

PUBLIC-PRIVATE PARTNERSHIPS

Contractual Structure Brief Summary

Regional Seminar in Kigali
14th – 16th February 2011

Sena Agbayissah
Managing Partner
SNR Denton - France



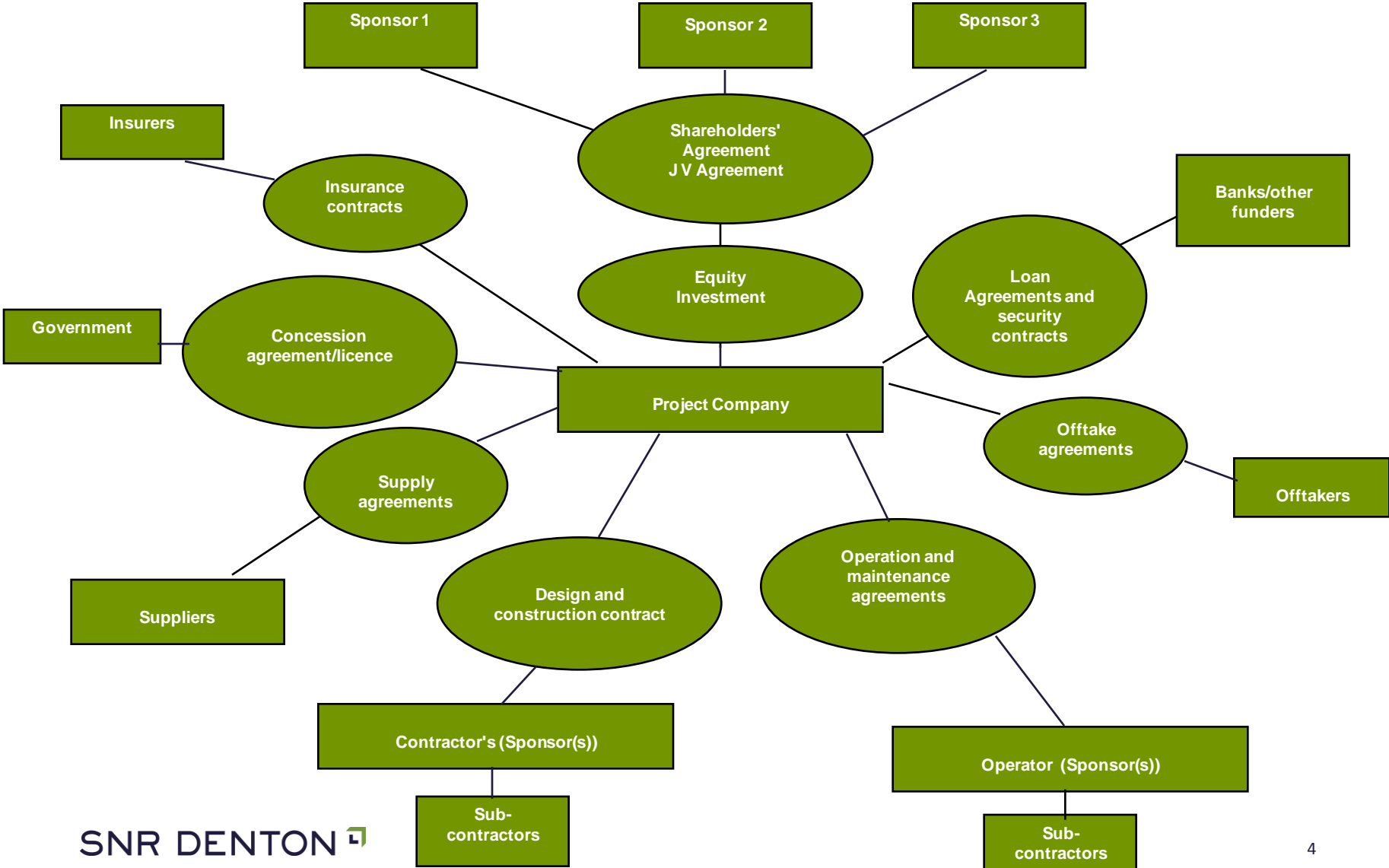
Outline of presentation

- 1) Project Finance approach
- 2) Typical contractual structure for PPPs
- 3) The rationale for SPV
- 4) Key contractual parties
- 5) Contractual Matrix
- 6) Bankability

Definition of project finance

- The financing of the development or exploitation of a right, natural resource or other asset, where the bulk of the financing is to be provided by way of debt and is to be repaid principally out of the assets being financed.
- Key elements:-
 - 1) Debt finances specific project
 - 2) Lenders look (primarily) to project cash flows for repayment
 - 3) Recourse to Sponsors is limited
 - 4) Debt is secured on project's assets

TYPICAL CONTRACTUAL STRUCTURE FOR PPPs



Rationale for SPV

- To have a clear vision of the total project (accounting, financing etc)
- To isolate the project
- To protect the right of creditors
- Means to limit recourse to sponsors
- Who are the shareholders?
- Equity/debt ratio

Key Contractual Parties

- Project Company
- Host government
- Sponsors
- Lenders
- Contractor(s)
- Operator
- Suppliers and Offtakers
- Others (e.g. credit enhancers, insurers)

Contractual Matrix

- Equity Documents (Shareholders Agreement & Equity Subscription Agreement)
- Concession Agreement
- Construction Contract(s)
- Operation and Maintenance Agreements
- Supply Contracts
- Offtake Contract
- Other Major Sub-Contracts
- Management Agreement
- Financing Documents

Bankability

- Various factors including:
 - Security package
 - An appropriate allocation and control of risks such as:
 - Inherent risk that the project may not generate the expected revenue
 - e.g in PPP projects the project company typically receives a pre-agreed monthly payment from the procuring authority, but this is usually linked to the level of performance of the obligations set out in the concession agreement
 - Political risk
 - Interest rate, inflation and currency risk
 - Can be mitigated by swap arrangements

Bankability, continued...

- Change of law risk
- Contract counterparty performance
- Clear and robust assumption of risks in the contracts, consistent with the risk allocation structure
- Market practice/appetite from time to time as to risk assumption

Lenders general approach to risk

- Only assume measured or measurable risk
- Control is key
 - Especially the right to take control of the project as soon as possible when difficulties arise
- Analysis and allocation of risks at an early state is important

Bankability, continued ...

Ground rules for risk sharing

- Lenders recourse limited to assets and cashflow of project company
- Any risk left with the project company is lender risk
- Lenders will seek to transfer risks – generally risk averse
- If more risks are assumed by the lender the price will go up
- Where should the risks lie?
 - Should rest with the party best able to take them
- Use of risk mitigation

Cashflow certainty

- Cash flow sensitivity governs equity requirement
 - from sponsors' perspective, they want to provide as little equity as possible

Bankability, continued ...

- Debt to equity ratio
 - historically a typical non-PPP project would have had 85:15 debt to equity ratio
 - UK/French PPP projects tend to have a higher ratio, e.g. 90:10, given government involvement
- Greater cashflow certainty if more risk allocated back to authority or pass down to sub-contractors
- Risks that are typically retained in project company: tax, non-discriminatory change of law, liability to 3rd parties (beyond sub-contract limits)
- Direct Agreements
 - Definition
 - Where A is in a contract with B (e.g. a loan agreement)
 - And B is in a related contract with C (e.g. a project agreement)

Bankability, continued ...

- Qualifying C's rights against B to A's advantage when B is in default to A or C

- Including entitling A to substitute a new party D in place of termination of B

– Why a Direct Agreement?

- Contract is the main or key source of cashflow or service
- Assets, in the form of contracts, can be terminated early, unlike tangibles
- Lender needs to prevent loss of asset if security is to continue to have value
- Hence direct agreement to:
 - o Bind key project counterparties to restrictions against termination
 - o Preserve the integrity of the project contract structure

Bankability, continued...

- Why does a Contract party agree to have a Direct Agreement?
 - Bankability – direct agreements expected
 - Continuity of contract
 - Common interest in project completion and success

Sena AGBAYISSAH

Managing Partner

Paris – SNR Denton UK LLP

112 avenue Kléber

Paris

75116

France

© 2010 SNR Denton.

SNR Denton is the collective trade name for an international legal practice. The Paris office of SNR Denton UK LLP is registered with and regulated by the Paris Bar in accordance with Directive 98/5/CE. SNR Denton UK LLP is a limited liability partnership registered in England and Wales under no. OC322045. Also regulated by the Solicitors Regulation Authority of England and Wales. A list of its members is open to inspection at its registered office: One Fleet Place, London EC4M 7WS, England. Any reference to a "partner" means a partner, member, consultant or employee with equivalent standing and qualifications in one of SNR Denton's affiliates. This document is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. We are providing information to you on the basis you agree to keep it confidential. If you give us confidential information but do not instruct or retain us, we may act for another client on any matter to which that confidential information may be relevant. Please see snrdenton.com for Legal Notices, including further information on our professional obligations.