PUBLIC PRIVATE PARTNERSHIPS (PPPS) AND SOME INSIGHTS INTO THEIR FAILURE

Category: Administrative and Procurement Law,Commercial Law
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In a democratic society, the government has a crucial role in ensuring that it meets its service delivery obligations to its citizens. Sometimes, the government may not have the capacity or expertise to roll out projects which benefit the public. This is where Public Private Partnership ("**PPP**") projects become relevant. PPPs are projects undertaken within the government sphere, in conjunction with private parties. This article explores and discusses some common areas that result in PPPs failing.

So, what are PPPs and how are they regulated?

The Public Finance Management Act, 56 of 2003 ("**PFMA**") defines a PPP as follows:

> *"Public Private Partnership' or PPP means a commercial transaction between an institution and a private party in terms of which the private party –*
>
> *(a) performs an institutional function on behalf of the institution; and/or*
>
> *(b) acquires the use of state property for its own commercial purposes; and*
>
> *(c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and*
>
> *(d) receives a benefit for performing the institutional function or from utilising the 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 national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or*
>
> *(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 fee."

Due to the complexity and duration of PPPs, it is imperative that the PPP projects are implemented correctly. The process and mechanism of PPPs must be readily prepared for to cover all aspects of the project.((National Treasury, PPP Toolkit.)) The National Treasury regulations set out a prescriptive process for the implementation and delivery of PPPs. The process, as outlined in the applicable regulations being: the inception; the feasibility phase; procurement process; and the applicable project and/or contract documents. Instances where the process is not followed accordingly, usually leads to complications relating to project delivery.

Why do PPP projects fail?

Most PPP projects fail as a result of a misunderstanding of PPPs. The misunderstanding could relate to the nature of projects that may be developed as PPPs, including the sectors applicable, as well as a failure by a public entity to understand how these projects should be implemented, as set out in the relevant regulations.((Ibid.))

Lack of experience with PPPs

A lack of sufficient knowledge, skills and capacity to carry out projects, by both the private institutions and the public bodies results in major failures in projects of this nature. A case study that considered the South African Department of Labour ERP implementation project, illustrated the importance of the public body needing "*specialised knowledge and competence, to effectively manage private partners in the execution of ICT PPP contracts*".((Public private partnership contract management failure in information technology service delivery: a qualitative inquiry into the South African Department of Labour ERP implementation project https://open.uct.ac.za/handle/11427/23412 (accessed 25 November 2020.)))

PPPs are in their nature complex. They are long term, multidisciplinary projects that require expert skills from various industries. One of the key elements that lead to the failure of PPP projects is that the multi discipline team involved are usually not involved in the project from commencement to closure and therefore do not always see the final execution and handover of the project/s. Some of the project team members are engaged in the middle, with no proper handover process implemented. Further, given the varying of members within the procuring entity, there may tend to be a lack of knowledge and/or expertise as very few have seen PPPs through from beginning to end.

From practical experience, the lifeline of PPPs is not reached given the complexities of the projects. This was either due to not enough backing from a political perspective, alternatively due to reasons stemming from project due diligences, as well as the regulatory and legal requirements that are seen as stumbling blocks in projects of this nature.

For PPPs to be successful, it is imperative that the procuring entity and the private institution are experienced in projects of such nature. These are primarily regulated in terms of the applicable treasury regulations. However, in addition to these, the necessary practical skills and capacity required by both parties is imperative.

Political Interference

Political interference by government spheres has also been seen as one of the key elements that lead to the failure of PPPs. In addition, issues of corruption, from a procurement perspective, as well the recruitment of the labour force that make up the stakeholders required in these projects.((Solly Matshonisa Seeletse (South Africa), Performance of South African private-public partnerships, Problems and Perspectives in Management, Volume 14, Issue 2, 2016, Microsoft Word – Issue 2, 2016_online.docx (businessperspectives.org) (accessed 29 November 2020).))

Poor Project Planning and PPPs

Project planning, or a lack thereof, can also lead to some significant project failures. By their very nature, PPPs require planning as well as the defining of scope and deliverables. Effective communication and clarity in project structure are some of the most vital aspects of PPPs.((Ibid.))

Legal hindrances may also result from a contractual, or regulatory perspective and have also been seen as an aspect that has led to the project failures. Contractual management aspects of the projects once the agreements have been signed also play a role, should the processes not be clearly outlined.

Case studies conducted on certain PPP projects undertaken in the last few years such as the Water Provision in the Dolphin Coast/Ilembe District Municipality and the Prison Contracts in South Africa project, illustrate that issues relating to transparency and clarity in roles, as well as an emphasis on the scope deliverables, was shown as some on the lessons learnt from the projects.((The South African Institute of International Affairs Nepad Policy Focus Series Working Together Assessing Public–Private Partnerships in Africa, Peter Farlam, Public-Private Partnerships in Africa (oecd.org) (accessed 25 November 2020).))

Recommendations for PPPs

Risk mitigating factors that may aid in the success of PPP projects are required in order to ensure their success. In instances where a majority of the activities can be subcontracted to an independent third party, to ensure transparency in the process, ensure that corruption is reduced, there is accountability from the parties as a result of the regulatory role played by a regulator. Mechanisms that may be employed from the private party perspective would include adding the necessary provisions in engagement agreements with the private sectors that ensures institutions are held accountable, utilising services credits and ensuring that applicable provisions are added to incentivise the private sectors to deliver.((SM Seletse, 2016.))

Another mitigating tool would be to implement mechanisms to root out corruption, such as third-party independent verification agencies that are involved in the procurement process. This could also include the establishment of the regulatory body that plays an oversight role in PPP projects.((The South African Institute of International Affairs Nepad Policy Focus Series Working Together Assessing Public–Private Partnerships in Africa, Peter Farlam, Public-Private Partnerships in Africa (oecd.org) (accessed 25 November 2020).)) A further step would be to have transparent processes facilitating effective public participation. This would assist in avoiding any hindrances on the projects as a result of issues emanating from the public.

Conclusion

Some successfully implemented PPP projects include but are not limited to: the SanPark concessions, which are tourism concessions implemented for the establishment of small medium micro enterprises ("**SMME's**") within the tourism industry; and the DTI Campus, which was established for the provision of new head office accommodation for the Department of Trade and Industry.((National Treasury, PPP Unit.)) Effective project management processes are required in order to ensure the fulfilment of the project within the agreed timelines and pricing. It is imperative that both the procuring entity and the private institution have the level of skill and capacity required to successfully execute projects of this nature.

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[1] National Treasury, PPP Toolkit.

[2] Ibid.

[3] Public private partnership contract management failure in information technology service delivery: a qualitative inquiry into the South African Department of Labour ERP implementation project https://open.uct.ac.za/handle/11427/23412 (accessed 25 November 2020).

[4] Solly Matshonisa Seeletse (South Africa), Performance of South African private-public partnerships, Problems and Perspectives in Management, Volume 14, Issue 2, 2016, Microsoft Word – Issue 2, 2016_online.docx (businessperspectives.org) (accessed 29 November 2020).

[5] Ibid.

[6] The South African Institute of International Affairs Nepad Policy Focus Series Working Together Assessing Public–Private Partnerships in Africa, Peter Farlam, Public-Private Partnerships in Africa (oecd.org) (accessed 25 November 2020).

[7] SM Seletse, 2016.

[8] The South African Institute of International Affairs Nepad Policy Focus Series Working Together Assessing Public–Private Partnerships in Africa, Peter Farlam, Public-Private Partnerships in Africa (oecd.org) (accessed 25 November 2020).

[9] National Treasury, PPP Unit.