

SADC PPP Regional Framework

A Common Framework concerning Policy,
Institutional Arrangements and Legal
Frameworks in SADC

A. Background

The PPP Regional Framework has been drafted based on the recognition that Public Private Partnerships (PPPs) are an important source of procurement for delivery of infrastructure assets and public services across the Southern African Development Community (SADC). Countries with a successful track record of PPPs have built their schemes on the basis of an explicit and a solid framework next to fostering sectoral PPP programs. SADC Member States recognize PPPs as complex instruments that require solid and transparent policies, strong institutional and regulatory bodies with capacities to be in place and proper legislative frameworks. Member State progress in development and implementation of PPP policies, strategies and frameworks has been uneven. Some countries record a solid history of PPP procurements and project financings of service delivery. Other SADC countries have just begun to gain a better understanding of PPPs, their benefits, pitfalls and tradeoffs. They realize that PPPs are cost-efficient means of delivering services, but they are more than a one-roll off financial transaction with private sector and thus need to be based on firm policy foundations and solid institutional structures and rules to govern enforcement.

A solid framework is considered by Member States a prerequisite for developing efficient PPP markets. In addition, proper frameworks are essential for having an effective communication of Member State political commitment to the promotion of PPPs. Straight-forward PPP frameworks assist public sector agents and their governments across the region to ensure that proper projects are identified and investment projects are affordable, and ultimately that they provide Value for Money, and fiscal risks are limited. Member States in SADC have increasingly recognized that PPPs not only serve as alternative means of financing, but primarily help to improve Value for Money next to delivering the service in a better quality and in a timely and efficient manner. PPP frameworks evolve over time along a PPP maturity curve that often responds to various challenges faced while actually implementing PPPs in specific legal and procedural and institutional settings.

This PPP Regional Framework is based on the Draft Regional Strategy Paper submitted to the Steering Committee in September, 2012 with a comprehensive set of recommendations for SADC Member States concerning the adoption of a common regional PPP Framework relying on lessons learned from the review of other countries' PPP policies, institutional settings as well as the legal issues and individual implications for SADC Member States. It embodies important principles and guidelines agreed upon in the Steering Committee concerning PPP Frameworks for SADC Member States developed as a common point of departure for all those institutions, public bodies and entities involved in the implementation and promotion of PPPs.

This PPP Regional Framework is for SADC Member States to refine, develop and ultimately harmonize hereupon as far as possible their PPP policies, legal frameworks and institutional arrangements across the region. It serves SADC Member States to follow at national level the principles laid out in this document in order to have a unified and harmonized approach towards the implementation of PPP policies, the establishment of the framework concerning PPP institutional and legal structures across the SADC region.

B. Executive Summary

SADC Member States recognize that PPP schemes require 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. Harmonization of PPP structures across SADC requires its Member States to implement the following features related to policy, institutional structures and legal frameworks. This PPP Regional Framework encompasses the following essential Principles:

(1) Establishment and issuance of a clear PPP policy

- A. Member States shall set out the objectives associated with PPPs in a national PPP Policy Statement;
- B. They shall define the scope of PPPs in their national PPP Policy terms of types of PPPs that are to be adopted, size and sectors across which they are desired to be applied;
- C. Member States shall formulate guiding principles and define PPPs to be pursued when benefits can realistically be expected. They shall carefully investigate which investment method is likely to yield most Value for Money and is affordable. Key risk factors and characteristics of specific projects should be evaluated by conducting a Public Sector Comparator (PSC) compared to a PPP option; and transfer the risks to those that manage them best.

(2) Establishment of a functioning and strong Institutional Framework

- A. Key institutional roles and responsibilities are essential to the promotion of PPPs. Procuring authorities, PPP Units, others Ministries implementing PPPs, and the institutions overseeing as well as sector regulators shall be entrusted with clear mandates and sufficient resources to ensure a prudent procurement process and clear lines of accountability;
- B. Member States shall establish a PPP Unit as a focal point to disseminate good practice and relevant information to public and private sector. The PPP Unit shall act as a promoter, gatekeeper and adviser to national Ministries, institutions and agencies across sectors;
- C. The PPP Unit shall be located as a central Unit within the Ministry of Finance to streamline the functions across the country and sectors, ease oversight, accountability. Performance of PPP Unit's work can best be overseen by a higher level of government;
- D. SADC Member States shall distinguish between regulation of PPPs, their approval and the process of implementation; thus they shall introduce a clear distinction between those bodies in charge of procuring the PPP --quite often the Contracting Authority-- and the regulatory and approval entities.

(3) Establishment of a transparent and reliable Legal Framework

Recognizing that Member States do not need to establish cross-cutting PPP Laws for PPPs to work, nevertheless, they agree to follow the following matter related to the Legal framework:

- A. SADC Member States shall secure that their national legal framework sufficiently defines the roles and powers of the awarding authorities, procuring agents, regulating bodies and approval entities. By granting procuring authorities clear powers to enter into long-term PPPs, investors may best be reassured of the legality of PPP contracts;
- B. Member States shall credibly define and safeguard the rights of both private and public sector through proper regulation;
- C. They shall introduce clear guidelines and procedures concerning tendering process, procurement and control by public sector.

(4) Consideration of key PPP Drivers

Member States shall consider the following key drivers for the Regional PPP Framework to render the expected results:

- A. The promotion of PPPs across countries, and sectors requires Member States to pursue actively the process of stakeholder dialogue as an important driver of a sound PPP program;
- B. A sound and strong PPP pipeline is an important contributing factor for the promotion of PPPs in a larger regional context;
- C. SADC Member States must be aware of the contribution of sectoral reforms and their role in developing and supporting PPP schemes.
- D. Member States shall recognize the need for firm political commitment towards the promotion of PPP schemes;

The above principles laid out in the PPP Regional Framework is for SADC Member States and encompasses the Principles agreed upon in the Steering Committee on Policy, Institutional Arrangements and Legal Frameworks. This framework document entails a common approach towards the implementation of PPP Policies, Institutional and Legal Frameworks acknowledging the need to consider the economic and political context of SADC member States and taking into account the historically grown institutional and legal structures as well as the actual experiences with PPPs with some countries having made considerable strides and others having made very little progress, and some none at all.

C. Regional PPP Framework Principles

Noting the focus and progress made by Member States to improve their policies, institutional and legal framework for PPPs;

Recognizing that across SADC, PPPs have increasingly become a procuring method for delivering public assets and services, that they can deliver Value for Money, be affordable and transparent as far as the right policies, institutional capacities and legal frameworks are in place;

Noting that SADC Member States face huge challenges in ensuring that their national PPP schemes are supported by clear policies, strong public institutions, are affordable, represent Value for Money and are backed by proper legal frameworks which to date have been developed in an uneven pace and in a non-systematic way across countries in the region;

Noting that PPP policies and their framework should be formulated and introduced and supported at the highest political level, so that all government approaches ensure affordability, Value for Money, and proper risk allocation;

Recognizing that PPPs require sound institutional and regulatory frameworks, notably related to functioning, transparent and reliable institutions and regulations;

Recognizing that the SADC3P plays a leading role in the region to promote fruitful interaction between public and private sector, serves as adviser and promoter of PPPs as a whole throughout the region;

On the proposal of the SADC3P Steering Committee recommends that Member States take account of the Principles for the Regional PPP Framework set out below:

I. Establishment of a clear PPP Policy Framework

1. A clear Policy Statement is a prerequisite for SADC Member States to address both the rationale and also the limits to the use of PPPs thus giving their national PPP scheme a clear political mandate –also as means of introducing the institutional and legal framework for PPPs;
2. Broad policies provide an important signal of political commitment, but translation into a concrete action plan and formulation of policies for individual sectors give a more precise orientation thus encouraging ministries and agencies to pursue and implement PPP programs;
3. SADC Member States shall in their PPP policies set out the objectives associated with PPPs, define the scope of PPPs in terms of types of PPPs that are to be adopted, size and sectors across which they are desired to be applied;
4. PPP Policies shall encompass implementing and guiding principles formulating the need to pursue PPPs only where benefits can realistically be expected. These benefits are best derived by applying tests related to Value for Money, affordability and determination of proper risk allocation;

5. Ground the selection of PPPs in Value for Money, affordability and proper risk allocation as common benchmarks for determining the viability of PPPs;
6. All investment projects shall be prioritized at higher political levels. As there are many competing investment priorities, it is the responsibility of SADC Member States to define and pursue strategic goals. The decision to invest should be based on a whole of government perspective and be separate from how to procure and finance the project. There should be no institutional, procedural or accounting bias either in favor of or against PPPs.
7. SADC Member States shall carefully investigate which investment method is likely to yield most Value for Money. The test shall be applied as a relative measure to assess whether a PPP renders the best possible outcome at the lowest possible price. By Value for Money is meant the optimal combination of quality, features and price, calculated over the whole of the project's life.
Hereby SADC Member States need to consider a Public Sector Comparator (PSC) as a benchmark to a PPP to evaluate whether the project provides more value than a traditional public procurement. If quantification of Value for Money is difficult, then SADC Member States may also consider qualitative criteria when applying Value for Money tests to take account of non-financial benefits such as accelerated and improved delivery with wider social impacts;
8. In line with SADC Member States' fiscal policies, public agents shall ensure that PPPs are affordable and the overall investment envelope is sustainable. Thus, Member States shall use affordability as another important test to consider the viability of PPPs. They shall avoid the fallacy of PPPs to be cheaper than traditional procurement. In principle, affordability is to be tested by SADC Member States as to whether or not a project falls within the long-term (intertemporal) budget constraint of their national governments;
9. SADC Member States shall bear in mind proper risk allocation to the party that can best carry it as another key factor driving PPPs and Value for Money. Proper risk allocation may best achieved by introducing competition for the PPP project via a transparent, non-discriminatory tender process;
10. A consistent approach and a common understanding of important guiding principles as stated above (Value for Money, affordability and risk transfer) are key challenges and parameters to SADC Member States to make PPPs work. SADC Member States shall consider these implementing principles no matter how sophisticated they are in terms of experience with PPPs;
11. Member States need to develop detailed toolkits to standardize processes and approaches towards structuring and implementing PPP principles such as Value for Money, proper risk allocation and affordability. The standardization of common procedures promotes harmonization towards a regional understanding of the technical, operational and financial risks that are typically faced while procuring PPPs;

12. SADC Member States are to promote the effectiveness of their PPP policies by formulating not only country-specific goals and objectives of their PPP policy, but also introducing a clear definition of the term PPP. Determining a PPP as a long to mid-term contractual structure between public and private sector entity whereby public sector specifies outputs for various functions bundled to be rendered by private sector is an essential parameter of success. PPPs have an output specification and a subsequent monitoring of service quality once the project is operational. Defining outputs is instrumental in achieving better alignment of service specification with user expectations and exert pressure on service providers to meet service standards;
13. Member States shall allow for practical PPP lessons to be learned and for periodic improvements to be made to the PPP policy framework and avoid being overly-detailed, prescriptive, and inflexible, and encourage private sector innovation; they shall best focus on practical solutions to help PPP transactions get completed, while minimizing new administrative, reporting, or review burdens that delay or stop proposed PPPs;

II. Establishment of a functioning and strong Institutional Framework

1. Key institutional roles and responsibilities are essential to the promotion of PPPs. Procuring authorities, PPP Units, other Ministries implementing PPPs, and the institutions overseeing as well as sector regulators shall be entrusted with clear mandates and sufficient resources to ensure a prudent procurement process and clear lines of accountability;
2. A number of institutional roles shall be competently pursued to secure and maintain Value for Money. These include a sound procurement process; implementing the specific PPP; fiscal and budgeting issues; overseeing, regulating, auditing and monitoring of PPPs, and enforcement. These roles can be maintained in a number of institutional set-ups, but it is important that they are kept separate so as not to confuse the key tasks of each actor and to secure lines of accountability;
3. SADC Member States shall establish a PPP Unit to act as a focal point of dissemination of good practice on PPPs and relevant information to public and private sector. The PPP Unit shall serve as a center of excellence and as a means of easing the complexity of PPPs and assist as an advisor in their rather infrequent use. PPP Units shall assume central roles acting as a promoter, advisor and serving as a pool of expertise to transfer lessons and experiences across their country and various sectors. PPP Units shall serve as key drivers to assist in formulating PPP Policy and improve the quality of PPPs by bringing to bear better technical skills;

4. There shall be an adequate dividing line for PPP Units' roles and the necessity to have clear "Chinese Walls" to avoid conflict of interest between the provision of technical support and the "green lighting" of projects when a PPP Unit is responsible for both technical support and green lighting projects. The assumption of "green lighting role" is recommended for SADC Member States that are at advanced stages of development of their institutional frameworks;
5. PPP Units can fill gaps in institutional shortcomings taking the country's needs and current institutional context into account. The PPP Unit shall enable authorities (e.g. line ministries) to create, manage and evaluate a PPP efficiently and effectively;
6. Although the PPP Unit may be located differently within governmental structures, a central Unit within the Ministry of Finance is good to streamline the functions across the country and sectors, ease oversight, and accountability and performance of the Unit's work can be overseen by a higher level of government;
7. The roles of PPP Unit must be clear, precise and responsibility needs to be allocated properly to create certainty for all entities in charge and the role of the PPP Unit shall not be limited to a scope and authority that makes it ineffective;
8. The PPP Unit shall have a separate budget for expenditure. PPP Units are not to be considered as decision-making bodies, but they shall have status and respect if they are to be effective as an advisory body and as the interface between the private sector and government on PPP matters generally;
9. PPP Units may best provide technical assistance to Contracting Authorities and evaluate Value for Money tests submitted for review if they have a multidisciplinary team on board to cover the diverse set of skills required. In terms of funding, PPP Units are best funded via public sources of revenue. However, to attract people with the right skills, including people from the private sector, Units have to be able to offer attractive packages to both permanent staff and short-term consultants. Rigid public sector salary systems may render this difficult.
10. SADC Member States shall assist in proper staffing of PPP Units. Recruiting relevant expertise from private sector is important. PPPs are complex and require a set of multidisciplinary competencies in accounting, procurement; economics, law and technical skills for PPP Units to be able to assist other entities in assessing Value for Money and proper risk allocation. Thus, for PPP Unit staff to be able to act as a repository of PPP expertise and advisers to various entities, it must have a full understanding of the scope and structure of PPPs, the off-balance sheet nature and the PPP process with its life-cycle approach, as well as its core attributes such cost savings, timely delivery, efficiency in provision and risks such as contingent liabilities to be able to assess the benefits and risks associated with PPPs;

11. The Contracting Authority that procures the PPP is the institution ultimately responsible for the project, subject to approval, monitoring and advice from the other actors at various stages. The Authority is responsible for preparation, negotiation and administration of the contract and for monitoring and evaluating contract performance during the construction and operation phases of the project. This is crucial to ensure SADC Member States retain Value for Money over the life cycle of the project. This Authority is, therefore, ultimately responsible for the PPP contract and its operation;
12. The institutional framework must clearly define the generic responsibilities that SADC Member States allocate to various public bodies in three major areas: regulation of PPPs, their approval and the process of PPP implementation. A clear distinction is needed between the bodies in charge of procuring the PPP, such as the Contracting Authority, and the regulatory and approval entities.

III. Introduction of a credible, transparent and stable Legal Framework

Recognizing that the establishment of a legal and regulatory framework is largely determined by SADC Member States' cultural and historic context as well as their existing legal structures;

Recognizing that across SADC, there are a number of legal systems ranging from civil, common, to Islamic and African laws;

1. SADC Member States secure national legal frameworks to sufficiently define the roles and powers of the contracting or awarding authorities, procuring agents, regulating bodies and approval entities;
2. Member States grant procuring authorities clear powers to enter into long term PPPs, and investors are reassured of the legality of their contracts; Governments assign clear role to procuring agents, ensure clarity of laws, their enforceability and security of laws;
3. SADC Member States establish clear and complete procurement procedures for award of PPP contracts; they establish clear and complete guidelines concerning procurement control by public sector;
4. Member States establish clear guidelines and procedures related to the content of tender process and documents;
5. SADC Member States introduce credible guidelines on post-award of PPP implementation;
6. They credibly define and safeguard the rights and responsibilities of both public and private sector bodies;
7. Member States develop their legal frameworks in consistency with bilateral investment treaties and backed by investor to State dispute settlement to avoid long lasting dispute settlements and to provide security to investors.

IV. Consideration of key PPP Drivers

For the PPP Regional framework to render proper results, the following key drivers shall be considered by member States:

1. SADC Member States shall recognize the need for a strong and credible PPP pipeline providing signal to the market and putting the PPP policy statement in a context of action;
2. Member States with low level of experience shall initiate PPPs in sectors with relevant experience across the region and the world. Learning experiences from one type of PPP can best be applied to other sectors and broadened over time to other sectors and the country. Thus, SADC Member States shall apply PPP projects to sectors where there has been internationally and regionally good experience;
3. For PPPs to work and to be legitimate, stakeholder dialogue is actively to be pursued. Labor, private sector and NGOs and other civil society groups which often have concerns that PPPs may have social and environmental impacts shall be involved. Active involvement of stakeholders creates transparency about issues that might otherwise be overlooked and become serious problems if not tackled at an early stage.
4. Member States recognize that political commitment and support to PPP schemes are genuinely provided over and above election periods and party lines. On top, political commitment from the highest government authorities is vital for assuring private investors that institutional and regulatory issues are being addressed and they are consistent in the long-run and risks are minimized.