); Design Finance Refurbish Operate Transfer (DFROT); Design Finance Build Operate Transfer (DFBOT); Concession or Leases; and



any other mode as the Commission shall determine. The next chart provides an overview of the various PPP types as laid out by the Malawi Government.

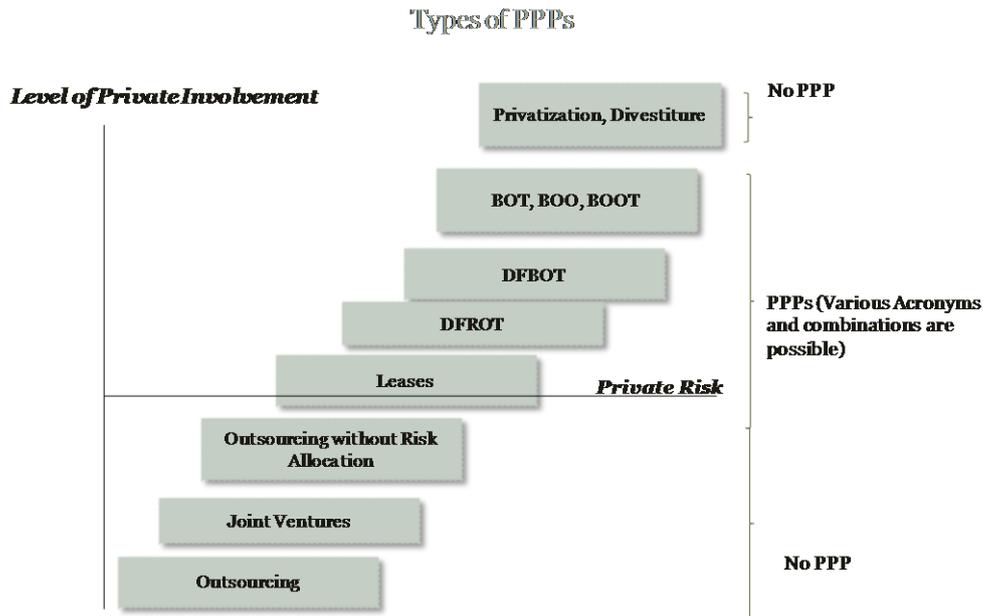


Chart 4: Malawi defined PPP Types

The sector application is laid out in Art. 25 of the PPP Act and also in the PPP Policy Article both papers highlighting the eligible areas of application of PPPs in Malawi. These include:

- Agriculture and food security,
- Energy, industrial development, mining and tourism;
- Transport infrastructure and inland ports;
- Education, science, technology;
- Public health, sanitation, malaria and GIV/AIDS management;
- Integrated rural development;
- Greenbelt irrigation and water development;
- Child development; youth development and empowerment;
- Climate change natural resources and environmental management;
- Any other type of infrastructure and services as the Minister may, from time to time, designate (Part V, 25 (2), No. 27 2011).

According to the OECD, clear implementing guidelines are a positive signal to the market conveying the underpinning standards against which those responsible for putting PPPs in place may be held accountable. Those guiding principles to be applied in Malawi include affordability, appropriate risk transfer, VfM, public interest and consumer rights, accountability, transparency, local participation, content & Technology Transfer, competition, stakeholder consultation, public procurement and PPP procurement and unsolicited proposals (Government of the Republic of Malawi, The PPP Policy Framework, Chapter 7.0, 2011). It lays out which guiding principles shall contribute to a successful outcome of PPP projects. The overall idea is to reach well-designed projects, thorough due diligence and competitive and transparent procurement.

5.2 PPP Institutional Responsibilities in Malawi

Due to the immanent evolving nature of PPPs, the Government of Malawi recognizes that



institutional roles and responsibilities of public institutions may change over time; nevertheless it has not hesitated to nominate and refer to some major institutions playing key roles in the PPP programme in the country (Government of the Republic of Malawi, The PPP Policy Framework, Article 9.1, 2011). The Office of the President and Cabinet (OPC) and the PPP Commission (PPPC) provide broad policy leadership and overall direction of the PPP Framework. The Ministry responsible for Economic Planning and Development (MEPD) ensures that PPP projects fall in line with the national planning process and the infrastructure plan. The Ministries and Contracting Authorities are the ultimate “owners” of PPPs starting from the identification through the selection and monitoring of PPPs. The Ministry of Finance is in charge of monitoring and evaluation of PPPs ensuring the coordination and review and screening of projects in the interest of the public. MoF evaluates and assesses fiscal sustainability, financial and economic viability and robustness of contracts over long-term. Thus, a PPP Monitoring and Evaluation Unit have been created within MoF.

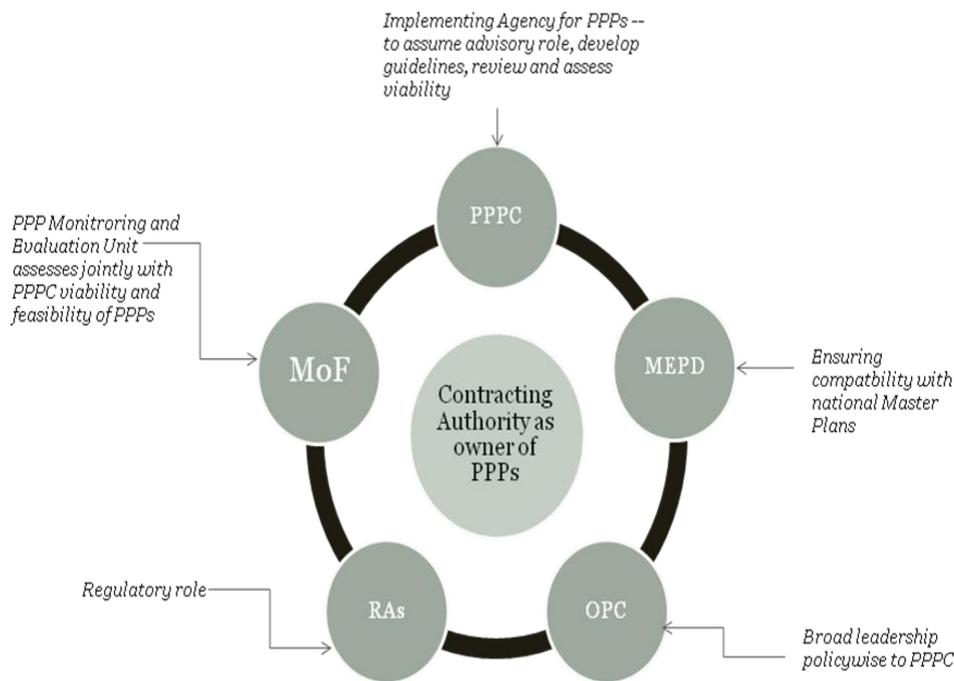


Chart 5: Institutions involved in PPPs in Malawi

The PPPC established by an Act of Parliament, is the sole authority for the implementation of the PPP programme in Malawi next to accompanying privatization processes (Government of the Republic of Malawi, webpage PPP Commission). Its stated vision is "...to be premier partner of choice in delivering world class infrastructure and quality life for all", and the mission is to "...Facilitate access to affordable and efficient public services through transparent procurement of innovative and dynamic private sector partners in viable infrastructure development for the people of Malawi."

The PPPC consists of a Chairman and four other members appointed by the President with relevant qualifications, expertise and experience economics, accounting, law, project finance, public administration, PPP mergers and acquisitions, and business management (Government of the Republic of Malawi, The Malawi Gazette Supplement, dated 23rd December, 2011, containing Acts, Malawi Government, Published December 2011, Act No. 27 of 2011, Part III) for a period of 3 years. Members of the PPPC are paid allowances to be determined by the Minister and to have an incentive to be devoted to their work. Decisions are made by majority of the members present



and voting at the meeting (the person presiding over the PPPC has a casting vote in case of equality of votes). Additional persons may be invited by the PPPC members at their discretion. Finally, the utility regulatory authorities (RAs) in sectors such as telecommunications, energy, transport and water under their sector Acts are in charge of issuing licenses to the private operator to provide services in the sector. Thus, RAs need to link with Contracting Authority and PPPC to make sure that the terms in terms of tariff setting and standards comply with the terms of the contract between the Authority and private partner.

5.2.1 Role of PPP Unit in Malawi

The PPPC is not only the implementation Agency for PPPs in Malawi, but is also in charge of developing guidelines on best practices to assist sector Ministries in the roll-out of their PPP projects. The PPPC works closely with the Ministry of Finance in the review and assessment of PPP project affordability, value-for-money, feasibility, and contingent liabilities associated with PPP projects. More specifically, the PPPC provides advice and support to Contracting Authorities (CAs) in the following areas illustrated in the next chart. In terms of structure, the PPPC has a CEO who is supported by 2 Directors who are in charge of PPP projects and also financial matters. Overall, there are 21 employees in the PPPC. The Director of PPP Projects is responsible for structuring PPPs and implementing them; he receives the necessary financial input from the Director of Project Finance conducting the financial evaluation of projects.

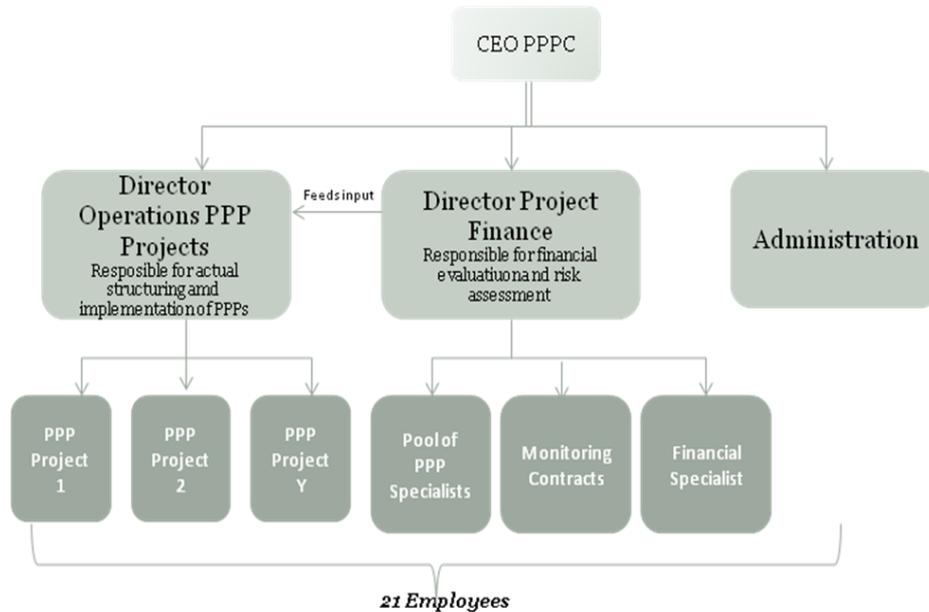


Chart 6: PPPC Structure

The PPPC is located not in the capital city of Malawi, but in Blantyre with the Chief Executive Officer (CEO) to coordinate all PPPs in the country. He holds a Ph.D. in Accounting with also privatization and PPP and audit background. The Director of Operations is an engineer with a Masters Degree, and PPP and Privatization experience. The Director of Project of Project Finance holds a Masters in Business Administration, PPP and Privatization experience. The Finance Management specialist is a Masters in Business Administration (MBA) in Finance and Accounting. The Procurement Specialist holds a Masters in Science, Procurement and Human Resources.

The PPPC structure seems to be in a country of Malawi’s size to be quite adequate, lean and nimble, but also has the capacity to cover a range of functions and grow in scale as the program



progresses. The PPPC seems to have core technical and management staff but still challenges such as financial constraints to promote PPPs in the country. Many of the staff is engaging in PPPs, however, without a proper understanding of the concept and against the PPP Act. The entity is financed by the Treasury through national budget allocation.

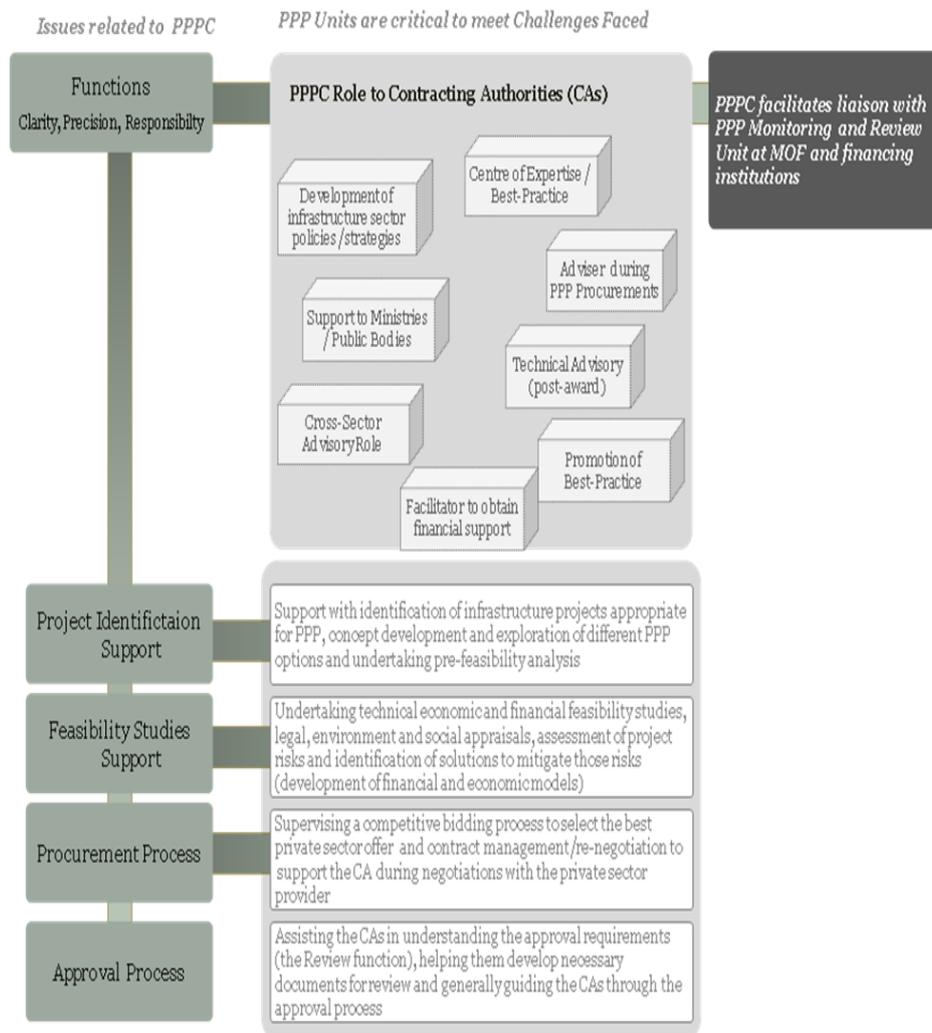


Chart 7: PPPC Support areas

5.2.2 PPP Regulation, Approval and Implementation Roles in Malawi

The roles to be assigned in terms of approval, implementation and regulation have been quite clearly determined in the PPP Act, for the latter of which, so-called “Sector Regulators” have been assigned to be in charge of the oversight of PPP arrangements. The Government allocates the implementation roles concerning identification, appraisal, development, monitoring a PPP under the PPP Act of 2011 either to the PPPC or the Contracting Authority (Government of the Republic of Malawi, The Malawi Gazette Supplement, dated 23rd December, 2011, containing Acts, Malawi Government, Published December 2011, Act No. 27 of 2011, Article 23, 2011). Furthermore, both authorities may undertake a feasibility study or be responsible for such activities as transfer of



assets of part of an interest of the Contracting Authority to a private partner.

The PPP agreement may be entered to either by the Contracting Authority or the Ministry of Finance (Government of the Republic of Malawi, The Malawi Gazette Supplement, dated 23rd December, 2011, containing Acts, Malawi Government, Published December 2011, Act No. 27 of 2011, Art, 25(1), 2011). It is quite important to take notice of the wide-ranging role of the PPPC throughout the procurement process. The PPPC may conduct pre-qualification exercise itself or delegate it to the Contracting Authority. Also the preparation of request of proposals remains with the PPPC. In its efforts to choose the optimal bidder, the PPC shall exercise the highest standards of equity and fairness (Government of the Republic of Malawi, PPP Act, Article, 27 (3), 2011). The PPPC is the approval body in terms of providing its consent to the contract to be concluded including the consent of the Minister. Thus, the PPPC is not an advisory body, but also an implementing body in terms of purchasing a PPP contract. Also quite interesting is that the PPPC is the sole entity receiving and dealing with unsolicited bids and proposals. Thus, the Contracting Authority does not possess any discretion to deal with unsolicited bids, but may be consulted by the PPPC for a preliminary assessment as to whether the PPP proposed is acceptable or not.

In terms of regulation, the sector regulator shall in consultation with the PPPC regulate the PPP arrangement to make sure that they are being managed well. The Minister is in charge of issuing from time to time Policy directions prescribing further objectives and forms of PPPs and guidelines to be followed for a proper and effective implementation of PPPs.

5.3 Malawi Legal Framework

The Malawi PPP Act covers not only issues related to PPPs, but also regulation and organization of privatization processes. The rationale behind this approach was provided by IP3 who advised the Government on its PPP Legal framework in 2007. They argue that an amendment of the existing law was better to pursue than establishing a new PPP Law (IP3, Development of Policy, Legal, and Institutional Framework for the Public-Private Partnership Program in Malawi 2007, p.3). They also emphasized that the flow from privatization to PPPs must be understood as a process of continuation, not a change in direction, thus deserving not a fundamental change of course. According to IP3, both privatizations and PPPs fit within the term of PPP. Although, we do not agree with this vision of IP3, nevertheless an institutional argument provided is that the privatisation commission (PC) would have its mandate expanded, whereas if a new law were to be enacted, the PC would have to be transformed into a new entity. Overall, if there were two separate laws, one for Privatization and another for PPP, the issue would be how to consolidate works within one organization.

No matter how practical this approach has been, it must be borne in mind that the PPP Act in Malawi has been derived from its institutional, legal and cultural context. We had highlighted some key challenges for a proper PPP Legal Framework in the Regional Strategy document. These related to requirements of lenders and investors that need to be addressed by a proper legal framework aimed at attracting private capital into the delivery of services. Next to assigning clear roles to various authorities including the procuring agent, also clarity of laws, enforceability and security of laws are some of the essential elements of a proper legal scope for promotion of PPPs across SADC.

The next chart provides an evaluation of how the Malawi PPP Act copes with the requirements indicating that the Government has managed well to establish clear and complete procurement procedures for award of PPPs, but it has not yet introduced guidelines and procedures on the content of tender process and documents and there seem to be lacking credible guidelines on post sward of PPP implementation. The Malawi Government assigns clear roles to various



authorities in Part III of the PPP Act, and further defines the procedures for the award of contracts in Part VI (Government of the Republic of Malawi, PPP Act, Parts III & VI, 2011). Based on the PPP Act, the PPC may consider carrying out a pre-qualification exercise to select potential bidders or the Contracting Authority may do so. Also there is determination that the evaluation criteria shall be clearly set out in the request for proposals. The PPC evaluates the expression of interest of bidders. The PPP project cycle covers five distinct phases; project identification, initial viability assessment, project preparation and development, project procurement and the post contract phase. Ministries, Departments or Public Institutions – who will be the Contracting Authorities (CAs) (assisted by PPC and/or qualified and experienced transaction advisors as appropriate) go through these steps to ensure that PPPs are carried out rigorously.

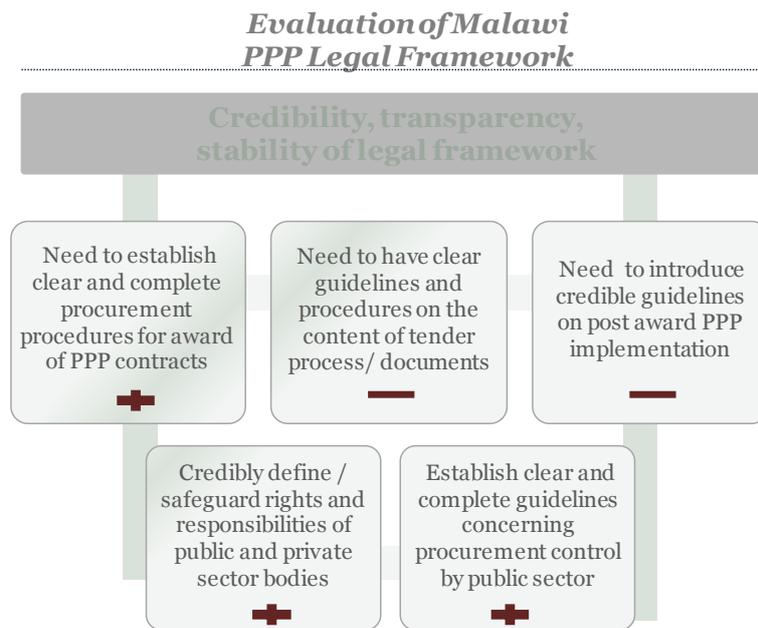


Chart 8: An evaluation of Malawi Legal Framework

A PPP options study conducted by the World Bank in 2011 took a look at the Legal Framework for PPPs in Malawi indicating some limitations related to usage of land in the country. Based on their analysis, many private sector investors seem to be concerned with the promulgation of the Land Amendment Act 2004, which has introduced significant changes in the management of land. The changes include restriction of sale of land to foreigners by according priority (first option) to Malawians, reducing the leasehold tenure from 99 years to 50 years and not permitting non-nationals to own freehold land (World Bank, Public Private Partnership Options Study and Awareness Raising for Irrigation Investment in Malawi, 2011, p.18). This is perceived by many foreign investors as a deterrent to investment in industries with long gestation periods. However, it is noteworthy that the land policy encourages noncitizens wishing to invest in freehold land to do so in joint venture with citizens of Malawi as part of the Government’s economic empowerment initiative.

Overall, the World Bank found back then that the legal basis for conducting PPP transactions in Malawi and creating credibility to investors could be greatly enhanced if the Government enacts or amends laws or regulations that set the basic principles needed to implement PPP transactions or that clarify some of areas of uncertainty. Such enactments or amendments should have related, for instance, to provisions concerning unsolicited bids or giving Government powers to provide subsidies, if necessary, to cover the difference between the true cost of service and the



affordable charges, and to guarantee private sector investment and financing arrangements, including in securing loans from local and international banks. These issues have been now addressed in the PPP Act dated 2011, and should to date pose no further limits to promotion of PPP projects.

6. Recommendations

There has been little PPP activity in Malawi to date. Nevertheless, the PPP Framework in Malawi has developed from a low level of maturity to middle mature Institutional, Legal and Policy setting. With the enactment of both PPP Policy Framework and the PPP Act in 2011, the Government of Malawi has established credible procedures and mechanisms to carry out PPPs in the country. There is growing interest in PPPs as an alternative method of procurement of public services.

The Government officially recognizes that identifying and establishing clear and unambiguous institutional functions in relation to PPPs early on in the onset of its PPP programme greatly assists in successful PPP implementation. While it realizes that institutional roles and responsibilities may change over time as Malawi's experience with PPP develops, the Government has clearly identified the OPC, MDPC, MoF and PPPC as well as the Utility Regulatory Authorities as public institutions to play key roles in the programme and these have been laid out on the PPPC website in a detailed manner. Thus, investors have quite a good idea of whom to approach and what to do to either submit solicited or unsolicited bids and also public government officials are informed about their roles at various stages of a PPP process.

The World Bank has been supporting the development of PPPs in Malawi to invest in capacity building of the PPPC. It commissioned a study to identify a prioritised pipeline of PPP projects. There is, however, need for capacity building and PPP awareness raising and strengthening of resources among key line Ministries to be aware of different PPP options and modalities for PPPs across various sectors in Malawi. There seems to be serious capacity constraints for the implementation bodies in terms of public procurement. A Malawi delegate from PPPC who attended the PPP training in Germany on PPPs in health in October 2013, reaffirmed the need to invest in specific training for PPPC staff concerning risk allocation, quantification of risks and also further financial viability analysis learning more about how financial models may best

be structured also as benchmark to private sector models submitted to procuring entities. Thus, despite capacity-building workshops held, procurement staff is still not optimally equipped to manage procurement processes and purchase the proper procurement choice.

In order to strengthen sector Ministries, we recommend investing in developing and formulating model contracts for various sectors in which PPP activity is to be undertaken. The idea behind model contracts is to provide parties to PPP contracts with the protections that would otherwise be provided by independent regulators. Along with these model contracts, the National PPP Policy and its related PPP Act and PPP Regulations, will provide highly specific policies and procedures for PPP procurement.

Concrete SADC3P Recommendations:

- Support the Government in financial modelling and risk analysis
- Assist PPPC in identifying proper PPPs and developing a PPP pipeline.
- Assist sector Ministries in getting a better understanding of the PPP concept.
- Provide assistance to draft model PPP contracts for various sectors



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