

Capacity Development for Partnerships in South Africa

Increasing service delivery through partnerships between private and public sector

Report on findings of needs assessment

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ABBREVIATIONS

| | |
|--|------------------------|
| Black Economic Empowerment | BEE |
| Integrated Development Plan | IDP |
| Inter-Departmental Task Team | IDTT |
| Public Finance Management Act (Act 1 of 1999) | PFMA |
| Treasury Regulation 16 issued terms of the Public Finance Management Act (Act 1 of 1999) | Treasury Regulation 16 |
| Municipal Finance Management Act (Act 56 of 2003) | MFMA |
| Municipal service | MS |
| Municipal Systems Act (Act 32 of 2003) | MSA |
| Municipal Public-Private Partnership Regulations, Government Gazette no. 27431, R.309 (1 April 2005) | MPPPR |
| Private Party | PP |
| Public Private Partnership | PPP |
| Service delivery agreement | SDA |
| Terms of Reference | ToRs |

1. INTRODUCTION

The implementation of partnerships between the public sector, the private sector, communities and civil society in South Africa, has grown steadily since the late 1990's. A legislative framework to guide the implementation of partnerships involving the public sector has been developed for National, Provincial and Municipal levels.

From a narrow legal perspective, public private partnerships (PPP's) are formal commercial contracts between government institutions and private companies, where the private partner assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project in return for specified benefits. There are two legally defined types of PPP, the first being where a private company performs a government function and the second where a private partner is given rights to use state property for commercial purposes, under certain conditions.

While it is widely acknowledged that the theory of PPP's is viable, and that they should work, the reality is that as a service delivery or development solution, PPP's are not in fact realising their potential. It is proposed in this study that the primary reason for the failure of the PPP concept to take purchase lies in the narrow application of the definition of PPP's as provided by most literature. This study has revealed that the future of partnerships lies in a broader, more creative and more flexible approach. A wide variety of partnerships have emerged over time, some strictly adhering to the terms of the law, others established within the law, but outside of the strictures of the Public Finance Management Act, the Municipal Finance management Act or Municipal Systems Act.

The pace of partnership establishment has however, been slower than expected, due primarily to the requirements of the legislation and the capacity of public sector functionaries. In some sectors such as tourism, partnerships have been flourishing and have involved communities and private companies, with the public sector playing an enabling role in the background.

A wide range of valuable experience has been gained over this period and one of the objectives of the Multi-Stakeholder Forum conference of October 2007 and the overall initiative driven by the GTZ Public Private Partnership Office, The Unisa Centre for Corporate Citizenship, the International Business Leaders Forum and the National Business Initiative is to promote dialogue and learning between actors involved with the formation, management, operation and monitoring of partnerships.

One notable factor is that very little South African literature has emerged on the subject since 2005, which is a clear indicator that the development of partnerships is slowing down as cumbersome legislation and capacity issues take their toll.

The past ten years have given stakeholders the opportunity to learn the constraints, the keys for success, techniques to manage the legislative framework more effectively and simply put: What works and what does not work. This paper makes use of a number of case studies across the country from different PPP focus areas such as municipal service delivery, property development, ecotourism and agricultural extension.

In almost all successful cases the partners had applied creativity and imagination in interpreting the provisions of the Acts, or developed partnerships completely outside of the PPP legislative framework, such as joint ventures - which are effectively PPP's, but are not registered with Treasury or bound by the strictures of the legislation.

Due to the sensitivity of some of the findings, in some instances the actual name of the case study has been withheld if it is being used to illustrate a particular example.

1.1 Background

In support of the Multi-Stakeholder Forum conference on capacity development for partnerships, Fakisandla Consulting was approached by GTZ's Public Private Partnership office with a view to assisting with the preparation of four major outputs:

- to identify the potential needs of municipalities and provinces in the field of partnership capacity, based on national expectations and regulations and local realities;
- to prepare an overview of different types of existing partnerships between municipalities and the private sector in South Africa;
- to prepare an inspirational booklet based on the information obtained from documents, case studies, best practices and the advice of experts;
- to develop a proposal in support of capacity building in partnerships, based on the needs assessment and stakeholder feedback for consideration for the German government for funding.

1.2 Methodology

The methodology for the current study is comprised of the following key elements:

- Interviews with key informants: generally speaking, interviewees were directly involved participants in PPP,s or CPPP's or they were involved with the facilitation of processes leading to the formation of PPP's. Government officials were also interviewed.
- Document review: A large number of documents derived from key informants, the Internet, Government departments and companies were considered.

1.2.1 Research questions for case examples

As can be seen from the description of the methodology, interviews formed a very important aspect of the information gathering process. The following questions formed a central part of the interview process, though many other issues arose during the interviews.

- The background, history and nature of the PPP: When was the PPP established? Who are the partners? How are the partners linked? What capacity was/is required within the PPP?
- Legal issues and the partnership: What acts, regulations and legal documentation support the PPP relationship? What are underlying contractual arrangements?
- Other enabling factors (ongoing management): How is service delivery within the partnership monitored? How is accountability managed? How is corruption dealt with (if relevant)? What are the sanctions on failure to deliver on the part of the private partner?
- Capacity issues (institutional / individual): Who deals with the partnership? Does the institution / private partner have the capacity to manage the PPP? What are the specific training needs within the institutional / private partner? Have the managers of the PPP been on training to manage the PPP?
- Major challenges and benefits: What have been the difficulties and challenges in the PPP? Are there any problems in the relationship with the partner? What have been the specific benefits of the PPP? What works well in the relationship with the partner?
- Recommendations: What are the principles that make a successful partnership?

2. DESCRIPTION OF THE TYPES AND RANGE OF PPP'S AND CPPP'S IN THE SOUTH AFRICAN CONTEXT

The types of PPP's operating in SA include those that fall into the traditional definition and understanding of the concept, and those that stand outside of this formulation. The range of PPP's evident in South Africa illustrates the varied types. It should be clearly pointed out that the purpose of this paper is not to provide a technical overview on whether a Build, Operate and Transfer formulas are better or worse than another technical model, but rather to look at challenges faced by partner groups and interventions to address these challenges.

2.1 Types of PPP's

There are approximately four types of PPP's functioning in South Africa at the moment and these roughly fall into the following overall categories:

- Traditional PPP's established in terms of the PFMA or MFMA
- Community Public Private Partnerships which also involve a defined community represented by a legal entity such as a Trust or Association
- Joint ventures, where an agreement is signed between a municipality or other organ of state and a private partner in terms of Common Law, Delict, and Law of Contracts
- Bilateral agreements between organs of state/municipalities and communities. These often include a private partner who is providing a service or investment within a community
- Virtual PPP's established by way of written or unwritten commitments by parties to render services, provide goods or support toward a shared goal.

2.2 Range of PPP's in South Africa

Internationally and nationally a large and varied range of PPP's have emerged to address challenges that range from service delivery to the management of international sporting events. A few examples of these are listed below to illustrate the range of possible areas of public private collaboration, and for interest and inspiration.

2.2.1 Formula A1 racing

EThekweni Municipality and the Formula A1 organising committee have a formal collaboration around the hosting and management of the Durban Formula A1 championships on an annual basis. EThekweni provides the safety barriers, closes off streets, does spectator traffic control while the Formula A1 team attracts more than 120 000 visitors per day of the races.

2.2.2 PPP's in the operation of municipal facilities

A range of municipal facilities have been subject to PPP's or variations thereof – typical examples of this include a large number of municipal Caravan Parks from Scottburgh to Ilembe to Ladybrand. Some of these smaller examples have been the most successful and trouble-free PPP's. Other facilities such as municipal gas works have also fallen into this category.

2.2.3 PPP's in property development

There are numerous PPP's in the property development sector, which include the Cape Town waterfront, the Durban Point Development, the Effingham Joint Venture, Umhlanga Ridge.

2.2.4 PPP's in water, sanitation and solid waste services

Water, sanitation and solid waste are probably the most frequently considered PPP's with much pioneering work being done around water provision and solid waste removal in particular. The two often cited examples of water provision are Nelspruit/Mbombela and Dolphin Coast/Ilembe.

2.2.5 Prison Contracts / Privatisation

Departments of Correctional Services and Department of Public Works have contract concessions for the designing, building, financing, operating and transferring of selected new prisons.

2.2.6 Eco-tourism

Partnerships between communities, private sector developers, statutory bodies, and even NGO's are starting to accumulate across the country. Examples include investment attraction within the Greater St Lucia Wetlands Park, Makuleke, Madikwe, Rocktail Bay, Manzengwenya.

2.2.7 The provision of higher / adult education

Several types of partnerships with the Department of Education exist including service partnerships, tuition partnerships and Professional Institute partnerships. The development of school infrastructure is another growing area of collaboration.

2.2.8 The Health sector

There are many examples where the public health sector (Department of Health) has contracted private practitioners to provide public health services and the construction health sector infrastructure (hospitals, clinics).

LoveLife, South Africa's National HIV Prevention Program for Youth is a PPP between the Kaiser Family Foundation (an US based NGO) and the government.

A PPP between the Department of Health, Sentech and Mindset Network launched health educational TV Channel called MINDSET HEALTH. The channel was broadcast in 48 clinics in the nine provinces and is being implemented nationally.

2.2.9 Transport

Partnerships between the Department of Transport and the private sector in fleet management and the construction road infrastructure and toll roads (e.g. Chapman's Peak Drive toll road)

2.2.10 PPPs in e-crime

An incidence of internet fraud in Cape Town was resolved by a joint venture between a bank, PricewaterhouseCoopers and the SAPS Commercial Crime Unit. A PPP between SAPS and SA banks resulted in the conceptualisation and implementation of SA's e-crime strategy.

2.2.11 PPP's in enterprise development

A PPP between Seda and essential oils company Biosys, with the support of the Department of Agriculture, will establish 300ha of essential oil crop plantations nationally over the next three years, creating sustainable opportunities for black farmers.

2.2.12 Swiss South African Co-operation Initiative

A South African development-finance agency funded by Swiss and South African companies in collaboration with the Swiss Agency for Development and Co-operation (SDC). The SSACI aspire to promote the social and economic development of South African youth.

2.2.13 Fresh produce markets

The management of fresh produce markets has also been a typical target for the formation of PPP's. They were among the first facilities identified for private sector involvement, and they attracted a large amount of opposition from the labour movement.

2.2.14 Fire fighting services

In many municipalities around Gauteng in particular, fire protection services have been privatised, outsourced or been subject to PPP's.

2.2.15 Urban Improvement Precincts

Urban Improvement Precincts are collaborations between Local Government, the private sector, and sometimes NGO's aimed at improving and revitalising urban centres. They are generally co-funded by Local Government and business and have been established in Johannesburg, Cape Town and Durban.

The Cape Town Partnership has as its objectives the following significant points:

- Mobilise the public and private sectors and other stakeholders around common development objectives
- Consolidate the Central City as the economic, social and cultural heart of the Cape Town metropolitan objectives
- Broaden access to the benefits and opportunities in the Central City for all the people of Cape Town
- Coordinate and facilitate multi-dimensional development programmes
- Guide decision-making and direct resources into solving the economic and social challenges facing the Central City
- Contribute to the overall development of the City of Cape Town

2.3 Case studies used for the preparation of the report

The rationale for the selection of case studies for the purposes of this report and presentation to the Multi Stakeholder Forum was based on a number of factors, the most significant being: Accessibility and proximity to the project team; and the need to cover a reasonable cross-section of sectors

Table 1: Partnership case studies assessed in this study.

| Type of partnership | Example | Sector | Location | Partners |
|---------------------|--|-----------------------------|--|--|
| PPP | Water and sanitation services concession | Municipal Service Provision | Ilembe (Ballito) | <ul style="list-style-type: none"> Ilembe District Municipality Siza Water Company |
| | Sugarcane extension delivery to Small-Scale Growers | Agriculture | eThekwini (Umhlanga, KZN) | <ul style="list-style-type: none"> South African Sugar Research Institute Department of Agriculture & Environmental Affairs |
| Joint Venture | Effingham Joint Venture to develop commercial property in Riverhorse Valley, Bridge City | Property development | eThekwini (Greater Durban area) | <ul style="list-style-type: none"> eThekwini Municipality Tongaat Hulett Developments |
| CPPP | Nqabara Community project underway to establish an ecotourism lodge on Wild Coast | Tourism | Mbashe Local Municipality – Eastern cape | Community Trust, private developer, NGO's, Local and District Municipality |
| | Rocktail Bay – coastal resort lodge | Tourism | Umkhanyakude DM, KwaZulu-Natal | Community Trust, Wilderness Safaris, supported by Ezemvelo KZN Wildlife and the Greater St Lucia Wetland Park Authority – facilitation by GTZ Transform |
| | Manzengwenya community tourism product offering | Tourism | Umkhanyakude DM, KwaZulu-Natal | Community Trust, Wilderness Safaris, supported by Ezemvelo KZN Wildlife and the Greater St Lucia Wetland Park Authority. Facilitation and co-investment by GTZ Transform |
| | Madikwe Lekhophung Lodge | Tourism | Central District Municipality, North-West Province | Lekhophung Trust, Central District Municipality (CDM), DfID, GTZ Transform, Ford Foundation, North-West Parks and Tourism Board |

3. PPP LEGISLATION¹

The legislation and regulations governing PPP's at a national/provincial and at a municipal government level differ. National and provincial government are subject to the Public Finance Management Act (Act 1 of 1999) (PFMA) and Treasury Regulation 16 (2004) to the Public Finance Management Act (Act 1 of 1999). Municipal government is subject to the Municipal Systems Act (Act 32 of 2003) (MFMA), Municipal Finance Management Act (Act 56 of 2003) and regulation 309 that was drafted to assist in clarifying the MFMA for municipal entities.

It is important to underline the fact that municipalities are not subject to the national and provincial PFMA or to Treasury Regulation 16. Other laws and guidelines applicable to PPP's at both National and Municipal level include the National Treasury Code of Good Practice for Black Empowerment in Public-Private Partnerships and the Preferential Procurement Policy Framework Act (Act 5 of 2000).

The following discussion summarises the essential issues of the identified legislation with reference to PPP's in South Africa.

3.1 PFMA² - Public Finance Management Act (Act 1 of 1999)

This Act stipulates the appointment of accounting officers, outlining their roles and responsibilities. It addresses matters such as the responsibilities of Ministers and MECs (executive authorities); the general principles on borrowing and issuing of guarantees; as well as financial misconduct and the regulation thereof. The Act also defines the areas over which the National Treasury is empowered to issue treasury regulations and instructions are listed, and obligate the appointment and composition of audit committees.

3.2 Regulation 16³ - Treasury Regulation 16 (2004) to the Public Finance Management Act (Act 1 of 1999)

Regulation 16 provides precise and detailed instructions for PPP's. An appointed accounting officer must enter into a PPP on behalf of a department and is responsible for registering the PPP with the National Treasury. If required, a project officer must also be elected. The accounting officer must conduct a feasibility analysis that amongst other things illustrates that the agreement:

- is affordable to the government institution
- offers a value-for-money solution
- transfers financial, technical and operational risk to the private party

Once the feasibility has been assured, a procurement procedure needs to be complied with. Procurement may proceed with the consent of the Treasury. The procurement procedure ensures that the PPP arrangement is fair, equitable, transparent, competitive and cost-effective, and in line with other legislation (e.g. BEE legislation). A second report must be compiled illustrating the preferred bid exhibit, and, amongst other things, the same criteria as the feasibility. This must be submitted to the Treasury for approval.

The contracting phase requires a third report to be submitted to Treasury for approval. Again, the report must illustrate that the chosen party, among other things, exhibits the same criteria as the feasibility. A management plan must also be included. The accounting officer is then responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored and reported on.

¹ See Appendix for full legislation review and citations

² See Appendix for consideration of PFMA and citations

³ See Appendix for consideration of Regulation 16 and citations

3.3 MSA⁴ - Municipal Systems Act (Act 32 of 2003)

The MSA, amongst other things, regulates PPPs. The MSA applies when a municipality reviews and decides on the appropriate mechanism to provide a municipal service. It outlines the criteria and processes for deciding on mechanisms to provide a municipal service e.g. the cost-benefit analysis, a full assessment of the private partner and impact on municipal employment patterns. The MSA establishes clear guidelines on community involvement.

A service provider may be assigned the responsibility of developing and implementing detailed service delivery plans as well as operational planning, management and provision of the service. The service provider is then responsible for customer and financial management and is subject to performance monitoring and auditing by the municipality.

A prescribed competitive bidding process is undertaken in the selection of a suitable service provider. The municipality may then enter into agreement with the service provider based on the terms and conditions specified in the bidding documents. Documentation must be made available for public viewing

3.4 MFMA⁵ - Municipal Finance Management Act (Act 56 of 2003)

There is substantial policy consistency between the PFMA and MFMA regulations with regard to PPP's. The principal approaches to PPP's, namely affordability, risk transfer and value-for-money, are consistent. The PFMA and the MFMA differ in their institutional systems and the decision-making processes differ.

The MFMA prescribes that PPPs must:

- be affordable to the government institution
- offer a value-for-money solution
- transfer financial, technical and operational risk to the private party

The MFMA regarding PPP's also requires a regulatory framework to be developed and prescribed by the National Treasury. With the assistance of the National Treasury, a feasibility study as similar to that described by regulation 16 must be carried out. Once the feasibility study has been completed, the municipalities accounting officer must formally solicit the views and recommendations of the National Treasury (and other relevant departments). The local community must be informed and given opportunity to give comment.

3.5 MPPPR - Municipal Finance Management Act (Act 56 of 2003) regulation 309

The MPPPR prescribes that PPPs must:

- be affordable to the government institution
- offer a value-for-money solution
- transfer financial, technical and operational risk to the private party

The municipalities accounting officer must notify the National and relevant Treasury in writing of the proposed PPP. The National Treasury will then develop and prescribe a regulatory framework for the PPP. As with Regulation 16, the municipality must conduct a feasibility study. The National Treasury may assist in carrying out and assessing the studies. The views and recommendations of the National and relevant provincial Treasury must be solicited regarding the proposed bid and bid evaluations. After the accounting officer has signed the final agreement, a project officer must be appointed to assist in the management and overseeing of the PPP.

⁴ See Appendix for consideration of MSA and citations

⁵ See Appendix for consideration of MFMA and citations

4. FINDINGS

The findings of the investigation conducted into Public Private Partnerships, or variations on that theme, revealed a mixed success record. What was clear was the fact that PPP's are a viable vehicle, but that there are a number of problems associated with the design and implementation of the structures. This chapter seeks to discuss the major successes and challenges with a view to analysing how to grow the former and mitigate the latter.

4.1 Successes and challenges arising from the case studies

The original intention was to divide successes and challenges into two separate sections in this report, however when the process of documenting these issues started, it became very clear that the inter-relationship between the two was too close and that separation was an artificial process. Most PPP's that were looked at were working more or less well, and contained elements that could easily be replicated.

4.2 Major challenges and related successes related to the design and implementation of PPP's

The major issues facing PPP's relate largely to capacity, resourcing and design. None of these aspects are in and of themselves unsolvable, and it is around managing these features that the recommendations of this report are based.

4.2.1 Capacity

The biggest challenge that undermines the effective implementation of PPP's lies in the lack of institutional capacity to manage and maximise the potential of the partnership arrangement. By definition, the partnership is premised on an arrangement of cooperation between two or more entities. It is often difficult to match the capacity of the entities involved. By virtue of their market-related definition, it is generally the private partner that has capacity, and the public partner that is limited in this regard.

A number of features underline this lack of capacity. In the first place, it is not unusual for the public partner to have limited or unwieldy institutional capacity, that generally renders the partnership either disabled and not functioning optimally, or completely crippled.

The PPP managing water and sanitation delivery in a portion of the KwaDukuza Local Municipality in KwaZulu Natal provides a good example of the former circumstance. In this situation the ultimate product is of a good standard, but it could be even better if the public partner had the capacity to complement the private partner with the same degree of capacity that underpins the performance of the private partner. The incentive that propels the private partner to perform relates to profit harvesting. The public partner has no such incentive, and relies on civil servants who are all too often apathetic, and under-trained to participate proactively in the actual mechanics of the partnership. In addition, the structures of accountability within the public sector cushion civil servants from poor performance related to implementation.

In almost all of the cases investigated, concerns were raised regarding the common fact that personnel within public sector partner organisations tend not to remain in place for very long, and that they often did not have the technical expertise to engage meaningfully with the technical side of the contracts. Again, the challenge presented by this scenario is minimised if the private sector partner is competent and ethical. However, the net result still remains a degree of delivery that is not optimal.

A representative of one case study private partner spoke rather of the lack of commitment and indifference from public sector representatives. This is indicative of a culture of passivity within the public sector that continuously undermines the quality of delivery, not only within the context of PPP's.

4.2.2 Understanding, interpretation, and implementation of the law

Almost all public partners have some difficulty managing the legal requirements associated with the selection and management of PPP's. The legislation that governs PPP's has been dealt with in an earlier chapter of this report, and the areas that typically present challenges to the establishment of PPP's have been identified in this context. It needs to be emphasised that the procedures are extremely cumbersome, to the point of discouraging municipalities from engaging in initiating PPP's. The complexity of the legal procedures required coupled with the lack of capacity mentioned earlier all too often renders the establishment of PPP's completely impossible for some of the municipalities.

The Effingham Joint Venture between eThekweni Metro Council and Tongaat Hulett Developments and the Cape Town Partnership are exceptions in this regard, but it is precisely because the nature of the contractual relationships sidestep the PPP legislation through a creative design, and because the private partners involved have the capacity to be involved in the legal design of the partnerships, and because eThekweni and Cape Town are relatively resourced, that these two examples are so successful. In the case of the Effingham Joint Venture, the two parties decided not to register a PPP with Treasury in terms of the MFMA, but rather established a Joint Venture agreement in terms of the laws of Delict, Contract, as well as Common Law. The outcome, however, has a comparable effect.

4.2.3 Lack of monitoring

Monitoring is an essential feature of best practice in all circumstances. In the context of PPP's, monitoring serves two functions: firstly, to ensure that partners are doing what they are supposed to be doing; and secondly, monitoring provides an important opportunity for review that almost always results in the enhancement of delivery in all aspects, including technical and financial. Monitoring is even better if it is a function carried out by an independent body. In most cases, the more traditional PPP's have inadequate or non-functioning monitoring systems.

One of the PPP's investigated as part of this study originally had a robust monitoring component as part of the original PPP agreement, with an arrangement whereby independent companies were appointed to assess the performance of two key areas of the contract. This arrangement fell away over a period of time, and the transferring of the contract from one organ of government to another. As it happened the private partner in this particular contract retained a high performance standard, but it could easily have happened that performance levels dropped, and no one would have been any the wiser. In addition to the maintenance of delivery standards, the private partner in the arrangement commented on the professional loss through the loss of the peer review opportunity.

4.2.4 Selection of effective partners (procurement process plus quality assurance)

The selection of effective partners is key to the success of PPP's. It is clear in the implementation success record of a number of PPP's that the success factor is almost always a function of an effective private partner. This is inevitable as the delivery aspect of PPP's is generally in the hands of the private sector partner.

In the one case study where the output was of a particularly effective and superior quality, the private partner selected was eminently well qualified with extensive resources to deliver on the arrangement, to the significant benefit of both parties within the partnership, and to the development of the local economy.

In another case study, the public sector partner demonstrated an almost total lack of capacity on all fronts, weakening the PPP to a degree, but because the private partner is highly competent, the end user still receives good service.

4.2.5 Contractual Design

The contractual arrangement that underpins any PPP has the potential to both enhance the impact of the relationship and ensure that delivery has the best basis for success, or it can provide a weak foundation and a recipe for disaster. The design of the PPP contract needs to be well structured, optimising on the respective skills sets and capacity of the partners concerned. Any lack of clarity regarding roles and responsibilities within the contractual arrangement can result in a slowing down of the delivery process, or in the disintegration of the relationships between the partners.

Two of the case studies in this investigation revealed circumstances where the public partner had reneged on their contractual obligations regarding payments for specific aspects of the delivery. In both cases the private sector expressed their lack of capacity to ensure payment without actually harming delivery of services, which neither private sector partner wanted to do. The net result was a souring of the relationship within the partnership, with the inevitable compromising of the optimal potential for delivery.

The contract design needs to be clearly mindful of the capacity and core expertise of the respective partners in its design. In this way the ultimate output is potentially optimised even before implementation begins. It is still true that the realisation of the potential rests in the successful management of the relationship between the parties, and the systems of monitoring that should both be explicitly spelt out in the details of the contractual arrangement.

A further issue is that the contractual arrangements need to be robust enough to withstand political pressure and opportunistic points scoring by local or higher level political parties. The water case study in Dolphin Coast was a clear example of the need for the contractual arrangements to be able to withstand political buffeting.

Contract and contract management needs to be able to be responsive to changes in the external environment, for example changes in national legislation that impact on local government such as changes to the National water Act in 2003. Another example is how political pressure from surrounding communities caused the Effingham Joint Venture to adjust its structure and functioning to respond to the need to increase community involvement. In other words, the contract design needs to be both sufficiently robust to withstand undesirable external pressure, and flexible enough to respond to site-specific dynamics.

Another issue that needs to be discussed in the context of contractual design refers to how delivery is optimised by ensuring that the agency within the partnership that is directly responsible for delivering the service (usually the private partner) should interface directly with the end user, or consumer. In cases where this is the case, it serves as an important incentive for maintaining service delivery quality. An example is where consumer responses to water and sanitation service delivery in KwaDukuza was the stated reason for the private partner in that PPP ensuring that their services were of a high standard. This kind of detail within the contractual design serves to bolster accountability, and is directed towards ensuring quality performance.

4.2.6 Institutional functionality of the partnership group management

PPP's are very sensitive to project management issues. It is essential that there be institutional responses to the effective management of the PPP in order to ensure that all parties are part of the decision-making process and are called to account regarding implementation. There are a number of ways in which these partnerships can be managed at an operational level, and the method selected needs to be determined by the specifics of the task at hand.

One case study had a committee that met quarterly to assess, monitor and guide the implementation process, but found that they needed to create a range of smaller subcommittees to ensure that the different facets of the contract were managed at a micro-level, but with appropriately expert personnel from both sides of the partnership. In this way this particular PPP was able to ensure good decision-making backed by appropriate accountability.

Poor management of PPP's can result from inconsistent management of the partnership. In at least two of the case studies associated with this investigation, the nature of the management of the partnership was unable to assist in the successful resolution of payment problems. This was a clear example of how there was no inherent mechanism to ensure that parties within the arrangement complied with their obligations.

4.2.7 Political support for PPP

It is interesting to note that the issue of political support has been identified nationally as one of the key challenges facing PPP's. This applies to PPP's from a national through provincial to a local level. The very fact that PPP's are not utilised more frequently to assist in the delivery of services and development is likely the result of a lack of promotion and support at a senior political level. There is ample evidence to show that officials at municipal level cannot initiate PPP's without the political support of Mayors and councillors. The key factors undermining political support are:

- Lack of knowledge and understanding about the benefits and advantages of PPP's by politicians and councillors
- Concerns about job losses and retrenchments – the political alliance between the African National Congress and the Congress of South African Trade Unions has also resulted in the slow implementation of PPP's.

A quote from a member of the PPP unit at National Treasury illustrates the issue: “With regard to capacity, you can buy in advisors, but if there is wavering political support, the project will face an uncertain future.”

4.2.8 Changing municipal entities and personnel

The successful PPP should be robust and protected against changes in structures and faces within the partnership arrangement. This speaks to the fact that the public sector does change its face from time to time, and that PPP contracts should not be so loose as to fall foul of these changes.

It was noted in one of the case studies that a number of changes led to the weakening of the PPP in a number of important ways. The Siza Water PPP that is responsible for the delivery of water in the Ballito area within KwaDukuza was originally an arrangement between the French-owned Saur Services and the Bourough of Dolphin Coast. The public sector partner was later changed to the KwaDukuza Local Municipality, and then again in 2003, the Ilembe District Municipality replaced its local municipality counterpart. It also so happened that the private sector partner changed from Saur Services to the Cascal Group. With each public sector partner change, the responsibilities of the public sector partner were diluted, resulting in a situation whereby the present public sector partner is wholly dependent on the performance standards of the private sector partner.

4.2.9 Individual drivers

This study revealed the reality that the most successful PPP's were actively driven by either specified entities representing all parties within the partnership, or by a tasked team for the purpose, generally the private partner. In circumstances where the public entity was responsible for driving delivery, the results were indifferent. This is partly due to a culture of passivity that was noted within the public sector, partly the result of high staff turnover, and partly due to inadequate planning and accountability structures within local government.

The most successful PPP canvassed involved a committee at a senior level driving the process and ensuring high level political and administrative support for the business of the PPP, supported by a series of subcommittees accountable to the higher level committee, and responsible for specific areas of delivery associated with the overall outcome of the PPP.

4.2.10 Red tape at a public sector partner level

Rules and regulations pertaining to any activity within the public sector present a challenge to the effective management of business in which this sector operates. Procurement procedures and multi-focussed public service agencies are inevitably subject to a mass of checks and controls that must slow down response time enormously. This is a given, and a necessary situation to protect taxpayers against impulsive spending of national funds. However, the downside of this is how it can hamper delivery. It is in this very regard that PPP's offer an important value, but as stated earlier, it is this kind of factor that needs to be addressed at a contract design level. If the partnership is intelligently structured then it is possible to mitigate against the reality of red tape, by, for example, making decision-making at an operational level the preserve of the private partner; or by employing private partner resources to assist in any aspect of the operation that is hampered by generalised red tape within the public sector.

4.2.11 Relationship management

It is crucial for the interests of each party to be transparently and honestly tabled at the outset, and that these issues are integrated into the contract formulation. For example there is debate as to whether the extent and placement of toll plaza's throughout the country do in fact lead to greater efficiency, or whether they are simply mechanisms for profiting by the private sector partner. There is currently a debate around the placement of a proposed toll on the N2 outside of Durban in relation to the proposed Dube Trade and Airport. The City is inclined to place the toll north of the airport in order to better manage traffic flow, whereas the toll company would rather the tollgate appear between the City centre and the airport, to maximise throughput.

4.2.12 Attitudinal blockages

A critical blockage to successful PPP implementation is attitudinal. It is crucial that effective, open and cooperative relationships are developed between key decision-makers.

The Effingham Joint Venture is successful precisely because the fundamental attitudes of both parties showed a willingness to optimise the output, to capitalise on the respective skills sets and capacity of both parties, and a commitment to make the arrangement work for the benefit of both parties. As a result the partners were able to ensure the following:

- That the structure of the partnership is clear
- That the contract is tidy
- That the roles and responsibilities are clearly defined by the core competencies of the respective partners
- That the Joint Venture Committee is responsible for strategic direction
- That key delivery elements lie in the hands of the private partner
- That decisions affecting delivery are taken by the private partner

4.2.13 Asset stripping and abrogation of responsibilities

Having noted all of the above functional issues related to the implementation of PPP's, it is important that PPP's be entered into with some caution. There is a danger for public sector partners that they could land up "selling the family silver", in other words, the potential profits that could accrue to the public sector could be unintentionally siphoned off into benefiting a different formulation. Another caution would refer to the need for especially public sector partners not to abrogate their responsibilities by "handing them over" to private sector partners through the implementation of PPP's. These dangers can more easily occur in the smaller less resourced municipalities who land up in partnerships whose formulation unwittingly causes one or both of the above dangers to occur. Lack of capacity and resources can lead to the tendency for less capacitated municipalities to outsource. Not enough monitoring and control can easily lead to a long-term loss for the public sector partner.

4.2.14 Understanding of PPP's

Though this point is mentioned last, it by no means least and is the lynchpin of PPP implementation. There is often a lack of understanding amongst both private and public sectors regarding the potential of PPP ARE to contribute meaningfully to economic development and service delivery. This is compounded by a lack of strategic awareness on the part of individuals or all partners. The concept needs to be “sold” to potential partners through a process of education and promotion. In this way potential partners will be capacitated to identify, initiate, facilitate and implement effective partnerships.

5. THE PRINCIPLES OF SUCCESSFUL PPP's

From the above discussion it is clear that there are at least six critical components of any successful Public-Private Partnership (PPP). While there is not a set formula or an absolute foolproof technique for crafting a successful PPP, each of these key components is involved to varying degrees. It is interesting to note that these critical components are international in nature and in this case were drawn from the Centre for Public Private Partnerships, a US based body.

5.1 Political leadership

In terms of this study, it was interesting to note that one of the primary success factors identified by the Treasury's PPP Unit was the issue of political commitment. A successful partnership can result only if there is commitment from "the top". The most senior public officials must be willing to be actively involved in supporting the concept of PPP's and taking a leadership role in the development of each given partnership. A well-informed political leader can play a critical role in minimizing misperceptions about the value to the public of an effectively developed partnership. Equally important, there should be a statutory foundation for the implementation of each partnership.

5.2 Public sector involvement

Once a partnership has been established, the public sector must remain actively involved in the project or programme. On-going monitoring of the performance of the partnership is important in assuring its success. This monitoring should be done on a daily, weekly, monthly or quarterly basis for different aspects of each partnership (the frequency is often defined in the business plan and/or contract).

5.3 A well thought-out plan

A carefully developed plan (often done with the assistance of an outside expert in this field) will substantially increase the probability of success of the partnership. This plan most often will take the form of an extensive, detailed contract, clearly describing the roles and responsibilities of both the public and private partners. In addition to attempting to foresee areas of respective responsibilities, a good plan or contract will include a clearly defined method of dispute resolution (because not all contingencies can be foreseen).

5.4 A dedicated income stream

While the private partner may provide the initial funding for capital improvements, there must be a means of repayment of this investment over the long term of the partnership. The income stream can be generated by a variety and combination of sources (fees, tolls, shadow tolls, tax increment financing, or a wide range of additional options), but must be assured for the length of the partnership. It should also be stressed that the flow of cash need not always be from the municipality to the private partner – it can involve an investment that the private partner recoups in other ways, such as directly from the end user of the core component of the PPP.

5.5 Communications with stakeholders

More people will be affected by a partnership than just the public officials and the private-sector partner. Affected employees, the portions of the public receiving the service, the press, appropriate labour unions and relevant interest groups will all have opinions, and frequently significant misconceptions about a partnership and its value to all the public. It is important to communicate openly and candidly with these stakeholders to minimize potential resistance to establishing a partnership.

5.6 Selecting the right partner

The "lowest bid" is not always the best choice for selecting a partner. The "best value" in a partner is critical in a long-term relationship that is central to a successful partnership. A candidate's experience in the specific area of partnerships being considered is an important factor in identifying the right partner.

6. RECOMMENDATIONS

Most of the challenges identified in the previous chapters of the report lend themselves to the formulation of recommendations. Some of these issues are already being addressed or partially addressed by the DPLG, The Treasury or other institutions.

6.1 Capacity issues

| General Issue | Specific Problem | Recommended Intervention |
|---|---|---|
| National and provincial institutional capacity | National Government to actively promote PPP's | Develop a set of national political & private sector champions |
| | Lack of proactive promotion of PPP's as a service delivery & development solution | Develop promotional strategy including materials, roadshow, study tours |
| | Institutional design to promote and handle PPP's not adequate | Promote establishment of dedicated PPP units at Provincial and municipal levels that include representatives of both public & private sectors |
| | Insufficient demand for PPP services of national government | Roadshow to all provinces |
| Institutional capacity at municipal level | Lack of political support from senior politicians | Roadshow, promotional visits by senior national politicians, study tours |
| | Lack of support by councillors | Roadshow, study tours |
| | Lack of support by senior officials | SALGA to assist with promotion, roadshow, specific training modules |
| | Lack of support from line managers | Training modules, roadshow, study tours |
| | Lack of dedicated capacity at municipal level to implement and manage PPP's | Establishment of municipal PPP Units/Departments |
| | Lack of legal expertise | Training modules, support materials, direct private sector support |
| | Lack of continuity among PPP implementation staff | Establish municipal PPP units |
| | Apathy among municipal officers | Roadshow, SALGA programmes, performance management systems |
| Individual capacity | Lack of capacity of implementation officers at a local level | Design, prepare and resource an educational programme Investigate and implement accreditation criteria Compulsory training of municipal PPP staff in all aspects of PPP's |

6.2 Legal issues

| General Issue | Specific Problem | Recommended Intervention |
|----------------------|---|---|
| Unwieldy legislation | Understanding, interpretation and implementation of the law | Establishment of appropriately resourced, informed and capacitated PPP unit at municipal level that include public and private sector practitioners Training programmes for legal officers |

6.3 Monitoring issues

| General Issue | Specific Problem | Recommended Intervention |
|-----------------------|---|--|
| Inadequate monitoring | Lack of monitoring mechanisms | Municipal PPP unit to include monitoring component with capacity to brief an appoint independent experts |
| | Inconsistent application of monitoring requirements | Effective communication of national standards |
| | Monitoring not conducted by technical experts | Monitoring to be conducted by external independent experts |

6.4 Selection of effective partners (procurement process plus quality assurance)

| General Issue | Specific Problem | Recommended Intervention |
|-------------------|---------------------------------------|--|
| Partner selection | Ineffective partners chosen | Setting up of a database of pre-screened private partners per sector within the strictures of national and municipal laws Partner selection processes to be supported by national experts Private sector advisors to play an active role in assisting with the selection of partners |
| | BEE opportunities not always realised | Setting up of a database of pre-screened private partners per sector within the strictures of national legislation |

6.5 Contractual Design

| General Issue | Specific Problem | Recommended Intervention |
|---------------------------------------|---|---|
| Undefined and/or inflexible contracts | Contracts do not define the roles and responsibilities of all partners clearly enough – leading to later conflict | Training for legal officers Setting up a national database of screened transaction advisors Setting up a national database of screened legal advisors Establishing linkages with the LED Practitioners Network Examples of “good” contracts to be made available to municipalities and their advisors |
| | Contracts do not allow for flexibility and adaptation to changed circumstances | Examples of “good” contracts to be made available to municipalities and their advisors |
| | Contracts are not able to withstand political interference | Examples of “good” contracts to be made available to municipalities and their advisors |

6.6 Institutional functionality of the partnership group management

| General Issue | Specific Problem | Recommended Intervention |
|------------------------|--|---|
| Design of institutions | Partnership institutions not adequately designed | Training interventions, study tours at all relevant levels Screened transaction advisors appointed |

6.7 Asset stripping and abrogation of responsibilities

| General Issue | Specific Problem | Recommended Intervention |
|---|---|---|
| Asset selling, abrogation of responsibilities | Municipal assets are sold or long leased due to inadequately thought out PPP's or contracts | Training for officials at all levels Screened transaction advisors appointed |
| | Municipalities hand over inappropriate responsibilities to private partners | Training for officials at all levels Screened transaction advisors appointed |

7. CONCLUSION

This investigation has used a number of case studies to reveal the challenges and success factors relating to the implementation of PPP's in South Africa, with a view of identifying a number of recommendations.

7.1 Disadvantages of PPP's

There are a just a few disadvantages, which unless managed effectively, will lead to the undermining of the PPP model:

- Requires extra careful management on part of partners
- Vulnerable to political pressure, but requiring political support
- Can be subject to unwieldy legislation
- Require fully capacitated private and public partners

7.2 Benefits of PPP's

There are many benefits of PPP's that have emerged during the course of this study, that serve to emphasise that the PPP construct is valid and viable:

- Cheaper in the long run because expertise tends to lie with private partner
- More efficient because delivery of service usually the responsibility of the private sector partner, and is run along business principles and is not subject to procurement red tape
- More responsive as decision-making related to delivery is in the hands of the private sector partner, and is run along business principles and is not subject to procurement red tape
- Profitable for public sector as they generally retain ownership of the infrastructure related to the PPP, but the private sector partner is responsible for maintenance. This means that any investment by the private sector partner remains the property of the public sector partner
- Improved standard of delivery based on business incentives
- Management of costs of delivery is easier as it is tied specifically to the PPP and is not integrated into a whole local government fiscus
- Can lead to job creation and skills development
- Employee performance is generally greater within the private sector, so in a PPP the public sector partner benefits from private sector employee relationships
- Successful PPP management can easily be duplicated.

7.3 Recommendations

A number of areas requiring interventions were identified during the course of this investigation, and some ideas are tabled around addressing those issues:

Capacity issues

- Promote establishment of dedicated PPP units at Provincial and municipal levels that include representatives of both public & private sectors
- Develop a set of national political & private sector champions
- Develop promotional strategy including materials,
- Design and implement a national roadshow,
- Design and use study tours
- Design, prepare and resource an educational programme that includes training modules designed to educate public and private sector role-players regarding all aspects of PPP's
- Investigate and implement accreditation criteria
- Ensure compulsory training of municipal PPP staff in all aspects of PPP's

Legislation

- Establishment of appropriately resourced, informed and capacitated PPP unit at municipal level that include public and private sector practitioners
- Training programmes for legal officers
- Setting up a national database of screened legal advisors

Monitoring

- Municipal PPP unit to include monitoring component with capacity to brief an appoint independent experts
- Effective communication of national standards
- Monitoring to be conducted by external independent experts

Selection of partners

- Setting up of a database of pre-screened private partners per sector within the strictures of national and municipal laws
- Private sector advisors to play an active role in assisting with the selection of partners

Contractual design

- Training for legal officers
- Setting up a national database of screened transaction advisors
- Establishing linkages with the LED Practitioners Network
- Examples of “good” contracts to be made available to municipalities and their advisors

PPP management

- Training interventions, study tours at all relevant levels
- Screened transaction advisors appointed

Asset stripping and abrogation of responsibilities

- Training for officials at all levels
- Screened transaction advisors appointed

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APPENDIX - Legislation background

A1. Introduction

This appendix is the full version of the legal scan conducted by Fakisandla to clarify the legal requirements that are faced by national, provincial and municipal stakeholders in the implementation of PPP's.

From a legal perspective, Public private partnerships (PPPs) are formal commercial contracts between government institutions and private companies. The Private Partner (PP) assumes substantial financial, technical and operational risk in the design, financing, building and operation of a project in return for specified benefits.

There are two legally defined types of PP⁶:

1. A private company performs a government function
2. A private partner is given rights to use state property for commercial purposes, under certain conditions.

In terms of the legislation there are three "tests" that a PPP agreement must pass at various stages of its inception. The agreement must:

- be affordable to the government institution
- offer a value-for-money solution
- transfer financial, technical and operational risk to the private party

In terms of both national and municipal legislation, PPPs have to be procured through an open and competitive bidding process, and all have to encompass principles of black economic empowerment (BEE). Before the government institution approaches the private sector for bids, it has to complete a feasibility study (as specified in regulations). Treasury must approve the feasibility study before bid documents and draft contracts are prepared and the bidding process can proceed. Various Treasury approvals are required before the agreement can be signed. The government institution is required to implement an effective management regime to ensure the quality of service delivery / business operation is to agreed standards over the life of the PPP. Penalties can be imposed or the agreement terminated where these standards are not met.

A1.1 Legislation background

In April 1997, the South African Cabinet approved the appointment of an Inter-Departmental Task Team (IDTT) to develop a regulatory framework for PPPs in South Africa. A Strategic Framework for PPPs was endorsed by Cabinet in December 1999, and in April 2000, Treasury Regulations (Regulation 16) for PPPs were first issued in terms of the Public Finance Management Act (Act 1 of 1999). In early 2001, the Treasury Manual on Public Private Partnerships was published⁷.

According to the National Treasury PPP Unit's Manual⁸, South Africa has established a firm regulatory framework in terms of which national and provincial government institutions can enter into PPP agreements. Fundamental guidelines to be considered by national and provincial government is the Treasury Regulation 16 issued in terms of the Public Finance Management Act, 1999 (PFMA). Local government at a municipal level however, needs also to consider the

⁶ National Treasury PPP Unit Online, 2007

⁷ Source: National Treasury PPP Unit, 2007

⁸ National Treasury PPP Unit's Manual, 2004.

Municipal Systems Act, 2000, and the Municipal Finance Management Act, 2003. Municipalities are not subject to the PFMA or to Treasury Regulation 16.

The National Treasury has published both a PPP Manual (2004) and Standardised PPP Provisions. These documents have been designed to assist and guide national and provincial departments and other applicable public entities affected by Treasury Regulation 16.

As stated above, legislation and associated regulations applicable at a national and provincial government level are the:

- Public Finance Management Act (Act 1 of 1999)
- Treasury Regulation 16 (2004) to the Public Finance Management Act (Act 1 of 1999)

Other laws and guidelines applicable to PPP's at both National and Municipal level are:

- National Treasury Code of Good Practice for Black Empowerment in Public-Private Partnerships
- Preferential Procurement Policy Framework Act (Act 5 of 2000)

Legislation applicable at a municipal government level is the:

- Municipal Systems Act (Act 32 of 2003)
- Municipal Finance Management Act (Act 56 of 2003)
- In addition, regulation 309 was drafted in April 2005 to assist in clarifying the MFMA for municipal entities

It is important to underline the fact that municipalities are not subject to the PFMA or to Treasury Regulation 16.

A2. National and Provisional Legislation

The PFMA, Treasury Regulation 16 and the PPP Manual, a set of guidelines and standardized PPP agreement provisions, govern PPPs at the national and provincial level.

A2.1 Public Finance Management Act (Act 1 of 1999)

The PFMA and the Public Finance Management Amendment Act (Act No. 29 of 1999) are complimentary and should be read in conjunction⁹. The Act came into effect 1 April 2000 and it applies to national and provincial government. The Act establishes and describes the National and Provincial Treasuries and their role in the management of national and provincial revenue funds. It outlines procedures around budgets promoting greater transparency in the implementation of national and provincial budgets.

The objective if the PFMA (as defined by the Act) is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies.

The key objectives of the Act may be summarized as being to¹⁰:

- Modernise the system of financial management in the public sector;
- Enable public sector managers to manage, but at the same time be held more accountable;
- Ensure the timely provision of quality information; and
- Eliminate the waste and corruption in the use of public assets.

The Act stipulates the appointment of an accounting officer, outlining their roles and responsibilities. It addresses matters such as the responsibilities of Ministers and MECs (executive authorities); the general principles on borrowing and issuing of guarantees; as well as

⁹ National Treasury Online, 2006

¹⁰ National Treasury Online, 2006

financial misconduct and the regulation thereof. The Act also defines the areas over which the National Treasury is empowered to issue treasury regulations and instructions are listed, and obligates the appointment and composition of audit committees. The Act establishes an Accounting Standards Board, who is responsible for accounting practices¹¹.

A2.2 Treasury Regulation 16

As described by the PPP Manual, 2000: “The PFMA provides, in section 76, that The National Treasury must make regulations for a range of matters to do with the effective and efficient management and use of financial resources; many of these matters are relevant to PPPs. National Treasury’s Regulation 16 to the PFMA defines and provides precise and detailed instructions for PPPs. It applies to all national and provincial government departments and sets out all the phases and tests a PPP is required to go through. The regulations have been amended since they were first issued in May 2000 to take account of experience in implementing PPPs”

Regulation 16.2¹² specifies that only an accounting officer may enter into a PPP agreement on behalf of a department, and only with the prior written approval of the national Treasury. The accounting officer must (in writing) register the PPP with the relevant treasury; inform the treasury of the expertise within that institution to proceed with the PPP; appoint a project officer and a transaction advisor (if required)¹³.

To determine whether a proposed PPP agreement is in the best interests of a department, the accounting officer must prepare a feasibility analysis. Regulation 16.4.1¹⁴ stipulates the requirements of the **feasibility study**: The feasibility study must explain the strategic and operational benefits of the PPP agreement and assess how the agreement will assist in meeting the department’s strategic objectives. Where a PPP will incur financial commitments the affordability of the PPP for the institution must be demonstrated. The proposed allocation of financial, technical and operational risks between the institution and the PP must be set out. Anticipated value for money to be achieved by the PPP must be demonstrated. The capacity of the institution to procure, implement, manage, enforce, monitor and report on the PPP must be explained. The feasibility study must also test whether the institution can afford the PPP, show that the PPP will provide a value-for-money solution and substantial technical, operational and financial risk must be transferred to the private partner.

Procurement of the PPP may not proceed without the written consent of the Treasury¹⁵ and procurement documentation may not be issued to prospective bidders without treasury approval¹⁶. The procurement procedure must be fair, equitable, transparent, competitive and cost-effective and include preference for the protection or advancement of persons disadvantaged by unfair discrimination¹⁷. After the evaluation of the bids, but prior to appointing the preferred bidder, the institution must submit a report for approval by the Treasury. The report must demonstrate the criteria of affordability and value for money and show that substantial technical, operational and financial risk transfer were applied in the evaluation of the bids. Lastly, the report must show how these criteria were satisfied in the preferred bid¹⁸.

The **contracting** phase of the PPP agreements requires that the accounting officer again, obtain approval from the treasury. In order to gain treasury approval¹⁹, the PPP agreement must meet the requirements of affordability, value for money and substantial technical, operational and financial risk transfer. A management plan that explains the capacity of the institution, and its

¹¹ Paragraph derived from: National Treasury Online, 2006

¹² National Treasury Regulation 16 (regulation 16.2)

¹³ National Treasury Regulation 16 (regulation 16.3)

¹⁴ National Treasury Regulation 16 (regulation 16.4.1)

¹⁵ National Treasury Regulation 16 (regulation 16.4.2)

¹⁶ National Treasury Regulation 16 (regulation 16.5.1)

¹⁷ National Treasury Regulation 16 (regulation 16.5.3)

¹⁸ National Treasury Regulation 16 (regulation 16.5.4)

¹⁹ as detailed by regulation National Treasury Regulation 16 (regulation 16.6.1)

proposed mechanisms and procedures, to effectively implement, manage, enforce, monitor and report on the PPP must be outlined.

The accounting officer is responsible for ensuring that the PPP agreement is properly implemented, **managed**, enforced, monitored and reported on²⁰. This includes, among other tasks, resolving disputes and differences with the PP; and the general overseeing of the day-to-day management of the PPP agreement.

PPP agreements may be **amended** with the written approval of the Treasury provided the agreements still provide value for money; affordability and substantial technical, operational and financial risk transfer to the PP²¹.

A2.3 National Treasury's PPP Manual & Standardised PPP Provisions²²

National Treasury's PPP Manual and Standardised PPP Provisions are founded on the PFMA and Treasury Regulation 16. They have been produced for national and provincial departments, constitutional institutions, and public entities.

Each module of National Treasury's PPP Manual, together with Standardised PPP Provisions, is issued by National Treasury as a PPP Practice Note (in terms of section 76(4)(g) of the PFMA) and are aimed at facilitating the application of the PFMA and its regulations. The 'instructions' contained in National Treasury's PPP Manual are presented in the form of detailed best practice guidance.

The manual comprises 9 Modules:

Module 1: SA Regulations. Module 1 outlines the legal foundations for a PPP (based on Treasury Regulation 16 to the PFMA) and outlines the PPP project cycle (the phases and stages of Treasury Regulation 16). The PPP project cycle enables the three regulatory tests of affordability, value for money, and risk transfer to be applied at every stage of preparing for, procuring and managing a PPP agreement.

Module 2: Code of Good Practice for BEE in PPPs. Module 2 presents the framework for BEE in PPPs.

Module 3: PPP Inception. Module 3 describes the procedures for the appointment of a project officer, defining the ToR's for the transaction advisor and the bidding procedure, the bid evaluation process and finalising a contract.

Module 4: PPP Feasibility Study. Module 4 explains in detail how an institution should carry out a feasibility study to decide whether conventional public sector procurement or a PPP is the best choice for the proposed project.

Module 5: PPP Procurement. Module 5 details the procurement process of a PPP.

Module 6: Managing the PPP agreement. Module 6 is intended to help the institution put effective mechanisms in place to manage the implementation of the PPP agreement.

Module 7: Auditing PPPs. describes the powers and functions of the Auditor-General, and the scope of financial, performance and forensic audits. It explains how this applies to PPPs, particularly in relation to the management of the PPP agreement. It also outlines the role of the institution's internal audit unit in PPP projects.

Module 8: Accounting treatment for PPPs. Not yet available.

Module 9: Introduction to project finance. Not yet available.

²⁰ National Treasury Regulation 16 (regulation 16.7)

²¹ National Treasury Regulation 16 (regulation 16.8)

²² Source: PPP Manual, 2004

A3. Municipal Legislation

Two different Acts, namely the MSA (issued by the Ministry for Provincial and Local Government) and the MFMA (issued by Ministry of Finance), govern municipal PPPs in South Africa²³. The Minister of Finance has also issued municipal PPP regulations under the MFMA. A further guideline has been issued by the Department of Provincial and Local Government entitled a “Practical Guide on Municipal Service Partnerships: 2006-2010”.

These Acts should not be considered in isolation and be read in conjunction with each other and with other national legislation²⁴. There are particularly close linkages and alignment between the MFMA and the MSA and they are mostly complementary to each other in many areas. Both deal with the internal processes, consultative processes, performance systems and reporting and accountability mechanisms. The fact that there are inter-related pieces of legislation has implications for the capacity of municipalities.

As described by the National Treasury²⁵, the MFMA deals with the procurement of goods and services. The MSA applies only to municipal services and is relevant when such procurement involves outsourcing of a municipal service to an external service provider (SP). When an external provider is to be contracted to provide a municipal service on behalf of the municipality (a PPP), both the MSA and MFMA apply. These procurement practices also have to comply with other national legislation like the Preferential Procurement Policy Framework Act and Broad-Based Economic Empowerment Act .

The PPP Unit was established in National Treasury mid-2000 and at that time comprised five professional staff drawn from both the public and private sectors²⁶. Each member gives assistance on registered projects and gives specialist knowledge at various stages of a PPP project. The Treasury team has expanded steadily over the intervening years. At a municipal level, the National Treasury’s PPP Unit has the dual role of providing technical assistance and acting as the PPP regulator²⁷. Technical assistance can include project conceptualisation, procurement of transaction advisers, and supervision of transaction advisers and project delivery. The regulatory function includes reviews of feasibility studies and provision of views and recommendations, reviews of procurement documents and of PPP agreements.

A3.1 Municipal Systems Act (Act 32 of 2003)

The South African Government Information website (2007)²⁸ summarise the Local Government: Municipal Systems Act as follows:

“The Act established a framework for planning, performance-management systems, effective use of resources and organisational change in a business context. The Act also established a system for municipalities to report on their performance, and provided residents with an opportunity to compare this performance with that of others.

It also regulates public-private partnerships. The Act allows municipalities significant powers to corporatise their services, establish utilities for service delivery, or to enter into partnerships with other service-providers. The Act provides for the adoption of a credit-control policy for municipalities that will provide for the termination of services in the event of non-payment. Municipalities will have the power to pass bylaws to implement the policy.”

²³ National Treasury, 2006

²⁴ National Treasury, August 2004

²⁵ National Treasury, August 2004

²⁶ National Treasury online, 2007

²⁷ Local Government Budgets and Expenditure Review: 2001/02 – 2007/08

²⁸ South African Government Online. 2007

Sections of the MSA relevant to PPPs:

Section 77 of the MSA applies when a municipality reviews and decides on the appropriate mechanism to provide a municipal service such as preparing or reviewing its IDP; where a new municipal service is to be provided; where an existing municipal service is to be significantly upgraded, extended or improved or a delivery mechanism is being reviewed; where the municipality is restructured or reorganised; or where requested by the local community.

Section 78 outlines the criteria and processes for deciding on mechanisms to provide a municipal service. In the case of a PPP being the mechanism of the service provision, the municipality is required to take into account the costs and benefits of the proposed PPP (Section 78 (1)). The capacity of the potential private partners to furnish the skills, expertise and resources necessary to ensure the provision of the service must also be considered as well as possible impacts on the development and employment patterns in the municipality and the views of organised labour (Section 78 (1)). It is required that the local community be notified and their views be taken in account when different service delivery options are assessed (Section 78 (3)).

Similarly, section 80 (2) specifies that before a municipality enters into a service delivery agreement for a basic service, it must establish a programme for community consultation and information dissemination.

Section 81 governs the responsibilities of municipalities when providing services through agreements with external providers. The municipality must regulate the service provision; monitor and assess the implementation of the agreement including the performance of the service provider; control the setting and adjustment of tariffs by the service provider; exercise its service authority to ensure uninterrupted delivery of the service in the best interest of the local community (Section 81 (1)).

Under Section 81 (2a), a municipality, may assign a service provider the responsibility of developing and implementing detailed service delivery plans. The service provider can take responsibility for the operational planning, management and provision of the service. They may also undertake social and economic development that is directly related to the provision of the service, be responsible for all customer management, manage its own financial, accounting, budgetary investment and borrowing activities and collect a service fee for its own account from users of services.

The Service provider is subject to performance monitoring and auditing Section 81 (3) by the municipality. The municipality may transfer or second any of its staff members to the service provider Section 81 (3). A SDA may also be amended but this requires further community consultation.

Section 83 of the MSA outlines the competitive bidding process. A municipality who supplies a MS through an SDA must select a service provider through a prescribed process: The bidding process must be competitive, fair, transparent, equitable and cost- effective and minimise the possibility of fraud and corruption. All prospective service providers must have equal and simultaneous access to information relevant to the bidding process and the municipality is accountable to the local community about progress with selecting a service provider, and the reasons for any decision in this regard (Section 83 (1)). The selection process referred must be fair, equitable, transparent, cost-effective and competitive (Section 83 (3)). A municipality may also determine a preference for categories of service providers in order to advance the interest of persons disadvantaged by unfair discrimination (Section 83 (2)).

Section 84 describes the negotiation and agreement with prospective service provider process. Once a service provider has been selected, a municipality must negotiate the final terms and conditions of the SDA, then enter into agreement with the service provider based on the terms and conditions specified in the bidding documents (Section 84 (1)). If an agreement is not

reached within a reasonable time, the municipality may negotiate with the next-ranked prospective service provider (Section 84 (2)). Once the municipality has entered into the SDA copies of the agreement must be available for public inspection and the media alerted as the particulars of the agreement, the name of the chosen SP and notification regarding the venue where the agreement can be viewed (Section 84 (3)).

Section 21a of the Act should also be noted. It describes the correct procedures for communication with the local community in the notification of a potential PPP agreement.

A3.2 Municipal Finance Management Act (Act 56 of 2003)

The objective if the MFMA (as defined by the Act) is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards for:

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
- (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.

Like the PFMA the Act is aimed at modernising municipal budgeting and financial management. It facilitates the development of a long-term municipal lending/bond market. It also introduces a governance framework for separate entities created by municipalities. It promotes transparency at local government level through budget and reporting requirements (South African Government, 2007).

Again similarly to the PFMA, the MFMA regulations provide for a three-tier approval process that assesses project affordability, value for money and risk profile. The guidelines include topics such as project finance, recruiting transaction advisors, how to conduct feasibility studies, how to draft request for proposal documents, unsolicited bids, departmental budgeting and tender procedures (National Treasury, August 2004).

There is substantial policy consistency between the PFMA and MFMA PPP regulations. The principal approaches to PPP affordability, risk transfer and value-for-money are consistent. They differ in their institutional systems and decision-making processes differ (National Treasury PPP Unit, 2007).

Sections of the MFMA relevant to PPPs:

The MFMA prescribes that PPPs must provide value for money, be affordable in terms of current and projected budget provisions and transfer appropriate technical, operational and financial risk to the private partner. (Section 120 (1)). It requires a regulatory framework to be developed and prescribed by the National Treasury (Section 120 (2)).

As with Regulation 16, it requires municipalities to conduct feasibility studies and states that the National Treasury may assist in carrying out and assessing these studies (Sections 4 & 5). The feasibility study must take into account all relevant information; specify benefits of the PPP for the municipality; describes the nature and extent of the PP's role in the PPP; how the PPP will provide value for money, be affordable, transfer appropriate risk to the PP and budgetary implications; and explain the management role of the municipality in the agreement (Section 4).

The accounting officer in each municipality must formally solicit the views and recommendations of the National Treasury, along with other relevant departments, once the feasibility study has

been completed (Section 6 (c)). The local community must be given notice of the particulars of the PPP and given opportunity to submit comment (Section 6 (b)).

Agreements having multi-year budgetary implications must formally solicit the views and recommendations of the National Treasury, along with other relevant departments (Section 33 (1a)). The local community must be given notice of the particulars of the PPP and given opportunity to submit comment (Section 33 (1a)). Future budgetary implications, and the impact of the PPP thereon must be considered (Section 33 (1b) and ensure significant financial / economic gain to the municipality (Section 33 (1c).

A3.3 Local Government: Municipal Finance Management Act 2003 Municipal Public-Private Partnership Regulations (MPPPR)

Regulations on municipal PPPs came into effect on 1 April 2005. As is the case with the treasury's regulation 16, the MPPPR requires that a municipality must carry out a **feasibility study**. Prior to the initiation of a feasibility study the accounting officer must notify the National and relevant Treasury in writing and if required appoint a transaction advisor to assist and advise the municipality on the preparation and procurement of the PPP agreement (Section 2 (1)).

The feasibility study must be specific, assess and explore all available options as well as the proposed impact on the municipality. It must also recommend a procurement plan and show comparative costings. It must include an assessment of municipal officials that would become redundant as a result of the PPP agreement; the costs involved in staff retrenchments or the retention of redundant staff; any assets that would become obsolete; and any revenue that would be foregone by the municipality (as per regulation 3(1)). The assessment must also show the full costs to the municipality if the PPP agreement is not concluded compared if the PPP agreement is concluded (as per regulation 3(2)).

The views and recommendations of the National and relevant provincial Treasury must be solicited regarding the proposed bid and bid evaluations (Section 4 (1)). The PPP agreement must also comply with Section 120 Municipal Systems Act. The PPP must also provide value for money, be affordable and transfer appropriate technical, operational and financial risks to the private party (regulation 5(1)).

The final PPP agreement can only be signed by the accounting officer (Section 6). Thereafter, a project officer, with the appropriate skills and experience must be appointed to assist the accounting officer an over see day-day management of the agreement (Section 7). The project officer has contract management and monitoring capacity and is responsible for ensuring that the activities of the PPP are carried out in accordance with the agreement in an effective and efficient manner and any property that is under control of a PPP is appropriately safeguarded (Section 8).

A PPP may be amended where the reasons for the proposed amendment have been tabled in the council, the local community have been give notice of the amendment and opportunity to submit comment. The views and recommendations of the national and relevant provincial Treasury on the reasons for the amendment must also be solicited (Section 9).

A4. Other legislation relevant to PPPs

A4.1 Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships

The National Treasury's PPP Unit released a Code of Good Practice for BEE in PPPs based on the fact that PPPs lend themselves very well to BEE. The Code of Good Practice for BEE in PPPs was submitted (in 2004) by the Minister of Finance to the Minister of Trade and Industry to be issued in terms of the Broad-based Black Economic Empowerment Act, 2003 (BBBEE Act).

The National Treasury²⁹ emphasize that PPPs are excellent vehicles for developing BEE in South Africa and are relevant to all phases of a PPP. PPPs are long-term projects, typically involving at least three critical empowerment areas:

- equity participation in projects over a significant period;
- the use of SMMEs in construction and operational activities; and
- meaningful transfer of financial and technical skills.

Each PPP has the advantage of sustained government expenditure over the life of the project, meaning that through stringent financial penalty systems the government can enforce contractual BEE provisions. Similarly, incentives for exceeding empowerment objectives can be put in place through a variety of financial and contractual mechanisms.

In keeping with the principles and policy objectives of the BBBEE Strategy, PPP BEE policy is devised to achieve a broad-based and sustainable BEE outcome in every PPP project undertaken. The PPP Manual³⁰ (Module 2) describes the policy objectives for BEE in PPPs :

- “to achieve meaningful and beneficial direct ownership of substantial equity interests in the Private Party to a PPP Agreement by Black People, Black Women and Black Enterprises;
- to achieve effective participation in the management control of the PP and its subcontractors by Black People and Black Women;
- to ensure that a substantive proportion of the Private Party's subcontracting and procurement is to Black People, Black Women and Black Enterprises;
- to ensure effective employment equity and skills development in the PP and its Subcontractors throughout the PPP project;
- to promote positive local socio-economic impact from the project to the benefit of SMMEs, the disabled, the youth, and non-government organisations within a targeted area of project operations;
- to create jobs; and
- for Institutions to be supported in all PPP projects by financial, legal and technical Transaction Advisors who generally reflect South Africa's diverse population, and to build the professional skills and number of Black People and Black Enterprises in these fields”.

A4.2 Preferential Procurement Policy Framework Act (PPPFA) (Act 5 of 2000)

The PPPFA applies to all organs of state in the national, provincial and local spheres of Government. Preferential Procurement regulations were issued in terms of the PPPFA and published in the Government Gazette on 10 August 2001.

The PPPFA promotes historically disadvantaged individuals and a broad-ranging set of developmental objectives by means of allotting preference points to these various policy objectives.

There is unlimited discretion currently afforded to practitioners to allot points to these objectives. The narrow based black ownership structure in the South African economy also limits the scope

²⁹ National Treasury. 2004

³⁰ National Treasury PPP Manual, 2004.

for an immediate meaningful acceleration of direct participation by HDI's in Government contracts. This gives rise to a great number of artificially created partnerships and joint venture arrangements (fronting practices), where the premiums under the preferential system are 'earned' without any real contribution to achieving Government's preferential policy objectives.

The Act incorporates a 80/20 (for the procurement, sale and letting up to a Rand value of R500 000) and 90/10 (for the procurement, sale and letting with a Rand value of above R500 000) preference systems.