AfriCOG FORUM ON GOVERNANCE AND SUBMARINE FIBRE OPTIC CABLE INITIATIVES IN KENYA 21ST JULY 2010, NORFOLK HOTEL

INTRODUCTION

This report documents the proceedings of the public forum convened by AfriCOG at the Norfolk Hotel on the 10th of December 2010. The forum served the dual purpose of launching AfriCOG's report, '*Unlimited Bandwidth? Governance and Submarine Fibre-Optic Cable Initiatives in Kenya"* and providing a platform for discussion of governance issues relating to public private partnerships in Kenya. Through this forum, AfriCOG sought to facilitate discourse among the various stakeholders, drawing lessons from fibre optic cable initiatives in the country with a particular focus on The East African Marine System (TEAMS).

PARTICIPANTS

In attendance were practitioners from the Information and Communication Technology (ICT) sector, including TEAMS, Kenya Data Networks (KDN), Kenya Education Network (KENET); representatives of the United Nations Development Programme (UNDP), The Department for International Development (DFID) and the Heinrich Böll Foundation (HBF); and the media. This forum was moderated by *Gladwell Otieno*, Executive Director of the Africa Centre for Open Governance.

I. Governance and Submarine Fibre-Optic Cable Initiatives in Kenya

By Gladwell Otieno (Executive Director, AfriCOG)

AfriCOG's mandate to produce cutting edge in the public interest, addressing issues of poor governance in the private and public sectors, informed its interest in monitoring performance on economic governance. AfriCOG's work on developing issues relating to the Telkom privatisation and Safaricom's Initial Public Offering (IPO) raised issues of transparency, accountability, probity of public officials and collusion between the public and private sectors. These corruption concerns undermine objectives of reforms at various levels and, further, undermine competition both for and in the market. Often, the environment created after reforms is particularly favourable to corruption and narrow interest groups may aim at capturing regulatory processes for the purposes of either influencing the design of regulations or the manner in which they are implemented once in place.

The Report, therefore, represents AfriCOG's continuing monitoring of the probity of ongoing privatization processes, following work on the financial, media and communication sectors. In doing so, it explores relationships that exist among regulators, regulated firms, bureaucrats, politicians (parliament) and consumers. It also seeks to analyze the interactions between the foregoing players and assessing opportunities for corruption and inform public debate on the governance aspects of these initiatives and their implications for the future. These include legal and institutional frameworks, access to information, transparency and accountability of regulators.

AfriCOG's attention was drawn to TEAMS due to the public interest issues inherent in government's involvement and against a background of great public concern about the transparency of the initiative. The TEAMS project was conceived in 2009 and promoted against a background of a lack of submarine fibre optic cable connectivity in the East African region and an urgent need for additional and significant investment in ICT infrastructure so as to achieve Kenya's development goals as espoused in *Vision 2030*.

II. Public Private Partnerships: Governance Lessons Learnt from the Fibre Optics Initiative

By Kwamchetsi Makokha (Consultant)

Report Summary

The key issues under investigation in AfriCOG's Report were as follows:

1. Should government have invested in TEAMS – and on what terms?
2. Did investment in TEAMS offer Kenyans value for money?
3. Were governance best practices adhered to?
4. What lessons can be drawn from this project for future ventures?

Prior to TEAMS, communications depended on expensive satellite connectivity which, in turn, had implications on costs of doing business. In the last 30 years, several attempts have been made to connect the EA seaboard to a fibre optic cable. The potential implications of such an investment included improved connectivity, delivered to the public at affordable rates and with optimal efficiency. The East African Submarine System (EASSy), the Lower Indian Ocean Network (LION) and SEACOM are examples of such initiatives that are, alongside TEAMS, operational in Kenya.

TEAMS was created out of frustration with the pace and politics of EASSy, the longest cable system serving Africa's eastern seaboard (linking South Africa to Djibouti) promoted by state-owned telecommunications operators and governments in the region. It was initiated as a joint venture between Kenya (through Telkom Kenya) and UAE in 2006 and sought to link Mombasa to Fujairah in the United Arab Emirates (UAE). Construction began in April 2009 and the cable landed June and subsequently operational in September 2009.

With regard to value for money, TEAMS resulted in the cost reduction of 1 MB of data from $2000 to $300. It is also the lowest cost cable globally.

With respect to ownership, government bears equal risk with other anchor shareholders, specifically Safaricom and Telkom. A deeper analysis, however, reveals that government has a bigger stake in TEAMS due to its significant shareholding in both Safaricom and Telkom.

Other shareholders include:

1. **Major shareholders**: Essar, Kenya Data Networks - 10% each
2. **Others** : Wananchi – 5%; Jamii – 3.75%; Access, Inland, Iquip, Inhand, Flashcom, AFN – 1.25%

TEAMS is subject to National ICT Policy and the ICT Act, the Privatisation Act, Public Procurement and Disposal Act (PPDA) regulations and Environmental laws. The involvement of the Communications Commission of Kenya (CCK) in the project was problematic, not because it was beyond its legal mandate, but because the existing mechanisms for government to direct the CCK were not followed. The fact that TEAMS was outside the ambit of Privatisation Act was also of concern as it was privatized as an entity that had not come into existence.

TEAMS secured all the necessary licences required under the law and these included a licence from the National Environmental Management Authority (NEMA) and the CCK. The concern, however, is that the CCK effectively licenced itself as major player in TEAMS implementation.

With respect to TEAMS as a public private partnership and the regulation of public private partnerships in general, the Public *Procurement and Disposal (*Public Private Partnership*)* Regulations came into force February 2009, after the TEAMS ownership structure had already been agreed. However, had the regulations been in force at the time of TEAMS conception, institution and promotion, TEAMS would still not be adequately covered for regulation except in a generic manner.

The TEAMS initiative also had transparency concerns, specifically with regard to openness to public scrutiny and parliamentary oversight. There was poor consolidation of information between the Ministry of Information, ICT Board, CCK and Privatisation Commission and poor public information and outreach with respect to advertisements in the media. Though there were high-level discussions, these were not wide enough in their outreach.

Though a number of meetings were held with investors, this constituted a narrow interpretation of an accountability provision. Accountability in the initiative can, however, be bolstered by adhering to equity/ inclusiveness elements such as open access principles, the continued development of the National Optic Fibre Backbone, cheaper access to the digital environment, consensus building, more inclusive stakeholder participation, responsiveness and effectiveness and efficiency in customer satisfaction.

What are PPPs?

Where a private party undertakes to perform a public function or provide a service on behalf of the procuring entity, the private party receives a benefit for performing the function, either by way of:

(i) Compensation from a public fund;

(ii) Charges or fees collected by the private party from users or customers of a service provided to them; or

(iii) Combination of such compensation and such charges or fees.

The private party is generally liable for risks arising from the performance depending on the terms of the agreement

Types of PPP

- Management contract whereby a procuring entity awards a private party the responsibility to manage and perform a specific service, within well-defined specifications for a specified period of time not to exceed five years and the procuring entity retains ownership and control of all facilities and capital assets and properties;
- Lease, whereby the private party pays the procurement entity rent and manages, operates and maintains the facility and receives fees or charges from consumers for the provision of the service for specified time not exceeding fifteen years;
- Cconcession for a period not exceeding 30 years whereby the private party maintains, rehabilitates, upgrades and enhances the facility in question;
- Build- Own - Operate-Transfer scheme whereby a private party designs, constructs, finances, owns, operates and maintains the given infrastructure facility for a specified time period not exceeding thirty years, or such longer period as may be agreed, after which the facility is transferred to the procuring entity;
- Build-Own-Operate scheme whereby a private party designs, finances, constructs, owns, operates and maintains the infrastructure facility and provides services for an agreed time period
- Any other scheme as may be prescribed by the Public Private Partnership Steering Committee and approved by the Cabinet. This is would be where the TEAMS initiative would fall as it does not fit into the other types of PPP.

PPPs: Lessons Learnt

The increasing need for public goods outstrips the government's finances in strategic areas such as energy, transport and communications. **G**overnment resources are increasingly being dedicated to security, education, health. PPPs are, therefore, informed by state enterprises' inability to mobilize adequate resources to finance public goods and the diminishing external interest in lending to government because efficiencies perceived to reside in the private sector.

Experiences from TEAMS and others (RVR) suggest that there are many lessons still to be learned. These relate to:

- Comprehensive Legislative and Institutional frameworks
- Parliamentary oversight
- Clarity of audit functions
- Clarity of public accountability

Governance Concerns

a) Legal/Institutional Frameworks

The Privatisation Act of 2005 defines privatization as a transaction or transactions that result in a permanent transfer of assets, operational control of assets, operations previously carried out by a public entity.

The PPDA specifically talks about PPP as an agreement allowing a private entity to:

1. Perform a function or provide a service on behalf of a public entity
2. Receive a benefit for the above by charging fees, receiving compensation or a combination of both

Key questions that must, however, be asked include:

- Do ministries have the capacity to structure these deals and negotiate in a manner that protects public interest?
- What is the level of public acceptance and political support?

b) Disclosure on Issues of Probity

PPPs represent claims on public resources, tend to be complex, long term and hide the potential for expensive mistakes. Issues of probity require clarity as to who bears the greatest investment responsibility and how the regulator's independence can be secured.

c) The PPP Steering Committee

The composition PPP Steering Committee is as follows:

1. Permanent Secretary to the Treasury—Chairman;
2. Attorney General or his representative;
3. Permanent Secretary, Office of the Prime Minister;
4. Permanent Secretary for the Ministry responsible for Planning, National Development and Vision 2030;
5. Other three members not being public servants appointed by the Minister from a list of nominees from private sector bodies approved by the Cabinet.

Though it is prudent for government to be represented in the committee, its composition government overrepresentation and exposes the committee to political manipulation.

d) Managing Competing Interests

There is also need to query whether the parameters involved to manage competing interests are sufficient. These parameters include value for money; affordability; substantial technical, operational and financial risk transfer to the private party; and necessary service to the public.

It is imperative to ensure effective communication with the public and their engagement at various levels

III. The Fibre Optic Cable and iHub

By James Muendo (iHub)

The landing of the fibre optic cable has contributed significantly to improved innovation in the region. The iHub is the standout example of the benefits of cheaper, faster and more reliable internet connection.

The iHub is a space in which youth come together to discuss and share innovative ideas. Examples of the fruits of this interaction are:

a) **i-cow**: an application intended to help hundreds of thousands of E. African farmers and ranchers earn a living. It is a voice based mobile application that helps farmers track the oestrus stages of their cows that enables them to better manage the breeding periods as well as monitor cow nutrition leading up to the calving day.'

b) **Rupu**: A group marketing tool that features heavily discounted deals for products and services from companies in various industries including Food & Beverage, Insurance, Entertainment, Health and Beauty

PLENARY RESPONSE

Participants were concerned with the continued high prices being incurred by consumers for internet connectivity. The public's expectation, with respect to communication after the cable had landed in Mombasa, was that lower rates would be charged for more optimal and reliable connections. The reality, however, is that prices have remained high and customers have not experienced the expected increase in efficiency in connectivity. Representatives from TEAMS however put the reason down to the high cost of penetration of fibres from the cost to inland urban hubs, redundancy, maintenance and vandalism.

Recommendations from the floor included a deeper analysis of the local penetration of fibres from the coast. Legal and institutional concerns such as the arbitrary raising of pricing for cables by local authorities pointed towards another avenue of corruption and lack of adherence to the rule of law.

There were also suggestions made for improved infrastructure sharing. The practice of penetration from the coast is that each stakeholder is responsible for their cables from the coast. The implication of this is that each bears significant cost in laying cables and this cost is ultimately passed on to the customer. Improved infrastructure sharing would enable stakeholders share the cost of penetration from the coast and ensure that a key reasoning for the laying of the fibre optic cable, reduced connectivity rates, is achieved. There was also a strong desire from the forum for AfriCOG to monitor governance issues that arise with the penetration of cables from the coast.

The plenary was also concerned with the lack of information and information access regarding the TEAMS initiative. The irony of TEAMS not having a website, through which relevant information of public interest could be disseminated, was not lost on the participants. It was therefore strongly recommended by the participants that TEAMS endeavour to make information available to the public so as to shed its perception as an initiative shrouded in mystery. TEAMS acknowledged this shortcoming and assured the forum that a website would be up by February 2011.

The TEAMS stakeholders present at the meeting also recommended that telecom infrastructure be classified as a utility. They reasoned that in light of the new constitution and new counties that would be formed in future, ICT could be considered as a resource in areas with insufficient natural resources. Classifying telecom infrastructure as a utility would further reduce communication and connectivity costs, allowing the youth in these counties to develop innovative mindsets that would then be beneficial to the county.

RECOMMENDATIONS

Informed by the plenary discussion, the following recommendations were made with regard to the TEAMS initiative:

1. A deeper analysis of the local penetration of fibres from the coast should be commissioned, especially with respect to governance issues such as the rule of law.
2. Infrastructure sharing should be improved to enable stakeholders share the cost of penetration from the coast and ensure that a key reasoning for the laying of the fibre optic cable, reduced connectivity rates, is achieved
3. TEAMS should make information available and accessible to the public to enable public participation in the initiative.
4. More effort should be made by government and stakeholders to ensure that the youth are empowered and innovation encouraged.

Annexe 1

Participants

Telecommunication Service Providers Association of Kenya (TESPOK)

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Nairobi Net

Department for International Development (DFID)

Heinrich Böll Foundation (HBF)

The East African Marine System (TEAMS)

The East African Marine System (TEAMS)

Kenya Education Network (KENET)

Cosultant

iHub

Heinrich Böll Foundation (HBF)

Semacraft

Ministry of Information and Communications (MOIC)

AMMK

Nairobi Net

International Commission of Jurists *(*ICJ Kenya*)*

The East African Marine System (TEAMS)

Multi Media University of Kenya (MMU)

Kenya Data Networks (KDN)

United Nations Development Programme (UNDP)

Media

Finance Magazine

Capital FM

Daily Nation

East African Standard

The Star

Kenya News Agency *(*KNA*)*

Pamoja FM

Hope FM

Africa Centre
for Open Governance