



GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES

Mega Contracts: Bidding, Negotiations & Implementation

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Nairobi, 18 and 19 May 2017

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- **Nairobi, 18 - 19 May 2017**



Contents

[A] Why Are We Here?

- Which Mega Contracts?
- Why Mega Projects & Contracts?
- The East African Race
- Role of 'Local Counsel' and Local Content
- Role of Joint Counsel

[B] Bidding: Getting on the Short List

- Relationship and reputation building (and BD)

[C] Bidding & Execution: Writing Your Bid

- Avoid 3 Past Proverbs For "Local" Counsel
- KYC: Know Your [Potential] Client – terminology
- Understanding the Deal
- The role of the local lawyers
- 5 Key Bid (& Execution) Messages

[D] Executing the Deal

- Executing the Deal: Key Parameters
- Frequently Encountered Issues

[E] Closing and Q&A

- Contact Details

- GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES
- Nairobi, 18 - 19 May 2017



[A] Why Are We Here?



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Which Mega Contracts?



Deloitte “Africa Construction Trends Report 2016”
<https://www2.deloitte.com/za/en/pages/infrastructure-and-capital-projects/articles/construction-trends-2016.html>



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Why Mega Projects & Contracts?



VISIT WEBSITE >

Uganda




Tanzania



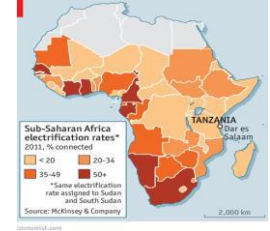
Kenya



Rwanda



Burundi



Sub-Saharan Africa electrification rates* 2011, % connected

< 20	20-34
35-49	50+

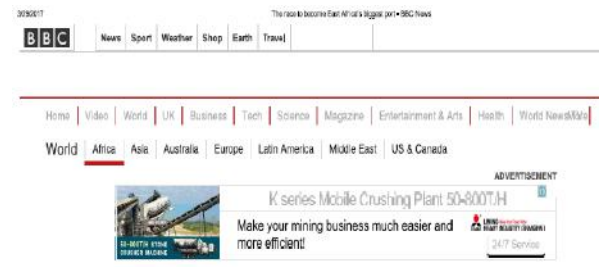
*Some electrification rate assigned to Sudan and South Sudan
Source: McKinsey & Company

Needs-Basis

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- Nairobi, 18 - 19 May 2017



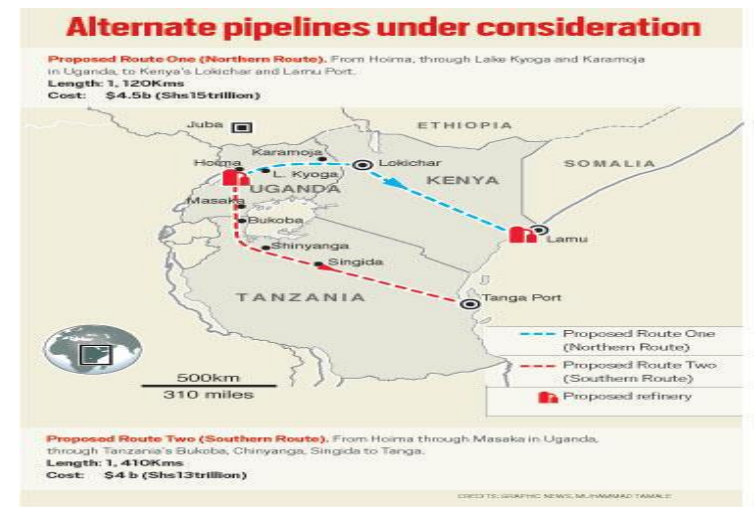
Mega Projects: The East African Race



BUSINESS DAILY

MONEY MARKETS

World's top lawyers vie for slice of East Africa's mega contracts

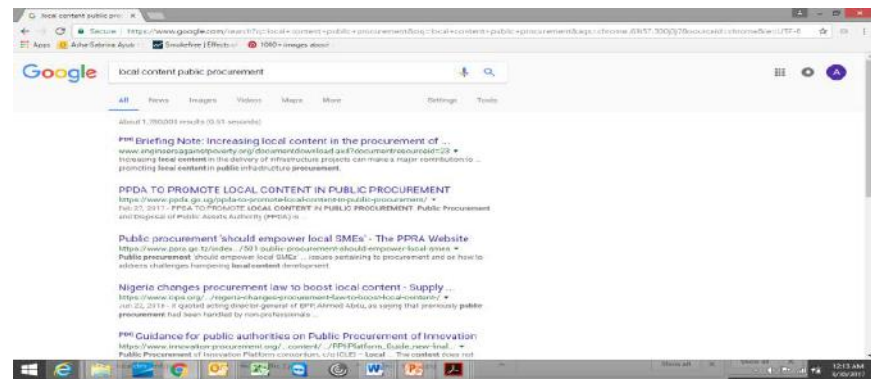


E&Y Spotlight on oil and gas megaprojects (2014) ([http://www.ey.com/Publication/vwLUAssets/EY-spotlight-on-oil-and-gas-megaprojects/\\$FILE/EY-spotlight-on-oil-and-gas-megaprojects.pdf](http://www.ey.com/Publication/vwLUAssets/EY-spotlight-on-oil-and-gas-megaprojects/$FILE/EY-spotlight-on-oil-and-gas-megaprojects.pdf))

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- Nairobi, 18 - 19 May 2017



Role of 'Local Counsel': Local Content, Rules & Public Procurement in Mega Contracts



Home > Zfeature

Danger Of Africa's Mega Projects Freezing Out Local Talent

THE PETROLEUM ACT (Act No. 21 of 2015)	
THE DRAFT PETROLEUM (LOCAL CONTENT) REGULATIONS, 2016 (Made under section 258)	
PART 1—PRELIMINARY PROVISIONS	
Custom and Commentaries	1. These Regulations may be cited as the Petroleum (Local Content) Regulations, 2016 and shall come into operation on day of 2016.
Application	2. These Regulations shall govern local content matters related to petroleum: (a) upstream activities; (b) midstream activities; and (c) natural gas downstream activities; in Tanzania Mainland.
Interpretation	3. In these Regulations, unless the context otherwise requires: "Act" means the Petroleum Act, 2015; "bid rigging" means the manipulation of a bid process by dishonest conduct; "cartelization" means a collection of businesses that act together as a single producer and agree to influence prices for certain goods and services by controlling supply through their production and marketing activities; "common qualification system" means a sole centralized system of pre-qualified service providers in Tanzania's petroleum industry based on their capacities, capabilities and local content strength to enable ranking and categorization of the service providers as well as tracking and monitoring their performance; "contractor" means a person who has entered into a petroleum agreement with the Government or TIDC to undertake petroleum exploration and production activities under the Act or any person hired by a licensee to provide goods or

Cap. 414

"EWURA" means the Energy and Water Utilities Regulatory Authority established under the Energy and Water Utilities Regulatory Authority Act, Cap. 414;

"financial services" means, but not limited to, the business of banking, any business of a financial nature, the business of a credit union, insurance business or insurance brokerage, the business of securities and any business relating to pension funds

"local company" means a company as defined under section 219(9) of the Act;

"licensee" means a licensee or a license holder as defined under the Act

"local content" means the quantum of composite value added to, or created in, the economy of Tanzania through deliberate utilization of Tanzanian human and material resources and services in the petroleum operations in order to stimulate the development of capabilities of Tanzanians and to encourage local investment and participation.

"local content plan" means a forecast of procurement, employment, technology transfer and research and development opportunities submitted to PURA or EWURA by a contractor, subcontractor, licensee or allied entity;

"local content performance report" means the assessment and review of local content plan to ensure compliance with these regulations;

"midstream activities" means activities related to petroleum processing, refining, liquefaction, storage and transportation to the point of supply or loading as a commodity;

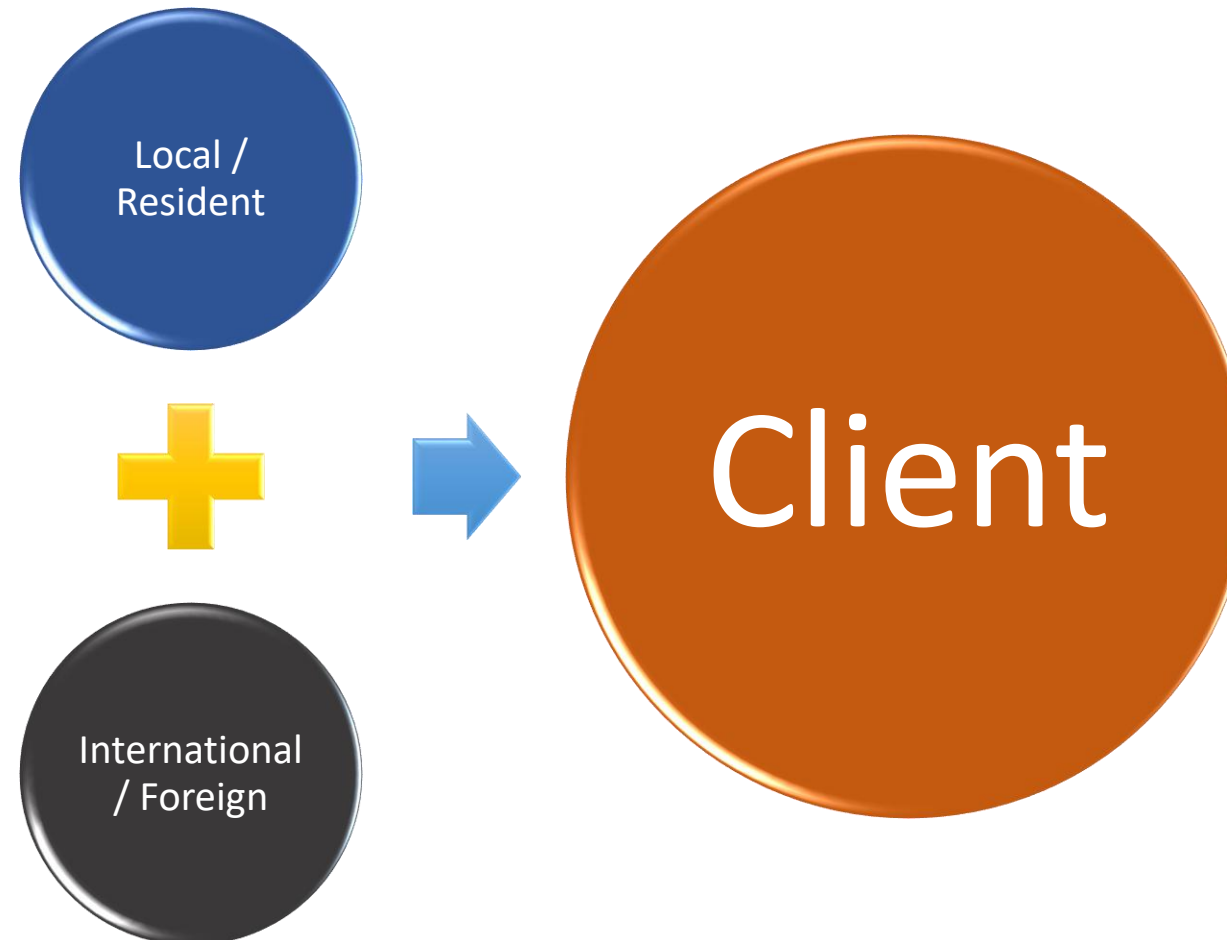
"NOC" means the National Oil Company;

"petroleum" means any naturally occurring hydrocarbon, whether in gaseous, liquid, solid state or any naturally occurring mixture of hydrocarbons, whether in a gaseous, liquids, or solid state or mixture of one or more hydrocarbons whether in a gaseous, liquid or solid state and any other substance and includes petroleum that has been returned to a natural reservoir, but shall not include coal or any

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- Nairobi, 18 - 19 May 2017



Role of Joint Counsel: Local Content, International Opportunity?



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- Nairobi, 18 - 19 May 2017



[B] Bidding: Getting on the Short List



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- Nairobi, 18 - 19 May 2017



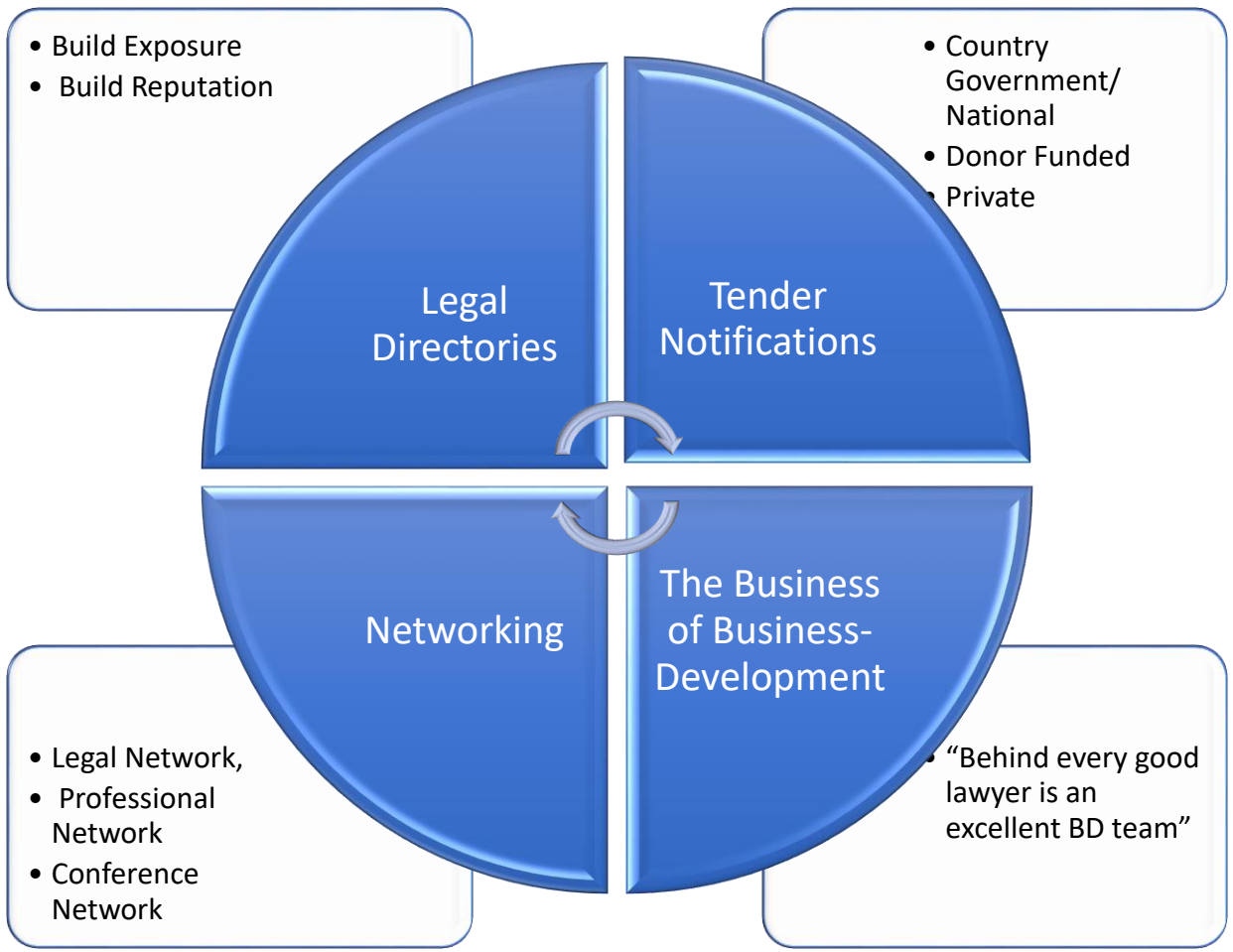
Bidding: Getting on the Short List - Relationship Building



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- Nairobi, 18 - 19 May 2017



Bidding: Getting on the Short List



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- Nairobi, 18 - 19 May 2017



Need Some Numbers?

“On average, each additional **hour per week spent on business development activities results in an additional **\$30,000** in origination revenue.”**

http://www.cba.org/cba/practicelink/leadership_marketing/women_rainmakers.aspx



- **GLOBALISING YOUR PRACTICE - OPPORTUNITIES AND CHALLENGES**
- **Nairobi, 18 - 19 May 2017**



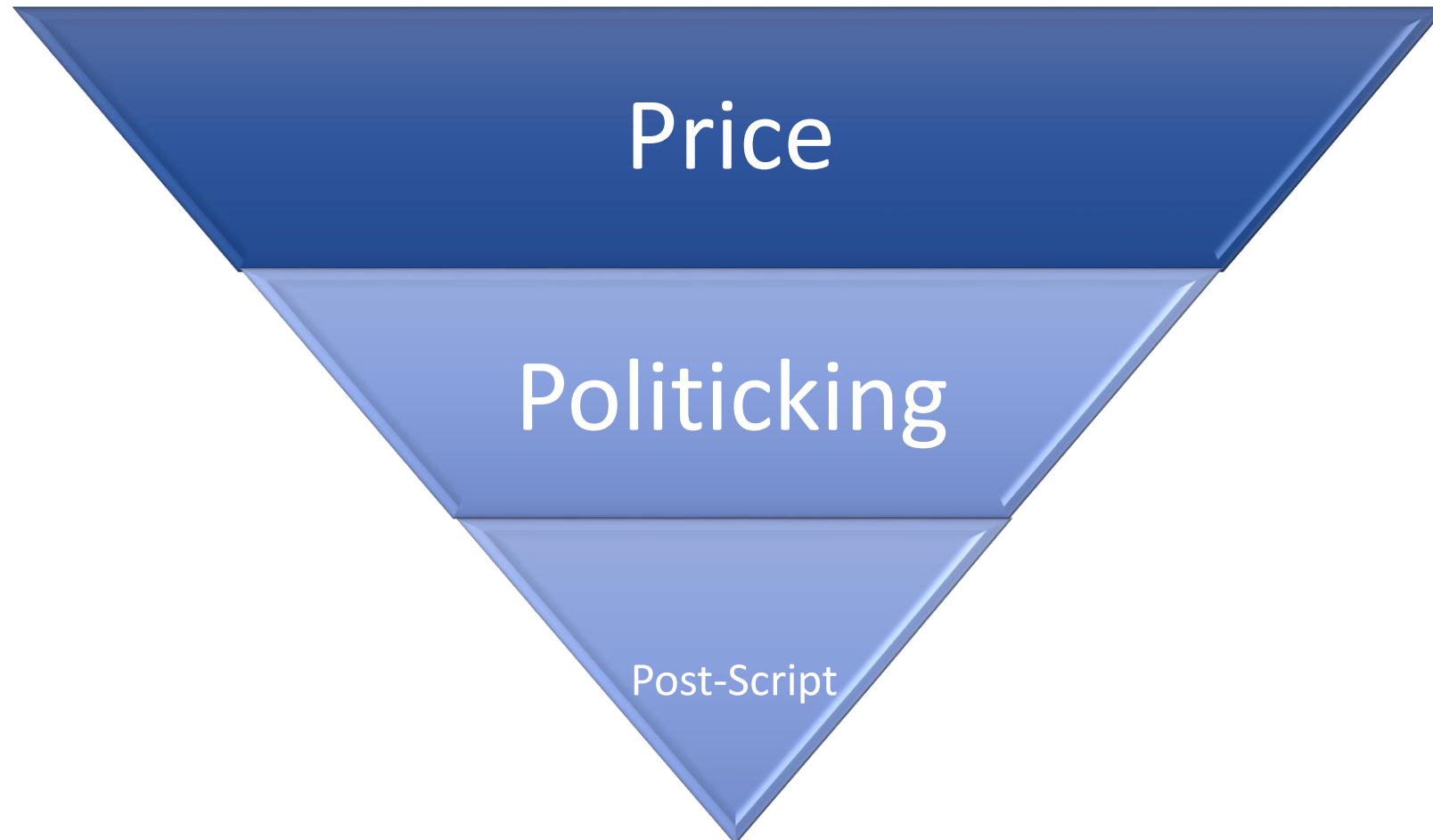
[C] Bidding & Execution: Writing Your Bid



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- Nairobi, 18 - 19 May 2017



Bidding: 3 Past Proverbs For “Local” Counsel

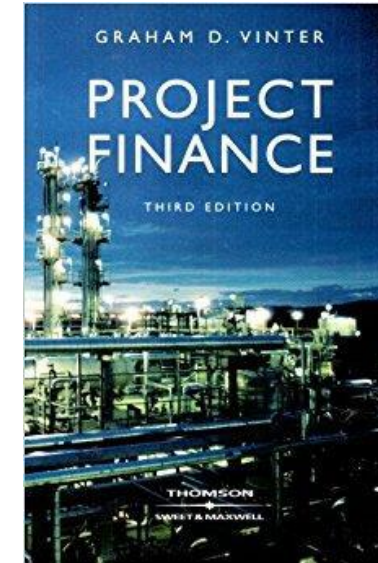


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- Nairobi, 18 - 19 May 2017



Bidding & Execution: KYC: Know Your [Potential] Client

1. The Project Co
2. The Government
3. The ILF: see <http://www.legal500.com/assets/images/roundtable/africa-roundtable.pdf> or see [here](#)
4. The 'Lingo'



FID
Bankability



Government Risk &
Stability

Backstopping by
Government and
Protections Against
expropriation

Fiscal stability &
change of laws



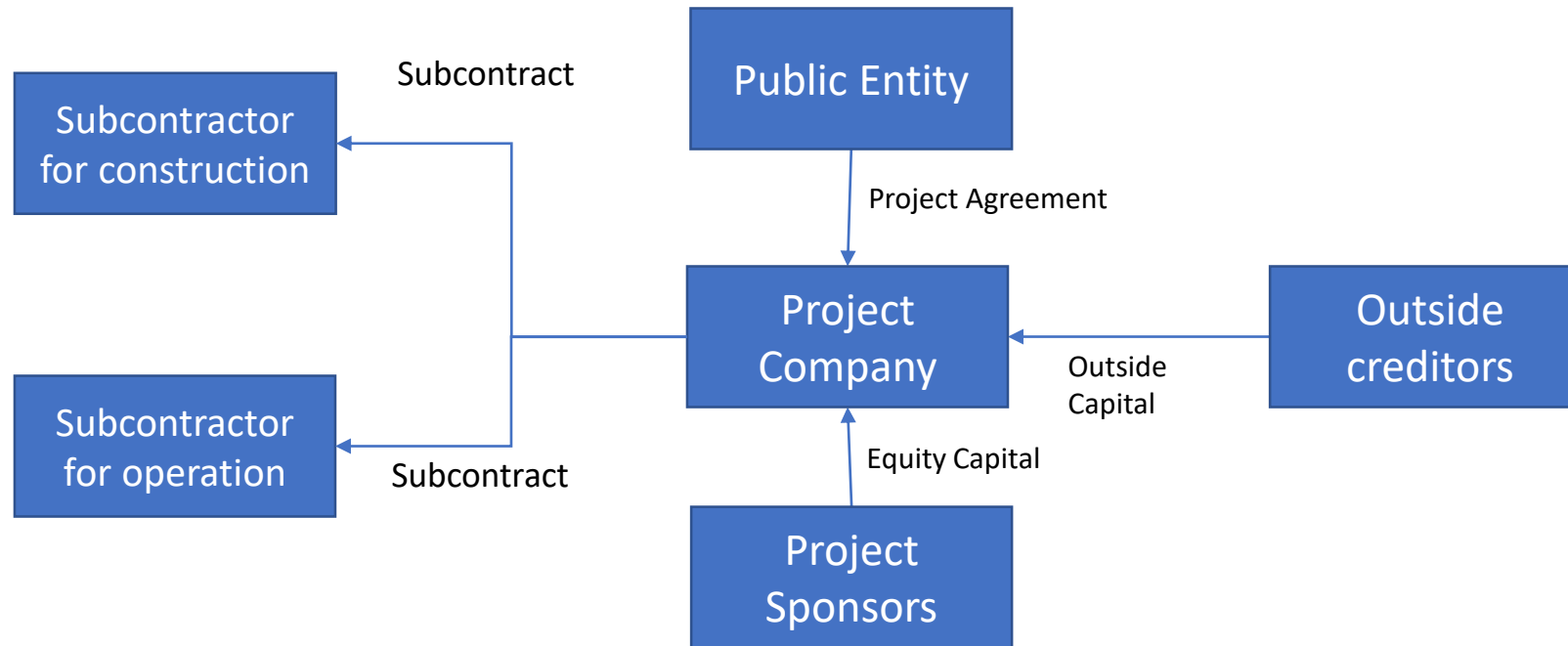
Decommissioning &
Risk

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- Nairobi, 18 - 19 May 2017



Bidding & Execution: Understanding the Deal

□ Typical legal structure - Parties involved:

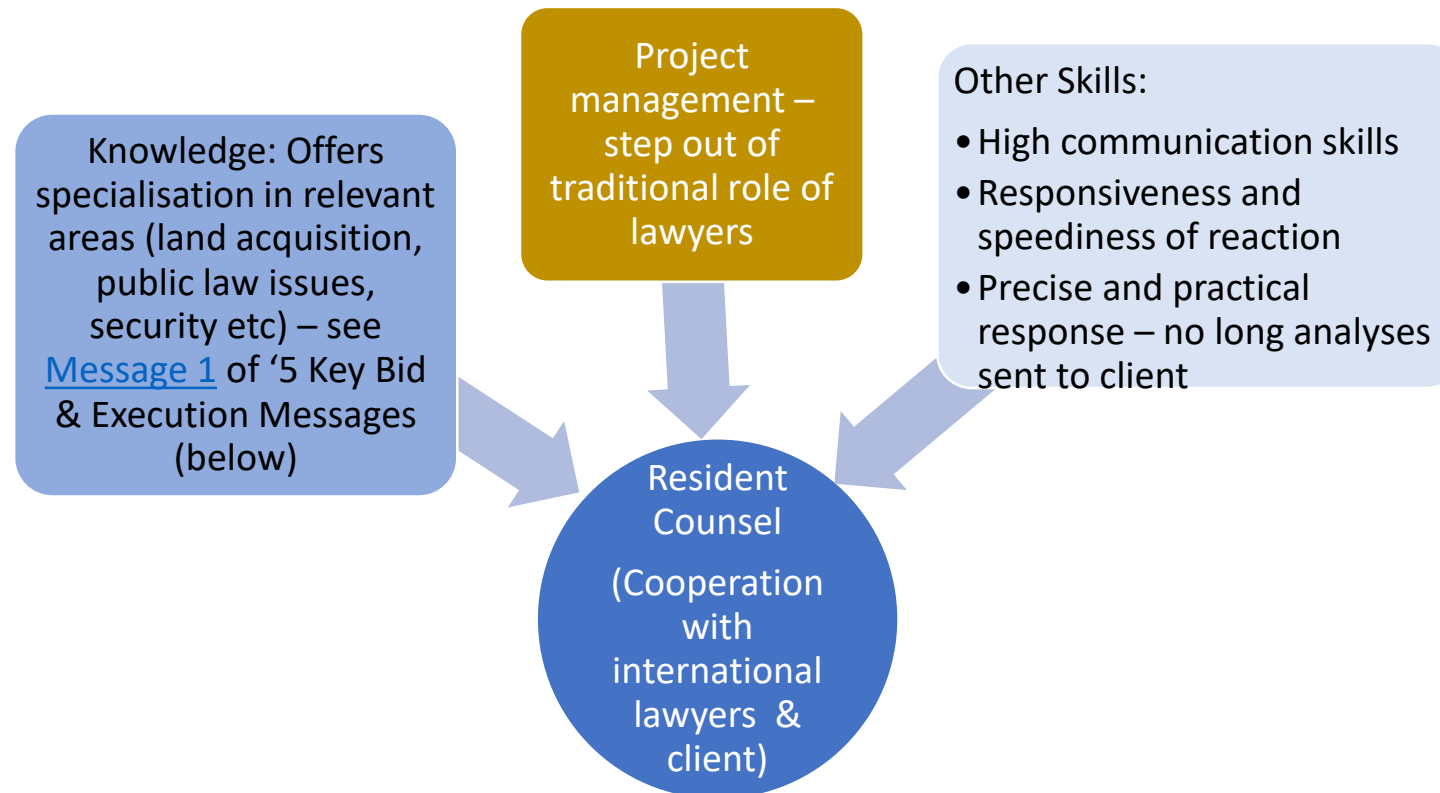


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- **Nairobi, 18 - 19 May 2017**



Bidding & Execution: The role of the local lawyers

- Typically separate teams of lawyers (local and international lawyers) for banks, project company (and project sponsors), public entity (customer)
- Resident lawyers are crucial for success, as project is locally realised



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- Nairobi, 18 - 19 May 2017



5 Key Bid (& Execution) Messages

Message 1: “Local” Knowledge

- Cross-border Network
- Real, In-depth Experience
 - Project land acquisition
 - Environmental
 - Community relations, resettlement, human rights (In Tanzania: Policy Forum, Hakimadini)
 - Port issues, work/residence permit issues other ‘real’ local issues
 - Public law issues
 - Investment laws, cross-border enforcement and BITs
 - Security laws



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- Nairobi, 18 - 19 May 2017



5 Key Bid (& Execution) Messages Cont.

Message 1: “Local” Knowledge (Continued)

- ❑ People Knowledge
 - ❑ Regulators
 - ❑ (other market players)
- ❑ Geographical Knowledge
- ❑ Legal Knowledge
 - ❑ Policies (not just laws)
 - ❑ Draft legislation and change-of law risks

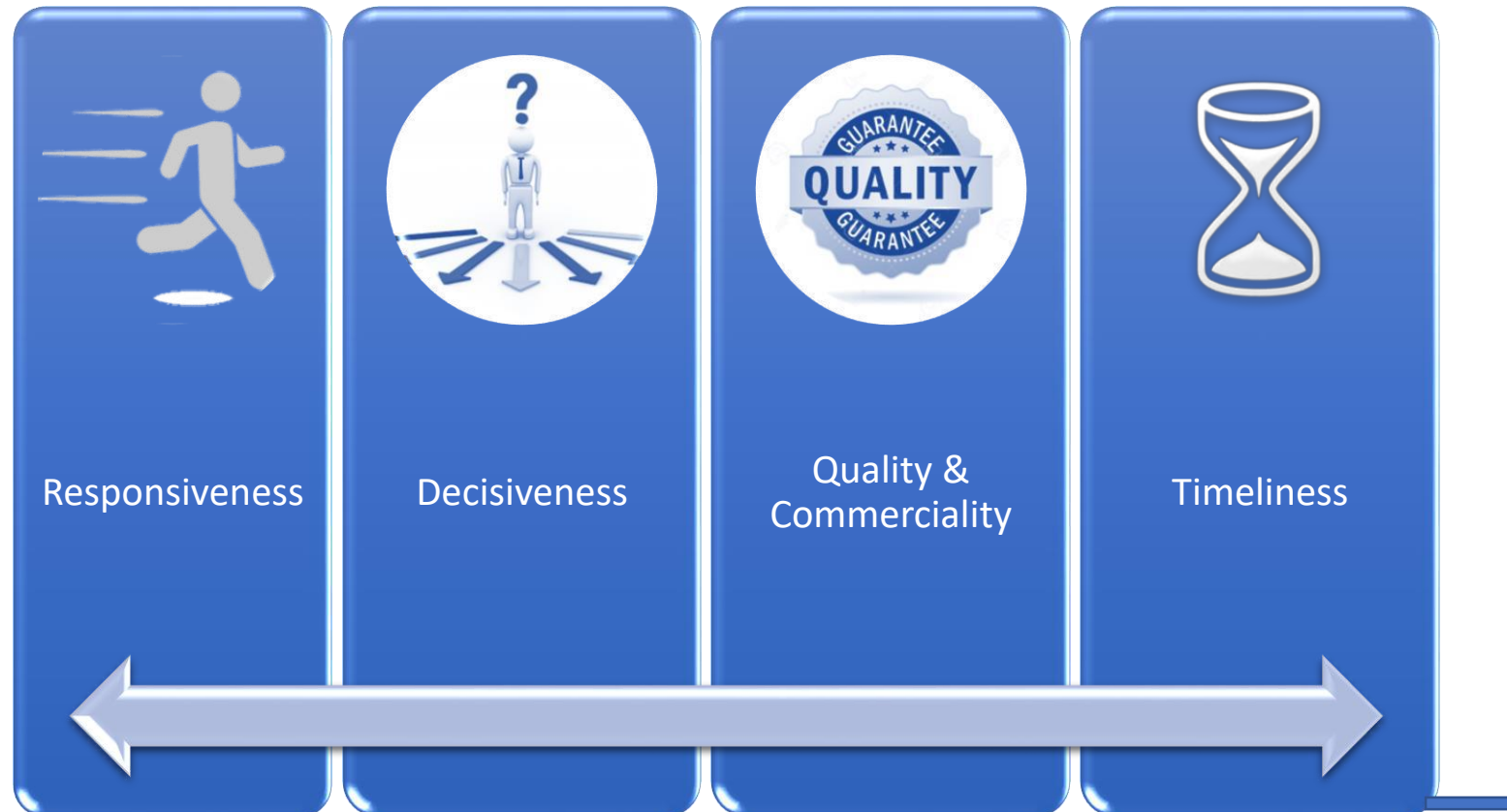


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- Nairobi, 18 - 19 May 2017



5 Key Bid (& Execution) Messages Cont.

Message 2: "International" Standards

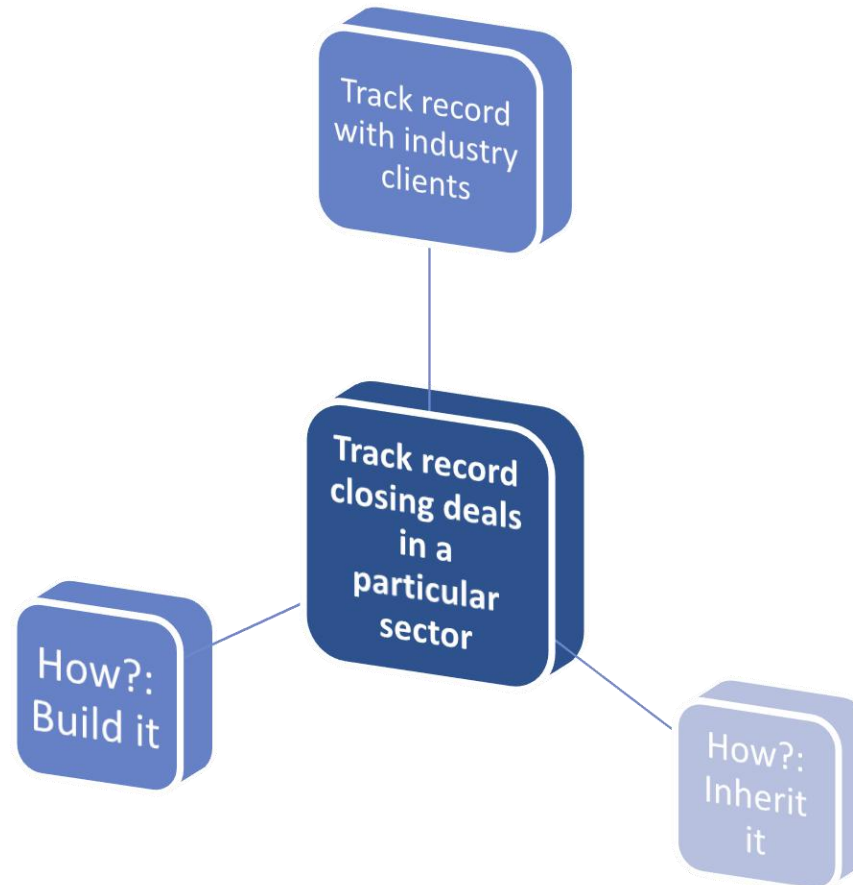


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- **Nairobi, 18 - 19 May 2017**



5 Key Bid (& Execution) Messages Cont.

Message 3: Sector Knowledge



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- **Nairobi, 18 - 19 May 2017**



5 Key Bid (& Execution) Messages Cont.

Message 4: Depth and Breadth

Team-Size

Team leverage

Specialisms

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- Nairobi, 18 - 19 May 2017



5 Key Bid (& Execution) Messages Cont. Message 5: Cross-border Capabilities



Experience working with
ILFs

Experience of deals
involving relevant
jurisdictions

Ability to coordinate other
African / network firms

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- **Nairobi, 18 - 19 May 2017**



[D] Executing the Deal



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- Nairobi, 18 - 19 May 2017



Executing the Deal: Key Parameters

- ❑ Set realistic timeframes
- ❑ “Be” [slide 20, Message 2](#): “International” Standards
- ❑ Effective Communication
 - Regular updates – demystify the “TIA” myth and “Regulator-wrangling”
 - Short-form reports (tables, summaries, red-flags) – no long narrative (see example [here](#))
 - Proportionality and risk-based analysis
 - Don’t sit-on-the-fence
 - Straight language (not legalese)
 - Team briefings and debriefings
- ❑ CP Management (Proactivity, Consents)
- ❑ “Etiquette” of mark-ups
- ❑ Holistic View Advice – don’t be overly ‘managed’
- ❑ Cement your tombstones



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- **Nairobi, 18 - 19 May 2017**



Executing the Deal: Frequently Encountered Issues

- ▣ Scope of work/Price
- ▣ Variations
- ▣ Penalties for delay
- ▣ Payment and performance guarantees



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- **Nairobi, 18 - 19 May 2017**



[E] Closing and Q&A





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