

PPP Country Paper

South Africa

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

LIMESSTRASSE 26, 61273 WEHRHEIM - 2013



South Africa



Axis Consulting
The Cross Sector Advisory

Table of Contents

List of Figures	IV
List of Abbreviations	IV
1. Engagement Overview	6
2. Introduction	6
3. Methodology	8
4. Examination of the Term PPP	9
5. Application of SADC PPP Framework Road Map	10
5.1 PPP Policy in SA	11
5.2 PPP Institutional Responsibilities in SA	14
5.2.1 Role of PPP Unit/s in SA	14
5.2.2 PPP Regulation, Approval and Implementation Roles in SA	16
5.3 SA Legal Framework	17
6. Recommendations	19



@ This publication includes information obtained or derived from a variety of publicly available and other sources. XS-Axis Consulting has not sought to establish the reliability of these sources or verified such information. XS-Axis Consulting does not give any representation or warranty of any kind (whether expressed or implied) as to the accuracy or completeness of the paper. The paper is for general guidance only and does not constitute investment or any other advice. Accordingly, it does not relieve any third party from conducting its own due diligence in order to verify its contents. The sole purpose of this Country Paper is to provide an overview of Public Private Partnership (PPP) Policy, Institutional Arrangement and Regulatory Framework as means of assisting the Client, Southern African Development Community-Development Finance Resource Center PPP Network (SADC3P), and its Member States to improve their Framework, and develop a common ground for aspiring potential harmonization of national PPP Policies.



List of Figures

- Chart 1: Overview of Infrastructure Spending by Sector, Data from PPP Unit, 2013
 Chart 2: Overview of Definition of PPPs in SA
 Chart 3: Overview SADC Road Map, Regional Strategy Paper, 2012
 Chart 4: Illustration of PPP Types in SA
 Chart 5: Overview of PPP Unit's Team Structure, Interview with Head of PPP Unit, 2013
 Chart 6: PPP Administrative Process including Treasury Approvals
 Chart 7: Overview of evolution of SA's PPP Legal Framework

List of Abbreviations

AfDB	African Development Bank
BOT	Build, Own and Transfer
BOOT	Build, Own, Operate and Transfer
BOO	Build, Operate, Own
BR	Billion Rand
DFBOT	Design, Finance, Build, Operate, Transfer
GDP	Gross Domestic Product
Mio.	Million
MoF	Ministry of Finance
MFMA	Municipal Finance Management Act
NPV	Net Present Value
OECD	Organization for Economic Cooperation and Development
PPP/s	Public Private Partnership/s
PFMA	Public Finance Management Act
SADC	Southern African Development Community
SADC3P	Southern African Development Community- Development Finance Resource Centre PPP Network
SA	South Africa
TA	Treasury Approval
VfM	Value for Money





KEY INDICATORS - 2012

South Africa

Population (Mio.)	50.6
GDP per capita (US\$)	7.507
PPP Level of Maturity	High

(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 SA'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 SA 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 SA. 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 by the SAn Government. We render this report to the best of our knowledge and belief.

2. Introduction

South Africa, officially the Republic of South Africa (SA) has a population of 50.6 Million (Mio.) governed by a constitutional multiparty democracy system characterized by free and fair elections. It is also earmarked by a dominant political party with the African National Congress (ANC) winning landslide victories in all four democratic elections since the end of the Apartheid regime in 1994. Its neighbouring countries include Namibia, Botswana and Zimbabwe to the North, Mozambique and Swaziland to the East while Lesotho is an enclave surrounded by SAn territory. Since 2009, Jacob Zuma has been President of SA for a term of five years. SA has much achieved in the provision of social infrastructure in the past 19 years (World Bank, 2013, web page). Since 1994, South Africa has gained prominence on the international stage. It is an active member of key multilateral institutions and a key player at the G-20, and the G-24. South Africa joined the BRICS in April 2011 and is an avid promoter of South-South cooperation.

Despite notable accomplishments of economic transformation, and regional integration, SA has a long road ahead to tackle issues related to chronic high unemployment, poverty and inequality. More specifically, the ability of the Government, at the national, provincial, and municipal levels, to deliver essential social services in townships, informal settlements, and rural communities remains a serious challenge. In 2012, the country suffered from social unrest and the Euro crisis indicating a weak economic performance with Gross Domestic Product (GDP) growth rate of 2.5% in 2012, down from 3.5% in the previous year (World Bank, 2013, web page). Thus, SA's potential growth has slowed over the last few years. Considerable efforts will be needed to meet the Government's goal of raising per capita income to at least US\$ 13,750 and to create 11 Mio. new jobs by 2030. African Development Bank (AfDB) urges the country to invest in lagging regions, particularly with a focus on infrastructure, such as drinking water, electricity and sanitation (AfDB, Southern African Resource Centre, Republic of South Africa Country Strategy Paper 2013-2017, 2012, p.4).

AfDB estimates economic growth to accelerate moderately in 2013 and 2014 thanks to improved global demand and accommodating macroeconomic policies (AfDB, 2013, web page). SA's global competitiveness ranks 52 of an overall 144 countries, thus remaining excellent (the best



performing country) compared to other SADC Member States. Rankings for SA 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 infrastructure, port infrastructure, air transport infrastructure, and available airline seat kilometres-- is also quite acceptable (ranking 63, the fourth best performing country) reflecting the Government's success 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.347). Overall, the level of competitiveness of SA is a reflection of its Government's and policy makers' acceptable commitment, and the political will as an essential driver to achieving sustainable growth in the country and prosperity for its people. In terms of the most problematic factors affecting doing business in the country, the Global Competitiveness Report 2012-2013 provides an insight focusing on inadequately educated work force and restrictive labor regulations as the main limiting aspects hindering progress in SA (World Economic Forum, The Global Competitiveness Report 2013–2014, 2013, p.274). Also the quality of infrastructure remains a bottleneck to proper economic performance.

SA is known as one of the most developed countries in the SADC region as far as its PPP Legal and Institutional Framework is concerned. In April 1997, the SAn Cabinet approved the appointment of an inter-departmental task team to develop a package of Policy, Legislative and Institutional reforms to create an enabling environment for PPPs (Department National Treasury, Republic of SA, PPP Unit, web page). Since 1999, National and Provincial Governments are regulated by the Public Finance Management Act (PFMA) and Treasury Regulation 16 (issued in 2004 in terms of the PFMA), whereas Municipal PPPs are governed by the 2003 Municipal Finance Management Act (MFMA). A dedicated PPP Unit was established in 2000 within the National Treasury, and has been mandated to provide technical assistance and oversee PPPs in SA. In 2004, the Government issued Standardised PPP Provisions jointly with the PPP Manual, providing detailed instructions and guidelines for diverse set of players in the SA PPP market. The latter was aimed at standardising the PPP Concession Agreement and expediting the time frame to financial close. Two provincial PPP accommodation projects for the Department of Education and the Department of Trade and Industry Project were recently implemented according to the standardized agreement (IP3, 2013, website). Both projects involved outsourcing the construction of building and then the operational and maintenance requirements of Provincial Governmental buildings for employees to a private sector body.

SAn PPP models have been pioneered by development of toll roads and have since been used as models for PPPs (Department National Treasury, Republic of South Africa, PPP Unit, web page). They are now applied to various sectors such as ICT, roads, education, health, eco-tourism and fleet management. Private sector is increasingly interested in PPP infrastructure and social services projects in SA to expand market presence and business volume. Across the SADC region, SAn PPP guidelines and procurement procedures are increasingly used as an example by other countries. In June 2011, President Zuma reinforced the benefits of application of PPPs by stating "...The involvement of the private sector is critical to achieving our infrastructure initiatives. We must embark upon mutually beneficial PPPs in championing our projects".

As a Federal Republic, the legislative structure in SA provides for delineation between Provincial and National projects, on the one hand, and Municipal projects on the other. SA is divided into various Provinces, each of which has provincial legislatures which are governed by national legislation and input. The Municipal regions (also referred to as "local government") are further subdivisions of these Provinces and in turn have their own Municipal system and legislation.

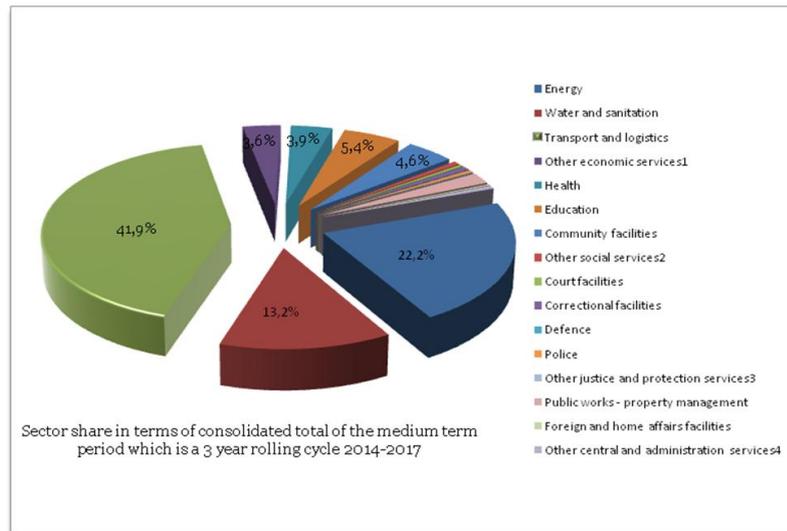
The market has a general impression in SA that the Government is not implementing the number of PPP projects that is required in order to provide the country with the infrastructure that is desperately required (IP3, 2013, Webpage). At the National and Provincial levels, many perceive lack of political will and public sector capacity to hinder those planned projects to be brought to



fruition. These same critics argue that the focus on Municipal PPPs is even more fraught with obstacles and premature until learning lessons have been learnt from implementation of national level projects (IP3, 2013, Webpage). It must be mentioned, however, that there is admirable attempt by the SAn Government to empower Municipal Departments with the ability to choose their own projects and follow a clear and legislated process to procure services via PPPs. The coming years will be crucial in determining whether there is sufficient motivation, commitment and capacity in the municipal sector to utilise the Framework to achieve the objectives of infrastructure promotion also at the Municipal level.

Overall infrastructure spending (public and PPPs) in 2012 was 6.7% of GDP (Data PPP Unit, 2013). OECD reports that roughly 5-10% of SAN infrastructure investments were rendered via PPPs in 2010 (OECD Public Governance and Territorial Development, Hand Out, From Lessons to Principles for the use of Public-Private Partnerships, p.7). Current data from the PPP Unit indicates a planned nominal growth rate for PPPs of 17% increasing from Billion Rand (BR) 2.589 to BR 3.019 from 2013 to 2014. The next chart provides an overview of planned share concerning infrastructure investments by sector from 2014-2017 (Data from PPP Unit, 2013). Deloitte indicates alone for the energy sector, financial closure of 53 PPPs in SA to date whilst a further 19 Department of Energy (DoE) renewable energy PPPs were estimated to reach financial close by the end of June 2013 bringing the total to 72 PPPs (Deloitte, PPP Secondary Market, 2013, p.5).

Chart 1: Overview of Infrastructure Spending by Sector, PPP Unit, 2013



This paper is to be considered as a follow-up strategic document to the Framework paper which was 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 paper 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. SA was distilled to be one of the most advanced nations in SADC having instituted a PPP Framework and gained lots of experience with promotion and implementation of projects. The next chapter will elaborate on SA'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, and existing PPP policies per country across all SADC.

3. Methodology

Our approach in this country specific paper is to provide an overview of SA'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 SA, and to come up with specific recommendations concerning potential areas of assistance needed. The Regional Strategy document distilled SA in 2012 to belong to the most advanced nations in the region, and in the world in terms of promoting PPPs, and establishing institutions to promote the existing PPP Framework. This paper will touch upon this evaluation and move further to analyze the current progress made in SA 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 SA 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 SA'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 SA'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 SA'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 SA'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 SA as far as next steps is concerned.

4. Examination of the Term PPP

Regulation 16 to the Public Finance Management Act, 1999 (PFMA) governs PPPs in SA, and provides a definition of the term as follows: “public-private partnership (PPP)” means a commercial transaction between an institution and a private party in terms of which the private party – (a) either performs an institutional function on behalf of the institution for the duration of the PPP agreement ; and / or (b) acquires the use of state property for its own commercial purposes for the duration of the PPP agreement; (c) assumes substantial financial, technical and operational risk in terms of the PPP agreement; and Annexure “B” – Proposed Version (d) receives a benefit for performing the institutional function or by utilising state property, either by way of: (i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a government business enterprise, from the revenues of such institution; (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or (iii) a combination of such consideration and such charges or fees” (National Treasury, Public Finance Management Act, 1999: Treasury Regulation 16, 2003).

SA defines PPPs relying primarily and basically on an understanding of the payment structure to include three types of PPPs. Depending on project revenue sources, PPP projects may be dedicated to delivering an institutional function of the public sector, thus in these PPP projects SAn Government is the sole client of the project, and buys the service from the PPP provider at a unitary cost based on the project's Net Present Value (NPV), at cost. Here, the private sector party simply provides a service instead of Government --at a better overall cost (Value for Money (VfM) and affordability principles), but executes a Government-led political or social agenda. Examples of these projects include housing, hospital services, and social services. The second category relates to those PPPs where revenue flows stem primarily from the market, so for instance the road projects in SA which are toll based and bear substantial market risks. Another type of PPPs includes projects where revenues are derived from both Government and the market, but are not entirely market-led, thus creating dependence on government subsidies. The



latter types of PPPs relies on the acquisition of state property for commercial purposes, these may include PPP implementation for special economic zones which the PPP Unit is planning on designing and introducing in the coming years (Discussion with Head of PPP Unit, 2013).

The PPP term in SA as embodied in Regulation 16 has quite an explicit reference to risk allocation as a pre-requisite for pursuing PPPs. However, it lacks a clear and solid reference to bundling and output specification as requirements for defining a PPP. Nevertheless, it must be noted that the Procurement Notes and also the feasibility test in SA both contain specific requirements concerning output specification and bundling. A project may not be passed the various Treasury Approvals, if there is no proper specification of output and bundling of functions. Thus, there is no need to include a more precise and better definition on these issues. The elaboration and clarification of the definition has been rendered in supplementary documentation determining which transactions fall within the purview of the term PPP. There is no specific elaboration of the length of the commercial transaction.

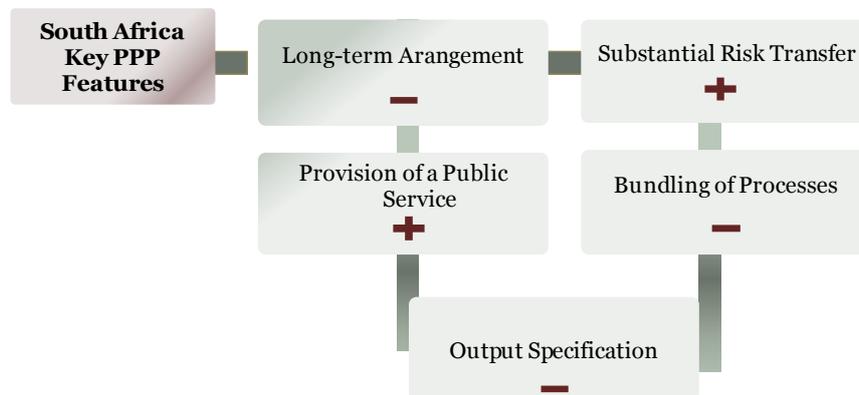


Chart 2: Overview of Definition of PPPs in SA

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 document a number of requirements for a proper PPP Framework with key features related to Policy, Institutional Structures and Legal setting (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 SA 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

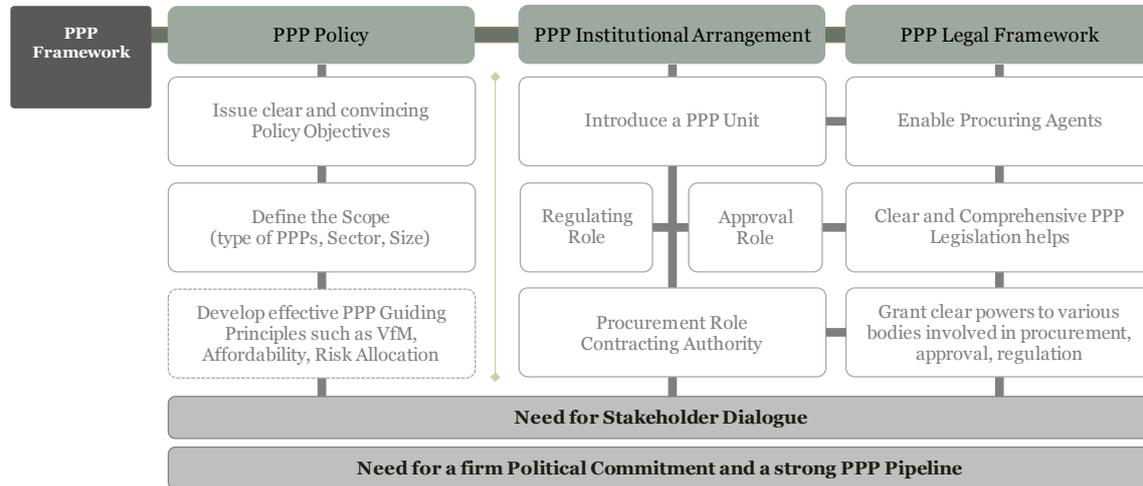


Chart 3: Overview SADC Road Map, Regional Strategy Paper, 2012

5.1 PPP Policy in SA

In April 1997, Cabinet approved the appointment of an interdepartmental task team to develop Policy, Legislation and Institutional reforms to enable the use of PPPs. From 1997 to 2000 Government operated six pilot projects including the SA National Roads Agency: N3 and N4 toll roads. Others included PPPs by the Department of Public Works and Correctional Services for two maximum security prisons; and two municipalities conducted PPPs for water services. On top, SA National Parks implemented tourism concessions (National Treasury Republic of South Africa, PPP Unit web page). The Strategic Framework for PPPs was endorsed in December 1999, while the National Treasury issued regulations for PPPs in April 2000. Although there is no explicit PPP Policy in SA, the Government's PPP strategy is laid out in various documents and may be summarized to include substantial restructuring of state assets and extended involvement of private sector in public service delivery. Government's objectives are two-fold to:

- improve economic efficiency; and
- to extend services to more people (Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, PPP Benchmarking Study, 2005, p.25).

Reasons for involvement of private sector include the recognition that it is better able to deliver effective services, and it may bring private capital and expertise into state enterprises, and the government gains access to technology and skills transfer, as well as to the capital needed for expansion and organisational renewal (Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, PPP Benchmarking Study, 2005, p.32). Thus, the Government's main thrust on PPPs is enhancing capacity, ensuring a competent degree of capacity is created and integrated the country's public services. The managerial contribution of private sector to projects run as PPPs is deemed essential (Africa Investor Magazine, March –



May 2004).

The support from Government in SA concerning promotion of PPP schemes may be depicted from Minister of Finance's (MoF) quotation at the launch of the Standardised PPP Provisions and the PPP Manual where Trevor Manuel emphasizes: "This is what PPP is about. PPPs are about combining the pool of expertise and resources available in the private sector and managing it in such a way that it accelerates service delivery and allows government to focus on its core mandates and responsibilities. The public gets better, more cost effective services; the private sector gets new business opportunities. Both are in the interest of the nation" (National Treasury, PPP Manual, August 2004).

Results of a study conducted with 40 interviewees back in SA in 2007 indicated then that due to lack of a proper PPP Policy, there seems to be an unclear picture as to whether the highest levels of Government favour the use of PPPs in general, or whether they favour PPPs only in specific circumstances, or for specific sectors. For example, Treasury's view seemed to portray that PPPs should be used to achieve VfM, optimal risk transfer, and improve long-term planning, but many implementing agencies viewed PPPs as vehicle for financing, not service delivery (Support Programme for Accelerated Infrastructure Development (SPAID), Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.2).

It is important to mention that in SA, there is no specific reference to scope of PPPs in any of the officially published documents. A benchmarking review conducted in 2005 indicates that the National Treasury and the Department of National Economy then had a specific sector focus on PPPs in health, transportation and education. They found the top 3 sectors in SA to implement PPPs by value to include healthcare, IT services, and social development (Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, Benchmarking, 2005, p. 32). However, the situation in 2013 is different. With the assistance of the PPP Unit, and given the Government's increased investments in economic services such as roads and power, the SAN PPP landscape has changed to the better as far as promotion of economic infrastructure is concerned. The list of sectors as officially published by the National Treasury, Unit's website includes health, accommodation, energy, education, water, transport, ICT, tourism, and waste (National Treasury, Republic of South Africa PPP Unit web page). Nevertheless, the list is not cohesive since functions are intermingled with sector issues on the web page. For instance, the PPP Unit refers to Project Development or International Relations, whereby, it implies that the Unit aims at providing assistance across the region to other member countries, etc. Thus, information on sectors seems to need further clarification.

The most common PPP models applied in SA include the Build, Operate, Own, and Transfer (BOOT) (Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, Benchmarking Study 2005, p.32). The next chart provides an overview of the kinds of PPPs that are applied in SA. Privatizations and short-term service contracts are not included in terms of types of PPPs.

In terms of guiding principles, there are three kinds of tests for a PPP in SA; these include affordability, Value for Money (VfM), and appropriate risk transfer. These are applied with Treasury approvals in set PPP project cycles consisting of inception, feasibility, procurement, and PPP agreement management (National Treasury PPP Unit Presentation, p.15).



Types of PPPs

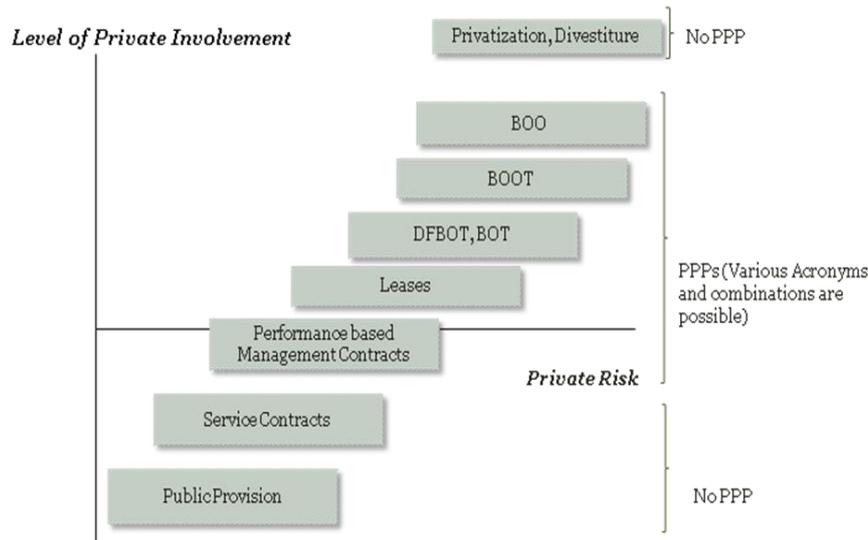


Chart 4: Illustration of PPP Types in SA

SPAID conducted an evaluation of SA’s Framework to come up with recommendations concerning SA’s PPP Policy. This entails the adoption of a more policy oriented leadership elaborating on why and under what circumstances PPPs should be used to achieve policy goals. Some of the issues usually embarked upon in a PPP Policy have been answered in Treasury Regulation 16 and other documents of the PPP Unit, but it is difficult to assess whether the statements are “de jure”, which may not be “de facto”. It is interesting to note that the agencies responsible for PPP Policy generally seem to feel the answers to Policy questions to be clear although they do acknowledge that the implementing agencies and private sector may not feel the policy issues are clear (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.3). On top, Policy directions concerning PPPs seem to vary from Line Department to Line Department, from Province to Province, and from Municipality to Municipality. Some National Line Departments, such as Transport, clearly support PPPs, but many others clearly do not (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.4). PPPs require a lot of preparation and typically last anywhere from 5–20 years. The SPAID report highlights that commitment to PPPs in SA suffers from changes in political leadership. For instance, leadership changes within the PPP Unit had to some extent harmed the development of the policy environment for PPPs in SA. Philippe Burger from the University of the Free State, SA highlighted back in the mid 2000s the need to develop a credible portfolio of PPP projects structured in terms of policy priorities in order for PPP schemes in SA to develop in a structured manner (Philip Burger, The Dedicated PPP Unit of the South African National Treasury, 2006, p.16). These issues have been to date better addressed and the PPP pipeline of the PPP Unit seems to be better in line with the national sector objectives and overall national policy.

Another study conducted back in 2007 revealed that policy makers in SA were concerned with a policy bias toward traditional public procurement and against PPPs. In addition, there seemed to exist a lack of fiscal imperative to use PPPs. On top, the market for PPPs at the Municipal level was found to be completely different including its legal environment for PPPs where all of the above problems are much more severe and infrastructure needs are much greater.



An important feature of South African PPP projects is the importance of Black Economic Empowerment (BEE). All qualifying bidders must meet minimum levels of BEE in terms of equity, management and subcontractor support, and BEE scoring forms an important part of bid evaluation.

5.2 PPP Institutional Responsibilities in SA

The initiative, and ultimate management and accountability regarding PPP projects, their identification and launching of agreements originates and rests with individual Government Departments and Provinces in SA. There is a PPP Unit in the National Treasury with two broad tasks consisting of provision of technical assistance to Government Departments, Provinces and Municipalities, and provision of Treasury Approvals during pre-contract phases. The main function of the SAN PPP Unit is to ensure that all PPP agreements comply with the legal requirements of affordability, VfM, and sufficient risk transfer. By fulfilling these functions, the PPP Unit guides Government Departments and Provinces to follow international best practice aimed at ensuring the successful advancement of PPPs in the country (Philip Burger, The Dedicated PPP Unit of the South African National Treasury, 2006, p.9).

The ultimate approval body is the National Treasury who provides the various Treasury approvals. The PPP Unit solely acts as an adviser to the National Treasury concerning its recommendations on whether to pursue a PPP or not. Also the review of proposed PPPs is the task of the Treasury and the PPP Unit both. Part of the thinking behind this allocation of responsibility is that the PPP Unit alone will not be in a position by itself to judge whether large liabilities associated with PPPs are acceptable to the Government; that judgment required the involvement of parts of the Treasury, such as the asset-and-liability-management group, that could take a broad Managing Contingent Liabilities in PPPs view of the Government's financial position. In particular, the Guarantee Certification Committee now reviews liabilities associated with (large) PPPs during Treasury Approval III (PPPIAF, World Bank, 2010, p. 28). To reflect that change, the committee was renamed the Fiscal Liability Committee. Although the PPP Unit remains the key advisor on PPPs, the control function is now shared with other parts of the Treasury.

As for Ministry of Finance, section 66 of the Public Finance Management Act 1999 states that “..departments (and other entities) may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction is authorized by the Act”. In case of the National Government, the Act authorizes the MoF to enter into all such transactions and to authorize responsible ministers to grant guarantees, indemnities, and securities if they have the written concurrence of the MoF.

5.2.1 Role of PPP Unit/s in SA

The PPP Unit resides in the National Treasury (including private sector resources) and assists National Departments and Provincial Governments with PPPs, and has thus far proven successful. National Treasury's PPP Unit now comprises some seventeen professional staff that are allocated projects depending upon individual sector expertise and interest (Department National Treasury, SA, PPP Unit, website). The National Treasury PPP Unit is dedicated to support the procurement process at the 3 Treasury Approval stages, demonstrate affordability and financial closure, and is to provide technical and financial advice throughout the project lifecycle, inclusive of monitoring and control: “Our technical assistance at all stages of the partnership's development has ensured that our project approvals have run very smoothly; this is very important as it makes the market feel comfortable, which assists in the success of PPPs”,



Aijaz Ahmad, then acting head Public Private Partnership Unit (Presentation).

The PPP Unit’s mission is officially published by the National Treasury to include the following:

- enable National Treasury and provincial treasuries to effectively regulate PPPs;
- evolve as a dynamic and sustainable centre of excellence for PPPs;
- drive PPP deal flow by identifying project opportunities that yield value for all stakeholders;
- provide technical assistance to public institutions through project feasibility, procurement and management; and
- promote an enabling environment for PPPs by:
 - a. facilitating certainty in the regulatory framework developing best practice guidelines
 - b. providing training
 - c. disseminating reliable information; and
 - d. driving black economic empowerment in PPPs (Department National Treasury, SA, PPP Unit, Webpage).

The PPP Unit in SA has both technical assistance and regulatory roles. The PPP Unit develops both the PPP Policy and Regulatory Framework; supports Departments through the project cycle, and develops private sector confidence in the PPP process, and also provides technical assistance on:

- Procuring Transaction Advisors
- Procuring Project Officers.

As a Regulator, the Unit approves feasibility studies to permit procurement as a PPP. It is in charge of the development and issuance of tender documents, selection of the preferred bidder, approval of execution of the negotiated PPP Agreement, and approval of material variations and amendments to executed PPP Agreements. On top, it is in charge of contract management and risk mitigation. The next chart provides an overview of the PPP Unit’s structure.

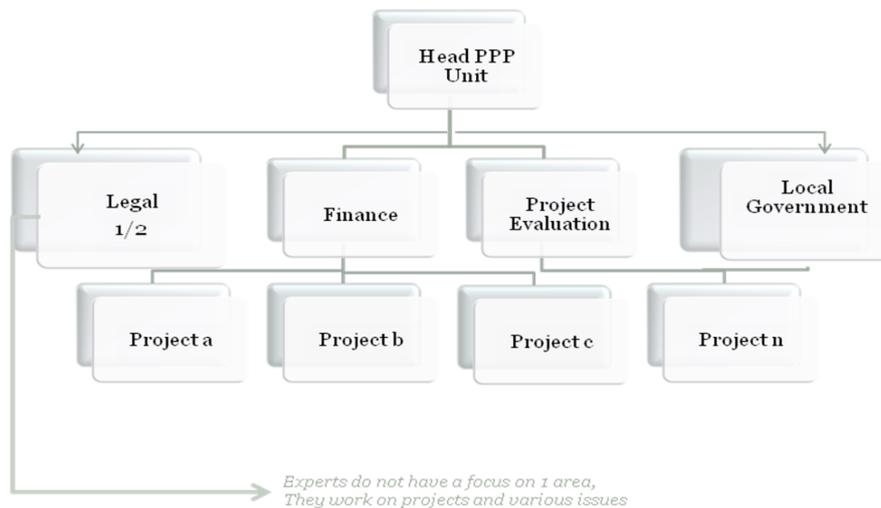


Chart 5: Overview of PPP Unit’s Team Structure, Interview with Head of PPP Unit, 2013

The PPP Unit has considerable, ongoing interface with other stakeholders (public and private) Most importantly, within National Treasury there are interfaces with Public Finance, for the



funding of national PPPs and Intergovernmental Relations for funding of municipal and provincial PPPs and Development Finance Institutions as well as the Budget Office – our –boss! for overall PPP Unit performance. The Unit also interacts with the Director General, for high-level policy direction and reporting, the Minister. The Unit also interacts with other National Departments procuring head offices via PPPs, and the Department of Public Works, which would otherwise undertake that role --sometimes an uneasy participant, and with State Owned Enterprises i.e. Eskom, Transnet, Water Boards. The Unit also deals with the nine (9) Provinces who have principal responsibility for health and education services, and two provinces desire to procure new legislative facilities via PPP, and with Municipalities.

Lack of resources within the PPP Unit was a problem as of the mid 2000s inhibiting further promotion of PPPs and support to implementing agencies in developing and doing PPPs (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.i). SPAID emphasized that SA needs promotion and facilitation of PPPs, and capacity building for implementing agencies. To date, there is a long list of projects being either planned or implemented at both Provincial, National levels. This list may be depicted from the web page of the National Treasury, PPP Unit. Thus, these findings must be considered with caution and no longer apply to today's situation.

In order to promote Municipal and Provincial PPPs, back in 2006 and 2007 there was the idea to create Provincial level dedicated PPP Units in SA to be independent from the National PPP Unit. The Provincial officials should be trained, and Units would be rolled out as capacity would develop, however, not all Units would roll out simultaneously. The ultimate idea was to have Provincial Units mainly providing Treasury Approvals, whereas, the National Unit would be in charge of providing technical assistance (Philip Burger, University of the Free State South Africa Presentation, p.18). These ideas never materialized due to various reasons including lack of resources and lack of approval from the Cabinet.

5.2.2 PPP Regulation, Approval and Implementation Roles in SA

The initiative to identify and set up PPP projects in SA like in many other countries in SADC region rests with the relevant Government Departments and Provinces and not with the PPP Unit. At the heart of the SAn PPP structure is nevertheless the National Treasury's PPP Unit constituted in 2000. This dedicated PPP Unit plays a key role particularly in the creation of PPPs where it has the final recommendation role concerning PPP agreements. The National Treasury has the approval authority, whereas, the initiative and ultimate management of PPP agreements originates and rests with individual government departments and provinces (Philip Burger, The Dedicated PPP Unit of the South African National Treasury, 2006, p.1).

The PPP project cycle reflects the roadmap for the PPP process and the Manual. The project cycle covers two main phases of a PPP process including the Preparation phase, and the Project term. The Preparation phase spans phases I to III of the project cycle: Inception, Feasibility Study and Procurement, and concludes with the signing of the PPP agreement. The Project Term spans phases IV to VI: Development, Delivery and Exit (See next chart).

National Treasury's PPP Manual elaborates in detail the Project preparation phase, during which Treasury Approvals I, IIA, IIB and III are granted. The PPP project cycle clearly indicates when these Approvals are required and which modules of the PPP Manual are relevant for the distinct phases. The PPP Manual also gives guidance on managing a PPP agreement, auditing PPPs, accounting treatment for PPPs, and project finance. In summary, Treasury Approval I or TA I, marks Treasury's approval of the feasibility study, allowing the actual launch of a tendering /



procurement process for private party consortia to deliver on the project. TA II A, TA II B and TA III, are the three steps in place to ensure the project is properly (1) designed, (2) tendered and (3) awarded. Once TA III is granted, the project is deemed “closed”, i.e. executed, with following stages looking at managing the project on a systematic program management basis, and auditing and reporting processes (Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, Benchmarking Study 2005, p.24).

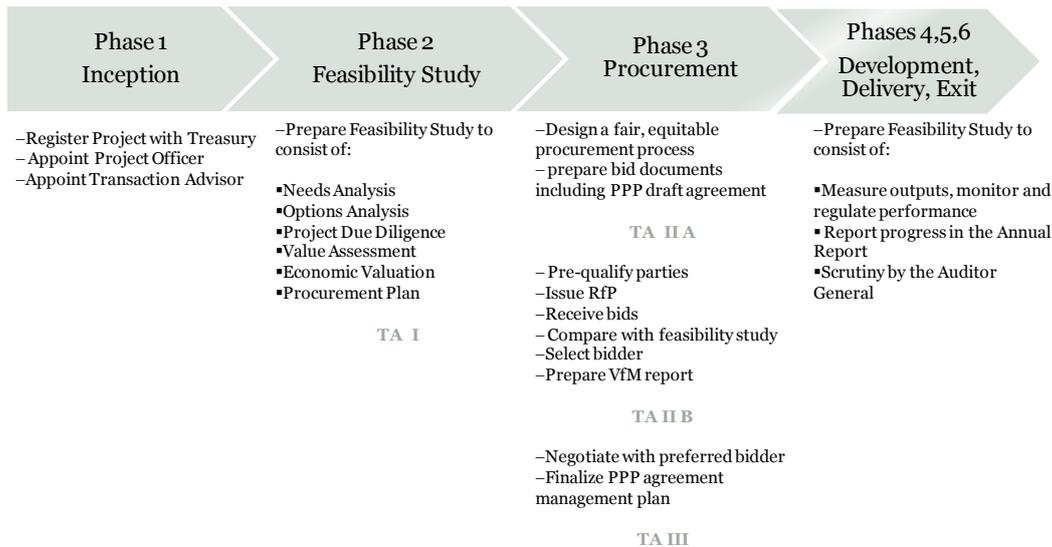


Chart 6: PPP Administrative Process including Treasury Approvals

The illustration of the procurement process as published by the National Treasury on their PPP website (www.ppp.gov.za) indicates the various stages in a Municipal PPP Procurement. The idea is to introduce a clear process, however, many view it as time-consuming and onerous (IP3, 2013, webpage). IP3 finds it questionable as to whether it is appropriate for a municipality to have to comply with all these steps in all PPPs, irrespective of the size or complexity of the project undertaken.

5.3 SA Legal Framework

The SAn legal and regulatory environment for PPPs is governed, since 1999, by the Public Finance Management Act, and its addenda (standardization) released in March 11th, 2004, known as the “National Treasury PPP Practice Note” or Treasury Regulation 16, which defines the standards and procedures for PPP. In parallel, this is accompanied by the PPP Manual, setting forth how PPPs are identified and managed, until they are deemed “closed”. See an overview of the Legal Framework for SA in the next chart.

The South African Constitution provides: “When an organ of state ... contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

The Public Finance Management Act (PFMA) was voted in 1999, and was amended by the Public



Finance Management Act No. 29 of 1999, to regulate financial management in the national and provincial governments. The objective of the PFMA is to ensure proper use of funds, defining responsibilities of all parties involved in financial matters. The generic framework does not provide any specifics on PPPs. Rather, this is dealt with in the PPP Manual and Treasury Regulation 16 which defines the various steps required obtaining approval for a PPP project in SA as laid out in the PPP Manual, in the National Treasury’s Standardized PPP Provisions and in Treasury Regulation 16. Municipal PPPs operate under the Municipal Public-Private Partnership Regulations, issued in 2005 in terms of the Municipal Finance Management Act of 2003.

Legal Framework for PPPs in South Africa

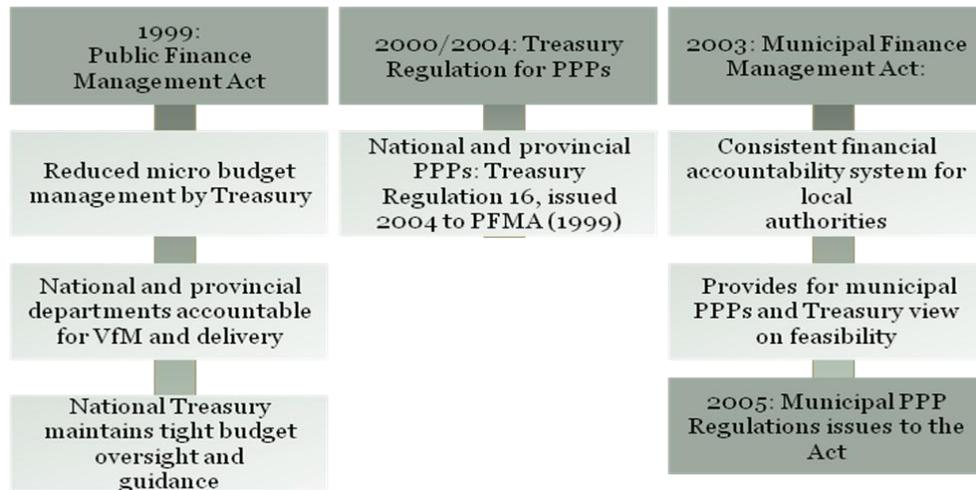


Chart 7: Overview of evolution of SA’s PPP Legal Framework

Overall, the Legal Framework for PPPs, the Public Finance Management Act (PFMA), is conducive to ensuring successful PPPs as the PFMA now includes Schedule Three public entities, previously only permitting Schedule One public entities, thereby allowing for grant of a greater number of PPPs via the inclusion of a wider range of public entities.

There seems to exist, however, large challenges to implementing PPPs at the Municipal level in SA. The PPP Unit attributes the problems and challenges at the Municipal level to "the fact that Municipal outsourcing, including PPPs, are governed by two different pieces of legislation - the Municipal Systems Act (MSA) and the Municipal Finance Management Act (MFMA) - and at least two sets of MFMA regulations - Regulations 309 (dealing with PPPs) and 868 (dealing with municipal procurement). Any Municipal PPP Guidelines must be agreed upon by the respective Ministries - the Department for Provincial and Local Government (DPLG) in terms of the MSA, and National Treasury for the MFMA and the existing Municipal PPP Regulations" (IP3, web page). National Treasury is focused on producing a set of guidelines that "suggest a simpler, more efficient process for assessing whether a PPP is appropriate in the municipal context. The aim is to craft a set of guidelines that will point the way to needed legislative and regulatory changes. The Municipal Desk at the PPP Unit has been coordinating this effort with its counterparts in DPLG" (National Treasury, PPP Unit web page).

IP3 analysis of challenges facing Municipalities finds the legacy of complex and interlinked legislation often involving inherent confusion and duplication to be a major hurdle. Both the MFMA and the Municipal Systems Act (MSA) require feasibility studies to be undertaken before a Municipality can proceed with a PPP. A Municipality is faced with the challenge of having to satisfy the requirements of both Acts, which is often perceived to be a difficult task. On average,



the PPP Unit confirms that a feasibility study in terms of Section 78 of the MSA takes approximately 2 years. Conducting a MFMA feasibility study takes on average a further 6 months. In addition, the level of detail regarding exactly what a feasibility study should entail is largely absent (IP3, web page). MSA's requirements concerning procurement of services exacerbate the perception that it is quicker and easier to source the service from an internal municipal body or municipal staff, adding a legislative layer of resistance to PPP procurement. In addition, in some Municipal sectors, the option of considering a PPP is considered as an indictment on the Municipality's own ability or capacity to provide the basic services required by the community they are meant to be serving (IP3, web page). This indicates a lack of appreciation of the benefits of risk transfer and VfM creation that is inherent in the provision of a public service through a PPP.

Provincial Governments have a more streamlined process to procuring National Treasury funds in that once the PPP Unit approves a project and an allocation is made by National Treasury, it is linked to future allocations for that specific PPP. Municipalities rely on Treasury allocations through conditional shares or equitable grants, which are specific Governmental allocations designed to uplift municipalities and their communities and more discrete and once off in nature. They also rely on municipal tax revenues or fees collected directly from users of basic services e.g. water and electricity and hence they need to collect these efficiently to secure revenue fund raising on the back of their debtor books. This contributes to the Municipalities' inability to build a good debtor book and they are hence sometimes perceived to be a credit risk when they approach financial institutions for funding on a PPP. Municipalities are also often not adept at securing external support from credit guarantees or other credit enhancing facilities from development banks.

Finally, political mistrust towards PPPs is quite dominant amongst some sectors of the Municipal community. They perceive PPPs as a form of privatisation of state-owned assets. Labour unions have a fundamental ideological opposition to PPPs, viewing them as a threat to job creation, which remains one of South Africa's biggest challenges, with unemployment at approximately 26%. Labour concerns are often specifically addressed in a PPP during the procurement by making specific proposal evaluation points available for skills transfer and job creation. It is vital that Municipal PPPs also introduce such a scoring system in order to allay such fears.

6. Recommendations

SA is one of the leading countries in the world as far as the maturity and level of development of its Legal, Policy and Institutional Structures for PPPs are concerned. SA's public service delivery record has improved through the usage of PPPs in the past decade, and its PPP project pipeline continues to grow, both in numbers and in the innovative VfM approach it has adopted. Government has in terms of the PFMA issued a series of National Treasury PPP Practice Notes. These notes constitute a PPP Manual and standardized practice Notes that Government departments and provinces use to guide them through the project life cycle of a PPP.

Trevor A Manuel, Minister of Finance reinforced in the SA National Treasury PPP Manual SA's world class first principles on PPPs. He emphasized in the beginning notes of the Manual that "...it systematically guides public and private parties through the phases of the regulated PPP project cycle for national and provincial government, unpacking policy and providing procedural clarity as it does so. It draws on South African project experience to date and on best international practice, without infringing on the authority of accounting officers and authorities. It sets rigorous risk-assessment standards by which Government will make affordable project choices that best leverage private investment for quality public services. Importantly, the PPP Manual contains a code that will go a long way to achieving broad-based black economic empowerment in PPPs, not only in the equity and management of the contracted private parties,



but in their subcontracting and in the projects' local socio-economic impact" (National Treasury, Public Private Partnership Manual, National Treasury PPP Practice Notes issued in terms of the Public Finance Management Act).

The latest inquiries into the SA PPP performance are old and date back to the mid 2000s. A study conducted in 2007 looked at the market and also asked PPP institutions on their perceived PPP experience. Results of the study indicated interesting information about the performance back then, and the SA market for PPPs as of mid 2000s. The suitability of the SA Legal Framework for PPPs embodied lack of policy direction from the highest levels of Government, or at least there seemed to exist some lack of clarity in the minds of implementing agencies and the private sector, on why SA should do PPPs, what PPPs are, and what is or should be the role of the PPP Unit. Furthermore, there seemed to be a perceived inconsistent commitment to PPPs in different parts of Government and at different levels of Government. In general, they found that Government commitment to PPPs, and direction on PPPs changes over time, while PPPs require a long time frame (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.i).

Next, there seemed to rule some mistrust among the implementing agencies concerning private sector involvement in provision of infrastructure services (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.i). On top, there was lack of time, resources, know-how, and authority within the staff of the implementing agencies, to originate and implement PPPs. It is quite important to highlight, however, that these results are outdated and need to be considered with caution. To date, the PPP Unit has quite a large pipeline at the National level and PPPs are actively being procured at the Provincial and National levels in SA. Thus, the above findings may no longer apply to the current practice for PPPs in SA. In general, however, private sector finds the rules for procurement of PPPs to be acceptable for large PPPs. However, the rules were considered restrictive for smaller PPPs, or projects with more limited risk transfer. The rules seem not to work at all for PPPs at the level of Municipalities. The private sector feels that the PPP Unit and the implementing agencies strive for too much risk transfer towards private sector, and that there is evidence of waning private sector interest in PPPs (SPAID, Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007, p.i).

Other challenges include continuous political and top level support and leadership, improving public Sector understanding of PPPs and complexity thereof. On top, there seem still to remain capacity constraints both public (project officers; contract management) and private (advisors; sponsors) (South African PPP Unit, Roundtable discussion with Cabinet Ministers and High-Level Government Officials - IMF and MINECOFIN, Kigali, Rwanda, 2010). Also the roundtable discussion in Kigali indicates the need to shorten timelines, and introduce new ways of looking at the process. Finally, there is need to change the focus to sectors – basic services should be targeted i.e. water, electricity, health education, housing and to increase the deal flow.

AfDB identifies key risks in SA to include inability of the Government to address issues in land acquisition, tariff setting, and state-owned enterprise reform that are needed to encourage PPPs in infrastructure investments. The Bank has indicated its commitment

Concrete SADC3P Recommendations:

- Contribute to improve the soft environment for PPP advancement at the Municipal levels.
- Provide advisory services to facilitate implementation of PPP at municipal level;
- Facilitate the dialogue with Federally organized State Governments such as Germany to learn about decentralized implementation of PPPs in such similar structures.



to work with the Government to develop a pipeline of feasible PPP projects, and will focus its policy dialogue and capacity development support in areas with sound prospects for advancing private participation in infrastructure provision (AfDB, Republic of South Africa, Country Strategy Paper 2013-2017, 2012, p. 34).

This paper discussed also the challenges facing SA in terms of promotion of PPPs at the Municipal level. Recommendations include continuation of efforts to improve the environment for Municipal PPPs. This includes the need to introduce a more streamlined process in PPP Procurement, and a more efficient utilisation of the resources provided by Government to source the skills required if they are lacking within Municipalities as well as build PPP capacity within Municipalities. IP3 emphasizes also the need for correcting credit enhancement of Municipal PPPs to ensure bankability of projects by providing Government guarantees or seeking international credit guarantees for projects that are not otherwise bankable. Thus, funding of specialized teams to work with Municipal agencies or bodies to drive PPPs to financial closure would be essential.



Bibliography

African Development Bank, Southern African Resource Centre, Republic of South Africa Country Strategy Paper 2013-2017, 2012

African Development Bank, Southern Africa Regional Integration Strategy Paper, 2011-2015, 2011

African Development Bank, 2013, web page

Africa Investor Magazine, March – May 2004

Collaboratory for Research on Global Projects, Public-Private Partnership Agencies: A Global Perspective, Christine Farrugia, Tim Reynolds, Ryan J. Orr, Working Paper #39, August 2008

Department National Treasury, Republic of South Africa, PPP Unit, web page

Economic Information Management Unit, Department of Economic Development, Kwazulu-Natal, PPP Benchmarking Study, 2005

IP3, 2013, website

National Treasury, Republic of South Africa, Public Finance Management Act, 1999: Treasury Regulation 16, 2003

National Treasury, Republic of South Africa, PPP Manual, August 2004

National Treasury, Republic of South Africa PPP Unit Presentation

National Treasury, Republic of South Africa Practice Note No 11 of 2008/2009, Unsolicited Proposals

National Treasury, Republic of South Africa, Sikhumbuzo Gqoli, PPPs in South Africa

National Treasury, Republic of South Africa, NOTICE 556 OF 2012, Local Government: Municipal Finance Management Act (ACT 58 OF 2003), Draft Municipal Financial Misconduct Regulations

National Treasury, Republic of South Africa, Public Private Partnerships, James Aiello, Senior Project Advisor, PPP Unit National Treasury, 24 August 2011

Philippe Burger, University of the Free State, South Africa, The Dedicated PPP Unit of the South African National Treasury

Support Programme for Accelerated Infrastructure Development (SPAID), Report # 01, Key Challenges to Public Private Partnerships in South Africa: Summary of Interview Findings, 2007,

World Bank, 2013, web page

World Economic Forum, The Global Competitiveness Report 2013–2014, 2013

